

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VIRGINIA OFFICE FOR PROTECTION :

4 AND ADVOCACY, :

5 Petitioner : No. 09-529

6 v. :

7 JAMES W. STEWART, III, :

8 COMMISSIONER, VIRGINIA DEPARTMENT :

9 OF BEHAVIORAL HEALTH AND :

10 DEVELOPMENTAL SERVICES, ET AL. :

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 Washington, D.C.

 Wednesday, December 1, 2010

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 11:01 a.m.

17 APPEARANCES:

18 SETH M. GALANTER, ESQ., Washington, D.C.; on behalf of
19 Petitioner.

20 GINGER D. ANDERS, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States, as amicus curiae,
23 supporting Petitioner.

24 EARLE DUNCAN GETCHELL, JR., ESQ., Solicitor General,
25 Richmond, Virginia; on behalf of Respondents.

	C O N T E N T S	
		PAGE
1		
2	ORAL ARGUMENT OF	
3	SETH M. GALANTER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	GINGER D. ANDERS, ESQ.	
7	On behalf of the United States, as	
8	amicus curiae, supporting the Petitioner	18
9	ORAL ARGUMENT OF	
10	EARLE DUNCAN GETCHELL, JR., ESQ.	
11	On behalf of the Respondents	28
12	REBUTTAL ARGUMENT OF	
13	SETH M. GALANTER, ESQ.	
14	On behalf of the Petitioner	52
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
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12
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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 09-529, the Virginia Office for Protection and Advocacy v. Stewart.

Mr. Galanter.

ORAL ARGUMENT OF SETH M. GALANTER

ON BEHALF OF THE PETITIONER

MR. GALANTER: Mr. Chief Justice, and may it please the Court:

The Virginia Office for Protection and Advocacy, known as "VOPA," seeks to enforce its Federal statutory right to inspect and copy records that are in the possession of State officials who run State-operated hospitals.

Respondents acknowledged below that if Petitioner were a private entity, Ex parte Young would permit this suit. VOPA's status as a State entity does not change the Ex parte Young analysis because it imposed neither a greater burden on the treasury nor the dignity of the State. The only issue to be resolved by the Federal court is who has the correct reading of Federal law about the records access issue. It --

CHIEF JUSTICE ROBERTS: Counsel, if this were a private suit, let's say Ford Motor Company has

1 two subsidiaries, Ford East and Ford West. They get
2 into a dispute. Ford West sues Ford East. No Federal
3 court would entertain that action, would it?

4 MR. GALANTER: Well, Your Honor, if I could
5 clarify. First of all, there would have to be a
6 question of Federal law.

7 CHIEF JUSTICE ROBERTS: Yes. They think --
8 Ford West thinks Ford East is discriminating on the
9 basis of race.

10 MR. GALANTER: It would have to --

11 CHIEF JUSTICE ROBERTS: That adversely
12 affects their reputation, too, so they sue them.

13 MR. GALANTER: I -- I think that inquiry
14 goes to the question of adversity and standing, the
15 Article III question. And this case doesn't involve
16 that because VOPA is independent of the entity that it's
17 trying to --

18 CHIEF JUSTICE ROBERTS: No, no. It's
19 independent -- right -- it's independent from what?

20 MR. GALANTER: It's independent from the
21 executive branch. It's independent from the Respondents
22 it's trying to sue.

23 CHIEF JUSTICE ROBERTS: Yes --

24 MR. GALANTER: And it is --

25 CHIEF JUSTICE ROBERTS: -- but is it

1 independent from the State? Is that what the statute
2 says?

3 MR. GALANTER: The -- the statute requires
4 independence. The Federal statute requires that VOPA be
5 independent. But it's independent here because its
6 commission -- only a third of it is appointed by the
7 governor, and none of the members of the commission that
8 run VOPA can be removed except for cause.

9 CHIEF JUSTICE ROBERTS: You say on page 27
10 of your brief, the blue brief, that there's no big deal
11 here with respect to State sovereignty because
12 ultimately the sovereign retains the authority to
13 dissolve the State agency plaintiff if the State
14 believes the litigation is too onerous.

15 MR. GALANTER: That -- that's correct. That
16 is, the sovereign, the Commonwealth, could repeal the
17 law that enacted VOPA, just as in this Court's cases,
18 ICC v. United States, Congress could have removed --
19 eliminated the ICC.

20 CHIEF JUSTICE ROBERTS: That's a good -- a
21 good cite for your proposition, but arguably in those
22 cases, the ICC is really not the real party in interest.
23 The real party in interest is the beneficiary of the ICC
24 ruling.

25 MR. GALANTER: Well, I believe this Court

1 has continually held that independent agencies and other
2 Federal agencies can litigate, the cases involving the
3 Federal Labor Relations Board. And this Court has
4 allowed, for example, suits about licenses for Federal
5 dams where one agency wants to build a Federal dam and
6 another is --

7 CHIEF JUSTICE ROBERTS: To get -- to get
8 back to my question, you -- no court would entertain
9 Ford West against Ford East?

10 MR. GALANTER: If -- if that's right, and I
11 think it is if they're part of the same -- if they're
12 subsidiaries of one corporation and aren't separate.

13 JUSTICE SOTOMAYOR: Well, why is that true?
14 If they're separate corporate entities, what legal rule
15 would stop a separate corporate entity from suing
16 another? Is there a -- if they're part of the same
17 company, I think that's a different issue. If they are
18 the same company, that's a different issue, and just a
19 different branch or a different office.

20 MR. GALANTER: I -- I had understood that to
21 be the Chief Justice's hypothetical. They were -- they
22 were divisions of a single legal entity.

23 CHIEF JUSTICE ROBERTS: Not divisions;
24 separate corporate entities that happened to be wholly
25 owned by the same parent.

1 MR. GALANTER: I do believe then that there
2 could be litigation between them, but ultimately there
3 wouldn't be.

4 CHIEF JUSTICE ROBERTS: Well, I would have
5 thought that would become an advisory opinion. Ford has
6 an internal dispute, basically, and your -- in that
7 hypothetical, one of the entities would be asking the
8 Federal court to resolve it. Ford can decide at the end
9 of the day how it wants to resolve it. If Ford West
10 wins and Ford East loses, Ford can say, all right, this
11 is how we're going to do it regardless of what the
12 Federal court says.

13 MR. GALANTER: Well, that's true that after
14 the litigation is over, one of the parties may, you
15 know, be able to work around the law. That's true, in
16 fact, in every Federal Spending Clause statute where
17 you're dealing with prospective relief. The State is
18 always free to say, okay, if this is what we have to do,
19 we -- we opt out of the program.

20 CHIEF JUSTICE ROBERTS: Well, the State here
21 is free to dissolve one of the -- one of the parties to
22 the case. That's -- that's a little different.

23 MR. GALANTER: Well, it's the Commonwealth
24 that's free to dissolve one of the parties to the case.

25 CHIEF JUSTICE ROBERTS: All right, State,

1 Commonwealth.

2 MR. GALANTER: But I know. I meant, as
3 opposed to the -- I wasn't making --

4 CHIEF JUSTICE ROBERTS: Oh.

5 MR. GALANTER: But the Respondents here are
6 State officials, and even the Respondents' agency has no
7 power over IPAS. And on the day-to-day basis, even the
8 governor and the attorney general have no control over
9 what IPAS -- excuse me -- VOPA does. IPAS is a similar
10 case out of Indiana.

11 But what's critical here is that, as we
12 stand here today, the Commonwealth has vested a Federal
13 right in VOPA, and neither the attorney general nor the
14 governor of Virginia can stop VOPA from exercising that
15 right.

16 JUSTICE SOTOMAYOR: Counsel, I'm -- I'm not
17 quite sure what the premise of your argument is. You
18 seem to be arguing that the independence of the State
19 agency is what makes this particular entity capable of
20 suing. Yet, in your brief, you rely on Verizon's simple
21 test, which says if you're asserting a Federal claim,
22 you can sue and you're not -- and you're looking for
23 prospective injunctive relief, you can sue the State.
24 That general rule wouldn't look at who's suing. That
25 was part of your argument. Yet, now you're arguing the

1 independence of the agency. Which is your position?

2 MR. GALANTER: I --

3 JUSTICE SOTOMAYOR: And if it is the one
4 about the State's independence, how do you articulate
5 why that becomes important or not? What's the legal
6 significance of that vis-à-vis this case and any ones
7 moving forward?

8 MR. GALANTER: If I may, I -- there are --
9 there are three issues that are intertwined here.
10 First, the issue that I was talking about with the Chief
11 Justice regarding the Article III adversity that you
12 need for standing. That's where the independence is
13 relevant.

14 The second question is the one that we
15 petitioned on, which is the Eleventh Amendment issue,
16 and there we would suggest that the simple
17 straightforward inquiry of Verizon is relevant.

18 And then there's a third portion which the
19 court of appeals seemed to rely on, which is that --
20 that the notion that the State has a Federal right at
21 all was -- against another part of the State and its
22 officials was incongruous. That, if anything, would be
23 a Tenth Amendment concern and is resolved here because
24 it was the Commonwealth itself that made the voluntary
25 decision to vest these Federal rights in independent

1 State agencies.

2 JUSTICE SCALIA: Well, let's assume -- and
3 -- and I'm not sure what the situation is in -- in the
4 Commonwealth. We have held that the States don't have
5 to have the same notion of separation of powers that the
6 Federal Government does. In the Federal Government, we
7 allow independent regulatory agencies separate from the
8 President. Let's assume that Virginia has a system in
9 which the governor is indeed in charge of the entire --
10 the entire executive branch. Do you know whether that's
11 the case? I don't know.

12 MR. GALANTER: It -- it is not the case in
13 Virginia or in 49 of the 50 States.

14 JUSTICE SCALIA: Okay. Well, if it were and
15 if Congress offered money to the State and the only way
16 the State could get it would be to abandon its system of
17 separation of powers and to allow an agency of the State
18 which would normally be under the direction of the
19 governor to go riding off on its own and -- and sue the
20 governor, do you think there wouldn't be any -- any
21 problem about -- about the Federal Government doing
22 that?

23 MR. GALANTER: I --

24 JUSTICE SCALIA: Requiring the State to in
25 effect alter its -- its governmental structure in order

1 to obtain the Federal money?

2 MR. GALANTER: I do think there might be a
3 problem, first requiring it. And I think there might
4 even be a problem if it were a Spending Clause statute
5 alone. But if -- I realize that's the -- but that's not
6 an Eleventh Amendment problem. That's a question about
7 whether --

8 JUSTICE SCALIA: Sure.

9 MR. GALANTER: And here the only question,
10 because -- the only question addressed below and the
11 only question -- this is all on an interlocutory appeal
12 just on the Eleventh Amendment --

13 JUSTICE SCALIA: Got you.

14 MR. GALANTER: -- is whether we can sue
15 other officials in the State to bring them into
16 prospective compliance with the Federal law. And as --
17 as I said, though -- and this statute authorizes the
18 State, if it takes the money, to designate either a
19 public or a private entity as its protection and
20 advocacy system; that is, they could have vested these
21 Federal rights in a nonprofit corporation --

22 CHIEF JUSTICE ROBERTS: Well, right, but
23 that makes all the difference in the world because they
24 made the choice of saying this is going to be one of us,
25 the State. And as far as what issue is before the

1 Court, I would suppose the Article III question is a
2 jurisdictional one that we have to address before
3 reaching the Eleventh Amendment question.

4 MR. GALANTER: I -- I think that they're
5 both sufficiently jurisdictional that you could reach
6 them in -- in -- you wouldn't have to reach Article III
7 before the Eleventh Amendment. But I do think that the
8 Article III question -- I mean, this Court in its FOIA
9 decisions such as, you know, Public Citizen v.
10 Department of Justice, has said that Congress can create
11 a right to access to information --

12 JUSTICE GINSBURG: Mr. Galanter, if we can
13 go back to get what this -- this entity was. The
14 Federal legislation gives the States a choice. They can
15 do it either in a State agency or a private entity. The
16 specification that the State agency has to be
17 independent is in the Federal statute, isn't it?

18 MR. GALANTER: Yes, Your Honor.

19 JUSTICE GINSBURG: It's not -- it's not up
20 to the State to want to put it into an independent
21 regulatory agency. And is it -- and this VOPA -- is
22 that an entity that was created just to carry out this
23 Federal program or was it a pre-existing agency?

24 MR. GALANTER: It -- it and its predecessors
25 were created just to implement this program.

1 JUSTICE GINSBURG: And does it do anything
2 else other than administer the Federal program?

3 MR. GALANTER: It has a few responsibilities
4 that the State has given it under State law in addition,
5 but its primary function -- and at this point all its
6 budget comes from the Federal Government, and it serves
7 primarily this Federal function to go into public and
8 private institutions to observe and make sure that abuse
9 and neglect is not occurring there.

10 And that is, obviously, why these records
11 were requested, because the statute gives the protection
12 and advocacy service a right to access records of people
13 in the institutions to make sure that they are not being
14 mistreated and that the investigations and the
15 oversights by the State are taking place and are being
16 done correctly.

17 JUSTICE SOTOMAYOR: Counsel, following up on
18 Justice Scalia's question to you, his question in fact
19 is in part what happened here. Virginia at some point
20 did require every State agency to seek the permission of
21 its attorney general, is it, to sue? And the government
22 said that's not independent enough, and if you want the
23 money, you've got to make VOPA eligible to sue without
24 that permission; is that correct?

25 MR. GALANTER: That -- that is correct. And

1 then the legislature of the Commonwealth went in and
2 gave VOPA independent litigating authority, independent
3 of the attorney general.

4 On the Eleventh Amendment point, which is,
5 again --

6 CHIEF JUSTICE ROBERTS: Well, just -- I know
7 you're anxious to get to that, but --

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: -- do you know -- do
10 you know of any other situation where one party to a
11 Federal court action can dissolve the other one in the
12 middle of the case? I mean, if VOPA files a discovery
13 request with the State and they think it is, as you put
14 it in your brief, too onerous, the State can say: Guess
15 what, the case is over, you're dissolved.

16 MR. GALANTER: Well, I -- again, I would go
17 back to the Federal analogy, that in all this litigation
18 with the ICC or -- well, with the Federal labor
19 relations authorities, with the licensing authority of
20 the Department of Interior for dams that -- that, you
21 know, the TVA might want to build, that Congress can
22 always eliminate these agencies, but while they are
23 still in existence --

24 JUSTICE SCALIA: I guess, in *Nixon v. United*
25 *States*, the President could have dismissed the attorney

1 general, but we allowed the suit to go forward. I never
2 did understand that.

3 (Laughter.)

4 MR. GALANTER: Well, I think -- I think it's
5 because you look at standing in terms of the current
6 reality, and in Nixon, for example, the attorney general
7 had promulgated a regulation saying he couldn't dismiss
8 the special prosecutor except for cause.

9 JUSTICE KENNEDY: But there are a number of
10 instances in the States where constitutional officers
11 have their separate autonomy, their separate
12 responsibilities. And it seems to me to follow
13 inevitably from your position that the attorney general
14 of State A could sue the governor of State A saying the
15 governor is being sued in an Ex parte Young capacity
16 because the governor is not following Federal law. I
17 think that's just inevitable from your -- from your
18 position, and that seems to me a vast extension of Ex
19 parte Young. It's true, I think, that we've never said
20 that the identity of -- or the permissibility of an Ex
21 parte Young suit depends on the identity of the
22 plaintiff, but don't we have to say that here if we're
23 going to allow the States to structure their -- their
24 own governments as they choose?

25 MR. GALANTER: Well, I would say that --

1 well, I would say two things. First, the idea that --
2 you have to accept, as I think Respondents do in this
3 case, that the Virginia Office of Protection and
4 Advocacy legitimately holds a Federal right. I can't --
5 I am hard pressed, and -- and Respondents and their
6 amici were hard pressed, to come up with any example
7 where an attorney general would hold a Federal right
8 against another part of the State. And particularly
9 here --

10 JUSTICE KENNEDY: Well, he would tell the
11 governor that the governor is not giving adequate
12 protection to prison inmates or State employees, that
13 the -- that the governor's own personnel regulations are
14 incorrect, and he would sue under Ex parte Young.

15 MR. GALANTER: If the Commonwealth --

16 JUSTICE KENNEDY: There are all kinds of
17 Federal rights.

18 MR. GALANTER: Well, but they're generally
19 not the --

20 JUSTICE KENNEDY: And the question is: Can
21 one State entity enforce it against another State entity
22 in a Federal court?

23 MR. GALANTER: The -- there aren't a lot of
24 Federal rights that State officials have against other
25 officials. Here, this is a right --

1 JUSTICE KENNEDY: Well, but that's -- but
2 under -- under your theory there would be, because under
3 Ex parte Young, the whole point of it is that a -- a
4 person can allege that this fictional private individual
5 who's really a governmental individual is violating a
6 Federal right. That's the whole point of it.

7 MR. GALANTER: Violating the plaintiff's
8 Federal right. That was the only point I was making.
9 But, yes, if there are Federal disputes at issue, a
10 Federal forum is appropriate, but --

11 JUSTICE KENNEDY: All State attorney
12 generals have the -- have the obligation to enforce
13 Federal rights for all of the citizens of their States.

14 MR. GALANTER: And if they have that right
15 under -- power under State law, then -- and they
16 exercise that power and elect to be in Federal court to
17 litigate Federal issues, that is not barred by the
18 Eleventh Amendment, we would submit.

19 JUSTICE KENNEDY: Well, that -- that
20 issue -- I know your white line is on.

21 You -- you indicated that there are certain
22 cases in which dams can be authorized by the Federal
23 Government, I think, contrary to State laws, with
24 municipalities. Do you know what those are? There's an
25 Iowa case; there's also a Washington case you were

1 talking about.

2 MR. GALANTER: I believe the case here I'm
3 thinking of comes out of Seattle. But -- but I think --

4 JUSTICE KENNEDY: Do you have the citation?

5 MR. GALANTER: I don't have it with me. I
6 --

7 JUSTICE KENNEDY: I've been looking for it.
8 Okay.

9 MR. GALANTER: But -- but the point I was
10 making is that sometimes one Federal agency needs
11 permission from another Federal agency to build
12 something, and there would be a litigable controversy
13 under Article III, and that's the only point I was
14 trying to make.

15 If I may, if there are no more questions,
16 I'd like to reserve the balance of my time.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Ms. Anders.

19 ORAL ARGUMENT OF GINGER D. ANDERS

20 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
21 SUPPORTING THE PETITIONER

22 MS. ANDERS: Mr. Chief Justice, and may it
23 please the Court:

24 VOPA has properly invoked Ex parte Young to
25 enforce Respondents' obligations under the DD and PAIMI

1 Acts here, because VOPA's complaint satisfies the
2 straightforward inquiries set forth in Verizon.

3 We don't think that it's necessary to go
4 into State sovereignty interests to determine whether Ex
5 parte Young should be allowed here, but even if the
6 Court were to do that, I think it's unquestionable that
7 there are no State sovereignty interests here.

8 JUSTICE ALITO: Do you think -- do you think
9 the Spending Clause allows the Federal Government to
10 condition the receipt of Federal funds on a State's
11 agreement to change the structure of State government?

12 MS. ANDERS: I think it does, so long as --
13 as that requirement is reasonably related to the
14 government's interest in the funds and in -- in the
15 objective of its regulation. Now, there's --

16 JUSTICE ALITO: Suppose the government said
17 if you want Medicaid funds, the State agency that
18 administers the Medicaid program must be headed by a
19 person who has a 20-year term of office and is removable
20 only for gross dereliction of duty. Would -- can they
21 do that? Can the Federal Government do that? Can
22 Congress do it?

23 MS. ANDERS: I think it could do that, so
24 long as that's not independently unconstitutional. I
25 think the State always has the opportunity to decide not

1 to opt into the scheme, and I think that's very
2 important here because the sole aspect of this suit that
3 Virginia challenges, which is the fact that VOPA is a
4 State agency, is the result of two sovereign choices
5 that the State made here.

6 The first choice was to opt into the DD and
7 PAIMI Act programs, to take the Federal funds, to create
8 a P and A system that has Federal rights of access to
9 which both State and private facilities are subject.
10 And the second choice that Virginia made was to
11 establish a State agency P and A system here. It could
12 have established a private agency if it were concerned
13 about --

14 JUSTICE GINSBURG: Ms. Anders, I understand
15 that most States that -- that are taking advantage of
16 this program do it through a private entity, not a
17 State; is that -- is that right?

18 MS. ANDERS: That's correct. There are
19 eight public P and A systems.

20 CHIEF JUSTICE ROBERTS: Can EPA sue the Army
21 Corps of Engineers for violating the Clean Water Act?

22 MS. ANDERS: Well, I think you would have an
23 Article III problem if there isn't sufficient adversity.
24 If the --

25 CHIEF JUSTICE ROBERTS: Oh, very adverse.

1 EPA wants clean water, and the Army Corps of Engineers
2 wants to, you know, dredge the water in a way that
3 contributes to pollution.

4 MS. ANDERS: Well, they're both -- the heads
5 of both agencies are, in that situation, I think,
6 subject to removal by the same people, and so in that
7 situation, you would have an Article III problem. But
8 we don't have that problem here, because VOPA is
9 independent under State law, and --

10 CHIEF JUSTICE ROBERTS: Do you agree with
11 the Petitioners that Virginia can dissolve VOPA if it
12 finds the litigation too onerous?

13 MS. ANDERS: I think that that would not
14 happen in practice, because if Virginia were to dissolve
15 VOPA, it would be out of compliance with the Federal
16 scheme, and so it would lose its -- it would lose its
17 Federal funding at that point. And so I don't think
18 that's a situation that's going to arise, but --

19 CHIEF JUSTICE ROBERTS: If -- if it happened
20 to arise, do you think that they can -- do you agree
21 with the Petitioners that they can do it?

22 MS. ANDERS: I think they -- I think they
23 could do it, but I think this -- this Court has
24 previously adjudicated cases where, in theory, the
25 government could have changed the case midstream.

1 U.S. v. Nixon is an example of that; the ICC case as
2 well. And I think also in the Lassen case, this Court
3 said that it could adjudicate a suit between two State
4 agencies because the agencies were sufficiently
5 independent from each other. They weren't subject to
6 removal by the same head of government.

7 So I think, while you might have an Article
8 III problem in some situations, you don't have that
9 problem here because of VOPA's independence.

10 JUSTICE SOTOMAYOR: Could you be a little
11 bit more specific for me on what you mean about an
12 Article III problem? Justice Kennedy was concerned
13 about State attorney generals willy-nilly suing -- or
14 not willy-nilly -- suing governors to comply with
15 Federal law.

16 Why do you think it won't happen, and what
17 are the legal impediments to that occurring?

18 MS. ANDERS: I think there are several. I
19 think, first, you would have to have a Federal right
20 that the AG would be able to enforce. He would have to
21 have a way to get into Federal court. He would have to
22 have a theory of standing, and I think this is not a
23 situation that has arisen at this point. There are no
24 examples of this. And so I think --

25 JUSTICE BREYER: I thought -- this I'm

1 confused about. I would think you would have to have a
2 State which has a law that permits the attorney general
3 to sue the governor. Wouldn't you?

4 MS. ANDERS: If the --

5 JUSTICE BREYER: I mean, if the State law is
6 the attorney general can't sue the governor, that's the
7 end of it, isn't it? Or is it --

8 MS. ANDERS: If that were sufficient to get
9 into Federal court for Article III purposes. I think
10 there might be some situations in which the attorney
11 general --

12 JUSTICE BREYER: No. Suppose the State law
13 is the governor of the State cannot bring a lawsuit
14 against the attorney general, and vice versa. Okay?
15 That's the State law. Now, under those circumstances,
16 can either bring a lawsuit on a Federal right in Federal
17 court?

18 MS. ANDERS: There may be some circumstances
19 like that one, in which the State AG's use of Ex parte
20 Young would raise special sovereignty interests that
21 would counsel against --

22 JUSTICE BREYER: No, but I want just a yes
23 or no answer. In your opinion, can an attorney general,
24 where the State law says, black letter law, attorney
25 general can never sue the governor; he's fired instantly

1 if he tries. That's the law in this State, okay? Now,
2 can that individual come into Federal court and sue on
3 an Ex parte Young theory suing the governor?

4 MS. ANDERS: I think he could --

5 JUSTICE BREYER: He could?

6 MS. ANDERS: -- under this Court's decision
7 in Verizon. I think that if -- there might be certain
8 extreme circumstances where --

9 JUSTICE BREYER: Well, I don't -- I think
10 that is a problem, and is that --

11 JUSTICE SCALIA: Yes, I --

12 JUSTICE BREYER: -- what we're saying here?

13 JUSTICE SCALIA: That can't be. How can
14 that be? He has no power as attorney general to do
15 that. It has nothing to do with -- with Ex parte Young.
16 It has to do with his power as attorney general.

17 MS. ANDERS: Right, and as this Court said
18 in Lassen, though, I think often the Federal court
19 doesn't look behind State officers' version of --

20 JUSTICE BREYER: But my -- excuse me -- I
21 thought --

22 JUSTICE SCALIA: But your -- your answer --

23 JUSTICE BREYER: Suppose I'm right about
24 this and you can't do it. You can't. You can't -- the
25 Federal Government cannot tell a State how to organize

1 itself. If it wants to have an attorney general that
2 can never bring a lawsuit, that's up to the State,
3 unless it's a due process problem.

4 Now, suppose I believe that. Now, do you
5 lose this case?

6 MS. ANDERS: No, I don't think so, because
7 the same special sovereignty interests are not present
8 here, because under the Spending Clause, Virginia had
9 the choice to opt into this scheme.

10 JUSTICE GINSBURG: Doesn't -- doesn't the
11 Federal statute say, Virginia, if you want to do this
12 through a State agency, that State agency has to be an
13 independent agency and have the authority to sue?

14 MS. ANDERS: That's correct, and --

15 CHIEF JUSTICE ROBERTS: Are you sure that
16 the governor cannot remove the members of VOPA? I know
17 it says VOPA has to be independent of any State agency,
18 and the governor appoints one-third. Can the governor
19 remove the members of this Virginia agency?

20 MS. ANDERS: As a matter of State law, I
21 don't think he can. And if he were to try to do that,
22 that would be a compliance problem from HHS's
23 perspective. And so Virginia might at that point --

24 CHIEF JUSTICE ROBERTS: What would it not --
25 what would it not comply with? I just don't know. I'm

1 just looking at the provision where you say it's
2 independent, and it says independent of any State
3 agency. You said the governor may not appoint more than
4 one-third. I just wonder if there's a prohibition on
5 him removing.

6 MS. ANDERS: Well, there's definitely a
7 prohibition on him removing board members of VOPA or
8 officials of VOPA as a result of VOPA's actions in
9 litigation. I think --

10 CHIEF JUSTICE ROBERTS: Where is that?

11 MS. ANDERS: Well, the provision -- well,
12 the requirement that VOPA have full authority to pursue
13 legal remedies to ensure the protection of individuals.
14 This is on page 52a of the petition appendix. That's
15 the PAIMI law. And I think that actually did happen in
16 Virginia, that HHS came in --

17 CHIEF JUSTICE ROBERTS: What if the VOPA
18 officials are engaged in corruption or illegal conduct
19 or, you know, extracurricular activity that brings
20 discredit upon the -- the governor has no power to say
21 that, you're a Virginia official and you're -- you know,
22 whatever -- breaking Virginia law, for example? And --

23 MS. ANDERS: Well, under Virginia law, I
24 think that VOPA's officials are subject to for-cause
25 removal provisions. So they can actually be removed

1 judicially through for-cause proceedings. And from our
2 perspective, that's consistent with VOPA's independence
3 and its full authority to pursue remedies because that
4 type of for-cause removal wouldn't be on the basis of
5 VOPA's actions in litigation.

6 JUSTICE KENNEDY: Going back to your
7 exchange with Justice Breyer, I assume that you could
8 stand by your answer and say the attorney general could
9 sue the governor, because he's not suing the governor in
10 his official capacity. He has a Federal right under Ex
11 parte Young to sue the governor as an individual. It's
12 a fiction; we all know that. But that's the way it
13 works, and this is a Federal right.

14 MS. ANDERS: Well --

15 JUSTICE KENNEDY: I think that's your
16 position.

17 MS. ANDERS: I think that's right, that
18 under Verizon no more is required. VOPA has a Federal
19 right here.

20 JUSTICE KENNEDY: Of course -- of course,
21 Verizon was a private party.

22 MS. ANDERS: Verizon was a private party,
23 but --

24 JUSTICE BREYER: Suing in his capacity as
25 attorney general and under his -- that's the plaintiff,

1 not the defendant. And he has no right to bring that
2 suit, because -- it's not that he doesn't have a right;
3 it's that he doesn't have authority. He's not a person
4 that can do this kind of thing --

5 JUSTICE SCALIA: I really lost you. I
6 thought *Ex parte* Young applied to defendants.

7 JUSTICE BREYER: Yes, right. Exactly.

8 JUSTICE SCALIA: I didn't think *Ex parte*
9 Young allows -- allows an attorney general to sue -- to
10 sue as a plaintiff in his personal capacity. Am I wrong
11 about that?

12 MS. ANDERS: Well, I think that you might
13 have State sovereignty interests at that point --

14 JUSTICE BREYER: That's your position.

15 MS. ANDERS: -- that would prevent a Federal
16 court from -- from adjudicating the suit, but there's no
17 question that those interests aren't present here
18 because Virginia has chosen to create a State agency in
19 order to enforce these Federal rights. When it opted
20 into the scheme --

21 JUSTICE BREYER: I'm with Justice Scalia on
22 this. Well, I'll pass to the other side.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Ms. Anders.

25 Mr. Getchell.

1 ORAL ARGUMENT OF EARLE DUNCAN GETCHELL, JR.,

2 ON BEHALF OF THE RESPONDENTS

3 MR. GETCHELL: Mr. Chief Justice, and may it
4 please the Court:

5 The dignity interest of a sovereign is
6 impaired if it is pitted against itself in the courts of
7 another sovereign without its consent. And I would
8 take --

9 JUSTICE SCALIA: A dignified sovereign
10 should not agree to the deal.

11 (Laughter.)

12 MR. GETCHELL: Well, let's --

13 JUSTICE SCALIA: I mean, you know, the
14 Commonwealth had the choice. It had two choices, as --
15 as counsel for the Government said. It could either
16 turn down the money or, if it's not dignified enough to
17 do that, it could take the money and establish a private
18 organization to do this work instead of a State agency.
19 So, what -- you know, what complaint do you have here?

20 MR. GETCHELL: Well, let me -- let me first
21 say that the choice issue raises some interesting
22 questions because of the procedural posture of this case
23 being an interlocutory appeal. Because remember, on the
24 issue of waiver and abrogation, that was litigated
25 below, and no waiver was found, and that wasn't appealed

1 against. So if we're going to say it makes a difference
2 under a spending statute that the State has taken the
3 money in analyzing the sovereign interest, then we are
4 creating a waiver on the cheap and disheveling the
5 established doctrine.

6 JUSTICE GINSBURG: It's not a waiver; it's
7 -- the Federal statute is clear. It says: State, you
8 can do this in one of two ways. If you go with a
9 government agency, then that agency has to have
10 independence and it has to be able to sue.

11 So if the State is given a choice, it has --
12 it can do it through private entity; it can do it
13 through, as in this case, an agency that was set up for
14 this very purpose and no other, right?

15 MR. GETCHELL: I would have thought two
16 things about that. One is when Congress gave the State
17 the choice of making it a State agency, it understood
18 that any issues that arise from that would come with the
19 territory. The second thing is what the State consented
20 to is it waived its sovereign immunity to be sued, but
21 it did not specify suit in Federal court, and under
22 ordinary doctrine, that's a consent to be sued in its
23 own courts, not in Federal court.

24 JUSTICE BREYER: Suppose you have a State
25 which loves litigation.

1 (Laughter.)

2 JUSTICE BREYER: Forty-eight percent of the
3 population are retired lawyers.

4 (Laughter.)

5 JUSTICE BREYER: Nothing pleases them more
6 than to have everybody suing everybody else. So they
7 pass a statute which says, for purposes of lawsuits in
8 this State, every department can sue every other
9 department.

10 Now, if you have such a State, what in the
11 Constitution stops the Federal Government from abiding
12 by that rule and applying ordinary Ex parte Young rules,
13 looking at the defendant, looking at horizon, and then,
14 if the plaintiff happens to be a Federal agency suing
15 another, say, well, if it complies with those first set,
16 the fact that A sues B and they're both State agencies,
17 that's the State's decision. What in the Constitution
18 can prevent the State from deciding to organize what
19 we'll call the legal heaven way?

20 (Laughter.)

21 MR. GETCHELL: I would say two things about
22 that. The first is that that's not what Congress did.
23 Congress -- Congress said they had to have a right to
24 sue, and they didn't specify it was Federal court.

25 JUSTICE BREYER: Okay. That's A. We can go

1 into A later because I agree that would be an answer, if
2 it's correct -- I mean, if that is what happened.

3 That's a different question, whether Congress could
4 restructure the State. That's a serious question. But
5 my question was on the first. Can Congress stop the
6 State from restructuring itself?

7 MR. GETCHELL: Well, I -- I don't think the
8 State by restructuring itself would then ordinarily
9 expect its agencies to sue each other in Federal court.
10 In --

11 JUSTICE BREYER: If they wrote it down
12 specifically in the law and said we'd love to have our
13 agencies sue each other. They don't say Federal court.
14 They just say we love to have our agencies sue each
15 other. They don't mention the court.

16 MR. GETCHELL: I would think that, under
17 ordinary rules of waiver of sovereign immunity, that
18 would limit the suits to the suits of the sovereign, the
19 State.

20 JUSTICE BREYER: Why? What's undignified
21 about allowing the State --

22 MR. GETCHELL: I just --

23 JUSTICE BREYER: -- to live with the choice
24 it made?

25 MR. GETCHELL: I think the existing doctrine

1 is an unspecified waiver of sovereign immunity does not
2 consent to the Federal court.

3 JUSTICE SOTOMAYOR: I'm sorry. I -- I think
4 there are concepts being confused. There's no question
5 that it hasn't waived sovereign immunity. VOPA doesn't
6 claim that. And this is not a direct suit against the
7 State; it's a suit against a State official. And the
8 entire premise of *Ex parte Young* is that this doesn't
9 offend sovereign immunity for a party to seek
10 enforcement, prospectively, of a Federal right.

11 So I don't know why it really matters who
12 the plaintiff is so long as the sovereign interests that
13 we've recognized, that the issue of sovereignty is one
14 that respects a State's coffers and State's laws and
15 we're not going to interfere with any of them, but we
16 are going to ensure that, because of the pre-emptive
17 effect of the Constitution and our laws, that Federal
18 laws are respected. So what's in this case the
19 intrusion on State sovereignty when the State knew and
20 consented consciously to letting VOPA sue for records
21 when it needed to?

22 MR. GETCHELL: In referring to sovereign
23 immunity, I was trying to answer the hypothetical with
24 respect to why *Ex parte Young* doesn't apply. The second
25 part of the question was Congress could expect *Ex parte*

1 Young to apply. There's -- there's no indication in the
2 legislative record that I could find of that.

3 JUSTICE SOTOMAYOR: The State should have
4 expected that.

5 MR. GETCHELL: Excuse me. That Congress
6 should have expected. In the hypothetical, Congress was
7 posited as having thought that Ex parte Young --

8 JUSTICE BREYER: No. The hypothetical was
9 just -- Justice Sotomayor is totally right. I'm talking
10 about Ex parte Young.

11 MR. GETCHELL: Okay.

12 JUSTICE BREYER: I'm imagining -- I'm
13 imagining a system where the State wants to let the AG,
14 this organization, the sheriff of Middlesex County, the
15 City of San Francisco -- they want to permit such
16 entities to become plaintiffs against other parts of the
17 State government in such a State if ordinary Ex parte
18 Young requirements are met. What in the Constitution of
19 the United States prohibits that suit from going ahead?

20 MR. GETCHELL: Because Ex parte Young is an
21 exception to the default position. The default position
22 is that the States at the founding retained all of their
23 natural law-of-nations sovereign immunity. We know that
24 it was -- that it was limited. A State can sue another
25 State; the Federal Government can sue another State; and

1 -- can sue a State; and there is the Ex parte Young
2 exception, but it is the exception.

3 It is being extended here. We know it's
4 being extended here because it's never been done before.
5 And if you're going to extend it, then we ought to ask
6 the question of whether or not -- asking the Hans
7 question.

8 JUSTICE SCALIA: Why -- why is it an
9 extension? I mean, I have sort of a bit of a problem
10 with that. Why is it somehow a -- a greater
11 infringement upon State sovereignty to allow a State to
12 be sued in Federal court by a private individual, who
13 doesn't even have to be a Virginian, for Pete's sake --
14 he could be from anywhere, he could be from Iowa. And
15 yet, it somehow offends State sovereignty more when --
16 when you allow a State agency to sue a State?

17 I don't -- I don't see why that's so
18 horribly worse, unless you're arguing that -- that it
19 somehow destroys the State system of separation of
20 powers. But that's a different question, and -- and the
21 answer to that is simply you did it yourself.

22 MR. GETCHELL: Well, what I -- what I would
23 say is that Ex parte Young is intended to deal with the
24 situation where a citizen of a dual sovereign is able to
25 vindicate his superior Federal rights against the State.

1 That interest is not served one bit by having a State
2 agency sue another State agency in Federal court, even
3 though that State agency could have sued in State court.

4 And I would ask the Hans question. The Hans
5 question is, would the -- you know, the Constitution is
6 presumed not to raise up causes of action against the
7 States that would have been considered as anomalous and
8 unheard-of at the time of the founding. And I think if
9 you posited whether or not at the founding, if you had
10 asked, can a part of a State -- well, can the Federal
11 Congress authorize part of a State to sue the other part
12 of the State in Federal court, I think it would have
13 been regarded as anomalous generally.

14 JUSTICE ALITO: When Virginia agreed to
15 participate in this program, did Virginia understand
16 that it could be sued by VOPA not only in -- in the
17 State courts but also in Federal court?

18 MR. GETCHELL: I would assert not. I mean,
19 that was the point of the waiver argument below, and the
20 court said there had not been a specific enough
21 declaration of the consequences of taking the money to
22 raise a traditional waiver.

23 JUSTICE GINSBURG: So the choice is, if it's
24 not in -- you certainly agree that this State agency has
25 taken on the obligations of the Federal program, and if

1 it doesn't turn over records as the Federal statute
2 requires it to do, it has to be amenable to suit
3 somewhere. We know if it were a private entity
4 administering this program, it would be suable in -- in
5 Federal court. So this State agency is doing the exact
6 same thing, because Virginia chose to do it that way.
7 Where is it -- where -- a very simple thing, the Federal
8 statute says turn over records to the agency, and the
9 State hospital says no, we're not going to turn over the
10 records. Where does the agency, whether private or
11 public, that's administering the Federal program go to
12 enforce the Federal right?

13 MR. GETCHELL: The program would go to State
14 court. Virginia has waived its sovereign immunity, and
15 there is a remedy through mandamus.

16 JUSTICE GINSBURG: If you -- is that -- I
17 mean, I want to make sure I understood what your
18 position is on that. It's not that you go into the
19 court that you ordinarily go to when you want to get
20 documentary discovery; you go to the State's supreme
21 court, and you -- you apply for the extraordinary writ
22 of mandamus? That's it?

23 MR. GETCHELL: If you have a -- if you have
24 a clear right to these documents as a surrogate -- and,
25 you know, that's a merits question that has never been

1 reached, whether this is a rights-conferring statute.

2 JUSTICE GINSBURG: I'm asking you what is
3 the forum? We have a simple problem. An agency,
4 whether private or public, wants records. A Federal
5 statute says you're entitled to the records. And I
6 would like to know now, Virginia having chosen to give
7 this newly created independent State agency the
8 authority, rather than picking a 501(c)(3) organization
9 to do it -- simple, we want records of these three
10 people, the hospital has them, the hospital doesn't give
11 them to us. The only way under Virginia law is to
12 petition the highest court of the State for a writ of
13 mandamus?

14 MR. GETCHELL: I would -- I personally
15 believe you could also do it in circuit court. I know
16 this office has previously taken the position that it
17 had to go to the supreme court, and I don't want to
18 withdraw any concession that had been made there, but I
19 personally read the statute differently.

20 JUSTICE GINSBURG: But which office has said
21 it has to go to -- to the State supreme court on
22 mandamus? You said that the office has taken that
23 position previously.

24 MR. GETCHELL: The statute, the mandamus
25 statute, has a fairly broad catch-all provision at the

1 end which I think would allow suit in -- in circuit
2 court, but I don't think where it can sue really informs
3 the doctrine here, because I think the doctrine here is
4 if you're going to let, under the analysis argued
5 here -- which is not modest; it's very, very broad. If
6 VOPA can sue in Federal court under Ex parte Young, so
7 can any agency of -- of the -- of any State that
8 receives Federal funds upon which it makes the claim at
9 the Ex parte Young stage, which is before you reach the
10 merits -- any agency receiving Federal money that can
11 dream up a Federal claim under Ex parte Young could sue
12 the State.

13 JUSTICE SCALIA: And -- and that has
14 independent litigating authority.

15 MR. GETCHELL: Yes, and -- and --

16 JUSTICE SCALIA: Okay. I mean, that's the
17 difference here.

18 MR. GETCHELL: And I believe --

19 JUSTICE SCALIA: This agency was given
20 independent litigating authority.

21 MR. GETCHELL: I think -- I think Virginia
22 happens to be unusual, as long as we're talking about
23 the policy results that will come from this. I think
24 Virginia is unusual in having as much control in the
25 attorney general over who can sue than -- than a lot of

1 States do, because I think a lot of States have their
2 own independent agencies that proliferate and have suit
3 authority.

4 But I will tell you, even in Virginia, there
5 is a mechanism by which, if you had the governor in one
6 party's hands and the attorney general in the other, the
7 governor can declare a conflict of interest and order
8 private counsel hired.

9 And so, if -- if the University of Virginia
10 wanted to sue the governor, or rather sue the attorney
11 general, and the governor said, well, if you want to,
12 and the attorney general won't authorize it, then that's
13 a conflict of interest. I --

14 JUSTICE SOTOMAYOR: It hasn't happened. Why
15 do you think? Don't you think it hasn't happened
16 because there are so many practical political restraints
17 on that kind of activity?

18 What would happen, I think, in that State
19 where there was a rogue attorney general is somebody
20 would win; the governor would win by getting a
21 legislative act that says it can't be done, or the
22 attorney general will win because the political
23 sentiments are so strong in his or her favor that the
24 suit is actually welcomed by the population.

25 So where's the intrusion on sovereignty?

1 States do what they want. The only issue is how do we
2 protect Federal rights.

3 MR. GETCHELL: I would -- I would say that
4 it's never happened before because nobody's ever claimed
5 before that Ex parte Young permits a part of the State
6 to sue the other part of the State. And I would say if
7 the word were declared from this Court that you can do
8 that, that there would be a lot of political motivation
9 to file suits.

10 JUSTICE BREYER: It isn't that Ex parte
11 Young, if I understand this right, which is why I
12 mention it -- it isn't that Ex parte Young permits one
13 part of a State to sue another part; it is a State
14 permits one part of a State to sue another part, that
15 that's common in the State, that the law requires it.
16 And the question is, in that circumstance, should the Ex
17 parte Young situation be treated differently?

18 MR. GETCHELL: And --

19 JUSTICE BREYER: Am I right about the
20 statement of the question in the case?

21 MR. GETCHELL: I -- I think -- I think
22 whether or not the State has given independent authority
23 to sue without specifying that it can be in Federal
24 court, without waiving its immunity in Federal court, is
25 not the issue in the case. I think the issue in the

1 case -- I think that the issue in the case is whether or
2 not Ex parte Young should be extended to do something
3 that's never been done before. I think that's the issue
4 in the case. And I don't think Ex parte Young, which is
5 a necessary fiction -- but it is a fiction; it's a
6 necessary fiction to allow the citizens of a dual
7 sovereign to vindicate his or her Federal rights in
8 Federal court -- is implicated in the least when it's a
9 State agency that could sue another State agency by the
10 State's consent in State court.

11 JUSTICE GINSBURG: Do you know -- do you
12 know of any other statute in which there is an
13 independent State agency that exists for the sole
14 purpose of administering a Federal program?

15 MR. GETCHELL: I -- I'm not an expert in
16 that area of the law. I would have thought it's quite
17 common. But I don't -- I don't know. That's just my
18 supposition. I think that -- that --

19 JUSTICE GINSBURG: You couldn't give any
20 example of a Federal program that says: State, you can
21 do it through a private agency; you can do it through a
22 public agency -- public agency created to implement this
23 Federal program, that is its sole business. I don't
24 really know of any such.

25 MR. GETCHELL: I -- I personally don't know

1 of one as I stand here, but my supposition is that
2 because the Federal spending power has been so
3 dramatically exercised over the years, that there
4 probably is one, and I had not thought to look for it.

5 JUSTICE BREYER: In your experience -- this
6 would be helpful -- would you characterize as common or
7 uncommon situations where State agencies are given
8 authority to sue other parts of the State? As I think
9 it to myself, I think, well, *City of Glendale v. State*
10 *Water Authority*, or *Middlesex County Sheriff v. The*
11 *Bureau of Prisons*. That doesn't sound weird to me. It
12 sounds as if there probably are a lot of such
13 circumstances, but I don't know. What -- what do you
14 think?

15 MR. GETCHELL: There -- I think two -- there
16 are two things to look at: lower subdivisions of the
17 States, which in many States are --

18 JUSTICE BREYER: Cities -- cities against --
19 they must do that a lot.

20 MR. GETCHELL: Yes, but they're just
21 corporations in -- in Virginia and in most States.
22 There are a few States where they are treated as
23 something different, but they are not generally regarded
24 as even units of -- subordinate units of government for
25 purposes of sovereign immunity.

1 However, the State itself and its agencies
2 are, and that's the issue that's implicated by Ex parte
3 Young. I would -- I would say that --

4 JUSTICE BREYER: University of
5 Massachusetts v. State Environmental Organization. Does
6 that -- does that kind of suit sound familiar to you or
7 -- or not?

8 MR. GETCHELL: I think that -- that the
9 States vary as to how tolerant they are of -- of being
10 sued by -- having their parts sue each other in State
11 court. I think I have seen titles like that, but I
12 don't think that, as a principle of Federal jurisdiction
13 -- because, ultimately, whether sovereign immunity
14 exists, if it's not waived, does deprive this Court --
15 or deprives a Federal court of the right to proceed.

16 I think that deciding we're going to extend
17 the fiction of Ex parte Young beyond the rights of
18 citizens to allow the State to sue itself in Federal
19 court is just something that's totally anomalous. I --
20 I just don't see how this Court would want to do that,
21 even -- even if it thought otherwise that it was, you
22 know, something that could be done under the logic of Ex
23 parte Young. I don't know why you'd want to extend that
24 and create -- and create the Federal courts as a venue
25 for political grandstanding, which is what I think --

1 JUSTICE SOTOMAYOR: I'm not sure that --
2 what you're forgetting is that Virginia took a lot of
3 money to set up and get the benefits of Federal funds by
4 creating an independent agency. It had expressed its
5 desire to control the agency more, and it was told very
6 directly: You can't. You have to let that agency sue.

7 What I don't understand is why you think
8 that it's a greater affront to sovereignty that the suit
9 is here as opposed to State court. The State has
10 already said: We're going to take your money, and this
11 is what we're going to permit --

12 MR. GETCHELL: I think it has --

13 JUSTICE SOTOMAYOR: -- a suit.

14 MR. GETCHELL: I think it has long been
15 recognized that the dignity of the State is not offended
16 at all by a suit against -- against it in its own courts
17 that it has authorized. I think that it is well
18 understood that if you bring a State against its will
19 into a Federal court, even if you're using the fiction
20 of Ex parte --

21 JUSTICE SOTOMAYOR: But we use -- we don't
22 bring the State in; we bring a State official who is
23 violating a Federal law.

24 MR. GETCHELL: But this Court has always
25 recognized that there is a large sense in which that's a

1 fiction and it's just something that we have to tolerate
2 in order to have a dual system of -- of sovereignty.

3 JUSTICE SCALIA: So your argument is really
4 -- really is a sovereign immunity argument. You're
5 saying that the waiver of sovereign immunity, unless it
6 explicitly includes a waiver to be sued in Federal
7 courts, applies only in State courts -- okay -- and that
8 that limitation should not be evaded by applying Ex
9 parte Young to a suit in Federal court where the suit is
10 by another State agency.

11 MR. GETCHELL: That is precisely my view.

12 JUSTICE SCALIA: So sovereign immunity is
13 part of your argument, but --

14 MR. GETCHELL: It -- well, it's -- I think
15 it's all that's really appropriately before this Court,
16 because, again, we're up here on an interlocutory appeal
17 where the decision below in the Fourth Circuit by Judge
18 Wilkinson is premised entirely on sovereign immunity.

19 JUSTICE BREYER: Right. Now, explain --
20 this is good because that's very helpful to me -- the
21 exact statement that Justice Scalia made, and you said
22 yes, that's exactly right.

23 And then it is the case that a citizen of
24 the State could come into Federal court and sue the
25 State official under Ex parte Young, but you say -- but

1 the agency of the State can't do it, even though they
2 have State litigating authority. And the reason that
3 the latter is more injurious of the dignity interests of
4 the State than the former is --

5 MR. GETCHELL: One, the State is being
6 pitted against itself. If you look at the very caption
7 in this case, VOPA sued the State officials in the name
8 of the Commonwealth.

9 Secondly, there's a -- to the extent there's
10 any authority, we have Ex parte Young here that gives
11 rights to citizens, and we have a lot of cases that
12 resulted most recently in Ysursa, in which it was
13 recognized that the general rule is that subordinate
14 parts of States, subordinate State authorities, have no
15 constitutional privileges and immunities that they can
16 assert against their creator.

17 And if you wanted to know whether or not Ex
18 parte Young should be extended into this area, it seems
19 to me that the previous expectation would have been that
20 the Ysursa tradition would have said, no, we don't want
21 to extend this into this area.

22 JUSTICE KENNEDY: Are there other areas --
23 and I can't come up with the name of the case. It was
24 suggested by counsel, your friend, in the -- in his
25 opening argument.

1 I thought there were cases in which a
2 subdivision is not -- a political subdivision of a State
3 is not allowed to build a dam by State law, and yet it
4 can go to the Federal Government, get a license, and
5 build the dam anyway and just bypass the restrictions
6 put upon its parent. The agent has more powers than the
7 principal gives it because it relies on Federal law.

8 MR. GETCHELL: I don't know the case. And I
9 don't believe anybody has cited as a principal case a
10 decision of this Court that would say that.

11 Now, a State can do anything it -- it wanted
12 to in terms of waiving its sovereign immunity.

13 JUSTICE KENNEDY: In -- in this case, could
14 Virginia sue VOPA in Federal court?

15 MR. GETCHELL: I don't think -- I don't
16 think it appropriately could.

17 JUSTICE KENNEDY: You think it could or
18 could not?

19 MR. GETCHELL: I do not think it
20 appropriately could. I don't think parts of the State
21 can sue other parts of the State in Federal court.

22 JUSTICE KENNEDY: Well, it would be the
23 parent suing the -- the subsidiary, and -- and VOPA is
24 not the State.

25 MR. GETCHELL: VOPA is -- is part of the

1 State for purposes of sovereign immunity analysis, I
2 would have thought.

3 But if somebody tried to get a personal
4 recovery -- I mean, VOPA employees are ordinary State
5 employees. I presume they're subject to the Tort Claims
6 Act, so it is -- it is a State agency. But I don't know
7 why the involuntary suing of the State in Federal court,
8 which I think raises these traditional sovereignty
9 dignity interests, would be reciprocal.

10 I mean, if for some strange reason the State
11 wanted to sue VOPA, I don't know what the answer would
12 be, because it may be they waived all their interests if
13 they tried to do that.

14 But I think that the -- that the practical
15 problem for this Court is that there's no limit.
16 There's no practical principle limit to what's being
17 argued here. And so we set up this intramural political
18 contest in Federal court as a matter of course. And I
19 think, doctrinally, that it is clear that this is an
20 extension of *Ex parte Young*, beyond dispute, and I don't
21 think it ought to be extended without doing a federalism
22 inquiry. And I think if you do a federalism inquiry,
23 you ask the Hans question: Is -- would this have been
24 regarded as anomalous and unheard-of at the founding?
25 And I don't think there's --

1 JUSTICE GINSBURG: The bottom line, then, is
2 to -- to restrict Congress's choice. Congress wants to
3 have an entity superintend this program for disabled
4 people. So the instruction we would like to give
5 Congress is: Congress, if you want Federal courts to be
6 able to enforce the Federal right, then you have to set
7 it up as an agency, as a private agency. You can't
8 give -- Congress, you can't give the States a choice
9 whether they'd rather do it through private or
10 public organizations.

11 MR. GETCHELL: I don't think so, for two
12 reasons. One is --

13 CHIEF JUSTICE ROBERTS: I'm sorry. I don't
14 think so -- what? You don't think Congress --

15 MR. GETCHELL: I don't think that -- I think
16 Congress could have, under traditional waiver authority,
17 under the spending power, have said: If you want to
18 take the money, we're making a clear statement, you have
19 to waive your sovereign immunity and be sued in State --
20 I mean, Federal court. That didn't happen.

21 Also, let's not overlook the fact that the
22 Secretary has an administrative remedy in withholding
23 the funds, and when this Court was faced with the
24 question of whether or not to extend *Ex parte Young* in
25 the Seminole Tribe, the answer was: No, we're not going

1 to do it, because there is an alternative remedy.

2 JUSTICE SCALIA: So you -- you would
3 acknowledge that if a State knew when it took the money
4 that it was -- and when it created a State agency to
5 administer the program, that it was letting itself open
6 to suit in Federal court under an Ex parte Young theory,
7 then everything would be okay?

8 MR. GETCHELL: Well, no, because I don't
9 think it ever -- it would ever.

10 JUSTICE SCALIA: Well, that would be a
11 waiver of --

12 MR. GETCHELL: No, but I would --

13 JUSTICE SCALIA: -- whatever sovereignty
14 immunity interest it had, wouldn't it?

15 MR. GETCHELL: If Congress -- Congress
16 conditioned receiving the money on waiver, then I
17 suppose it --

18 JUSTICE SCALIA: Well, Congress could, but
19 if they knew it in this instance when they accepted the
20 money, you wouldn't have a case, would you?

21 MR. GETCHELL: The law -- if -- if under
22 traditional waiver doctrine, it had been done right, no,
23 we wouldn't have a case. But remember, the law of the
24 case in this interlocutory appeal is that there was no
25 waiver. That waiver was -- was determined below and not

1 appealed.

2 JUSTICE SCALIA: That's a good point.

3 MR. GETCHELL: And -- and so under -- under
4 the circumstances here, we have a fairly peculiar
5 specialized situation, but -- but deciding in favor of
6 the Petitioners I think is fraught with peril and is
7 doctrinally unprecedented and improper, and we would ask
8 that the decision of the Fourth Circuit be affirmed.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Galanter, have you 3 minutes remaining.

11 REBUTTAL ARGUMENT OF SETH M. GALANTER

12 ON BEHALF OF THE PETITIONER

13 MR. GALANTER: I have three points for those
14 3 minutes. First, we don't think that a State AG or a
15 State agency could sue a governor if State law
16 prohibited it. The question of capacity to sue, the
17 power to sue, is one of State law. What we're saying
18 here is that if a suit could go forward between two
19 State agencies -- excuse me -- between a State agency
20 and State officials in State court, that if that case
21 involved a Federal issue, it can be heard in Federal
22 court if the other requirements of Article III and Ex
23 parte Young are being met.

24 Second, there was some suggestion that Ex
25 parte Young is only about citizens. But this Court's

1 applied Ex parte Young to Indian tribes, allowing them
2 to sue State officials. It's allowed foreign countries
3 to use Ex parte Young to sue State officials. The only
4 -- and the Respondents concede that political
5 subdivisions, which can also be eliminated at will by
6 the State, could use Ex parte Young.

7 JUSTICE BREYER: Have you found any case --
8 are there a lot, a few, none -- where one State agency
9 at a State level sues another in Federal court, period?
10 Say they have "arising under" jurisdiction.

11 MR. GALANTER: No. There aren't a lot of
12 them because --

13 JUSTICE BREYER: Well, are there any?

14 MR. GALANTER: Other than in this protection
15 advocacy system --

16 JUSTICE BREYER: None?

17 MR. GALANTER: None.

18 JUSTICE BREYER: See, nagging at me is some
19 kind of Article III problem.

20 MR. GALANTER: Well, but --

21 JUSTICE BREYER: And maybe there is none. I
22 don't know. It's -- there are none, though? None?

23 MR. GALANTER: Well, but that's because
24 Congress doesn't usually vest rights in --

25 JUSTICE BREYER: No, no. It wouldn't have

1 to. All -- they could get into all kinds of arguments
2 about EPA and all kinds of Federal rights with each
3 other. I would think.

4 MR. GALANTER: I -- I don't think that's
5 correct.

6 JUSTICE BREYER: Yes.

7 MR. GALANTER: I think that most of the
8 time, when a State is involved in a dispute with another
9 State, it's about State law. This is rather unique in
10 that respect.

11 And that brings me to the third point, which
12 is this notion of waiver. Now, we're not arguing here
13 that they've waived their sovereign immunity. What
14 we're claiming is that they don't have sovereign
15 immunity to these injunctive suits against the State
16 officials. We're not seeking damages, and we haven't
17 named the State in its own name. But what we are
18 suggesting is that -- that they -- it was the natural
19 consequence, as this Court decided in *Frew*, that when
20 you, you know, accept the Federal money and you are
21 bound by Federal duties and that the -- the entity that
22 you give the Federal right to has a Federal -- has a
23 right to sue, that the Federal issues will be litigated
24 in Federal court.

25 And I would say particularly that here

1 just -- of course, Virginia renews every year to take
2 the Federal money, but when it last amended the Federal
3 statute -- or the State statute to create VOPA in its
4 current structure, there were existing Ex parte Young
5 suits against State officials.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 I have one question of curiosity. You said in your
8 opening argument that 49 of 50 States limit in some way
9 the executive's power in this area.

10 MR. GALANTER: I --

11 CHIEF JUSTICE ROBERTS: What's the one
12 State?

13 MR. GALANTER: I'm drawing that from the --
14 Indiana's amicus brief, and I believe they identified
15 New Jersey as the State that has a unitary executive.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 The case is submitted.

18 (Whereupon, at 12:01 p.m., the case in the
19 above-entitled matter was submitted.)

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A				
abandon 10:16	advantage 20:15	agreement 19:11	answer 23:23	arising 53:10
abiding 31:11	adverse 20:25	AG's 23:19	24:22 27:8 32:1	Army 20:20 21:1
able 7:15 22:20	adversely 4:11	ahead 34:19	33:23 35:21	Article 4:15 9:11
30:10 35:24	adversity 4:14	AL 1:10	49:11 50:25	12:1,6,8 18:13
50:6	9:11 20:23	ALITO 19:8,16	anxious 14:7	20:23 21:7 22:7
above-entitled	advisory 7:5	36:14	anybody 48:9	22:12 23:9
1:14 55:19	advocacy 1:4 3:5	allege 17:4	anyway 48:5	52:22 53:19
abrogation 29:24	3:12 11:20	allow 10:7,17	appeal 11:11	articulate 9:4
abuse 13:8	13:12 16:4	15:23 35:11,16	29:23 46:16	asked 36:10
accept 16:2	53:15	39:1 42:6 44:18	51:24	asking 7:7 35:6
54:20	affirmed 52:8	allowed 6:4 15:1	appealed 29:25	38:2
accepted 51:19	affront 45:8	19:5 48:3 53:2	52:1	aspect 20:2
access 3:23	AG 22:20 34:13	allowing 32:21	appeals 9:19	assert 36:18
12:11 13:12	52:14	53:1	APPEARANC...	47:16
20:8	agencies 6:1,2	allows 19:9 28:9	1:17	asserting 8:21
acknowledge	10:1,7 14:22	28:9	appendix 26:14	Assistant 1:20
51:3	21:5 22:4,4	alter 10:25	applied 28:6 53:1	assume 10:2,8
acknowledged	31:16 32:9,13	alternative 51:1	applies 46:7	27:7
3:16	32:14 40:2 43:7	amenable 37:2	apply 33:24 34:1	attorney 8:8,13
act 20:7,21 40:21	44:1 52:19	amended 55:2	37:21	13:21 14:3,25
49:6	agency 5:13 6:5	Amendment 9:15	applying 31:12	15:6,13 16:7
action 4:3 14:11	8:6,19 9:1	9:23 11:6,12	46:8	17:11 22:13
36:6	10:17 12:15,16	12:3,7 14:4	appoint 26:3	23:2,6,10,14
actions 26:8 27:5	12:21,23 13:20	17:18	appointed 5:6	23:23,24 24:14
activity 26:19	18:10,11 19:17	amici 16:6	appoints 25:18	24:16 25:1 27:8
40:17	20:4,11,12	amicus 1:22 2:8	appropriate	27:25 28:9
Acts 19:1	25:12,12,13,17	18:20 55:14	17:10	39:25 40:6,10
addition 13:4	25:19 26:3	analogy 14:17	appropriately	40:12,19,22
address 12:2	28:18 29:18	analysis 3:19	46:15 48:16,20	authorities 14:19
addressed 11:10	30:9,9,13,17	39:4 49:1	area 42:16 47:18	47:14
adequate 16:11	31:14 35:16	analyzing 30:3	47:21 55:9	authority 5:12
adjudicate 22:3	36:2,2,3,24	Anders 1:20 2:6	areas 47:22	14:2,19 25:13
adjudicated	37:5,8,10 38:3	18:18,19,22	arguably 5:21	26:12 27:3 28:3
21:24	38:7 39:7,10,19	19:12,23 20:14	argued 39:4	38:8 39:14,20
adjudicating	42:9,9,13,21	20:18,22 21:4	49:17	40:3 41:22 43:8
28:16	42:22,22 45:4,5	21:13,22 22:18	arguing 8:18,25	43:10 47:2,10
administer 13:2	45:6 46:10 47:1	23:4,8,18 24:4	35:18 54:12	50:16
51:5	49:6 50:7,7	24:6,17 25:6,14	argument 1:15	authorize 36:11
administering	51:4 52:15,19	25:20 26:6,11	2:2,5,9,12 3:3,7	40:12
37:4,11 42:14	53:8	26:23 27:14,17	8:17,25 18:19	authorized 17:22
administers	agent 48:6	27:22 28:12,15	29:1 36:19 46:3	45:17
19:18	agree 21:10,20	28:24	46:4,13 47:25	authorizes 11:17
administrative	29:10 32:1	anomalous 36:7	52:11 55:8	autonomy 15:11
50:22	36:24	36:13 44:19	arguments 54:1	a.m 1:16 3:2
	agreed 36:14	49:24	arisen 22:23	

<p>B</p> <p>B 31:16</p> <p>back 6:8 12:13 14:17 27:6</p> <p>balance 18:16</p> <p>barred 17:17</p> <p>basically 7:6</p> <p>basis 4:9 8:7 27:4</p> <p>behalf 1:18,22 1:25 2:4,7,11 2:14 3:8 18:20 29:2 52:12</p> <p>BEHAVIORAL 1:9</p> <p>believe 5:25 7:1 18:2 25:4 38:15 39:18 48:9 55:14</p> <p>believes 5:14</p> <p>beneficiary 5:23</p> <p>benefits 45:3</p> <p>beyond 44:17 49:20</p> <p>big 5:10</p> <p>bit 22:11 35:9 36:1</p> <p>black 23:24</p> <p>blue 5:10</p> <p>board 6:3 26:7</p> <p>bottom 50:1</p> <p>bound 54:21</p> <p>branch 4:21 6:19 10:10</p> <p>breaking 26:22</p> <p>Breyer 22:25 23:5,12,22 24:5 24:9,12,20,23 27:7,24 28:7,14 28:21 30:24 31:2,5,25 32:11 32:20,23 34:8 34:12 41:10,19 43:5,18 44:4 46:19 53:7,13 53:16,18,21,25</p>	<p>54:6</p> <p>brief 5:10,10 8:20 14:14 55:14</p> <p>bring 11:15 23:13,16 25:2 28:1 45:18,22 45:22</p> <p>brings 26:19 54:11</p> <p>broad 38:25 39:5</p> <p>budget 13:6</p> <p>build 6:5 14:21 18:11 48:3,5</p> <p>burden 3:20</p> <p>Bureau 43:11</p> <p>business 42:23</p> <p>bypass 48:5</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1</p> <p>call 31:19</p> <p>capable 8:19</p> <p>capacity 15:15 27:10,24 28:10 52:16</p> <p>caption 47:6</p> <p>carry 12:22</p> <p>case 3:4 4:15 7:22,24 8:10 9:6 10:11,12 14:12,15 16:3 17:25,25 18:2 21:25 22:1,2 25:5 29:22 30:13 33:18 41:20,25 42:1,1 42:4 46:23 47:7 47:23 48:8,9,13 51:20,23,24 52:20 53:7 55:17,18</p> <p>cases 5:17,22 6:2 17:22 21:24 47:11 48:1</p>	<p>catch-all 38:25</p> <p>cause 5:8 15:8</p> <p>causes 36:6</p> <p>certain 17:21 24:7</p> <p>certainly 36:24</p> <p>challenges 20:3</p> <p>change 3:19 19:11</p> <p>changed 21:25</p> <p>characterize 43:6</p> <p>charge 10:9</p> <p>cheap 30:4</p> <p>Chief 3:3,9,24 4:7,11,18,23 4:25 5:9,20 6:7 6:21,23 7:4,20 7:25 8:4 9:10 11:22 14:6,9 18:17,22 20:20 20:25 21:10,19 25:15,24 26:10 26:17 28:23 29:3 50:13 52:9 55:6,11,16</p> <p>choice 11:24 12:14 20:6,10 25:9 29:14,21 30:11,17 32:23 36:23 50:2,8</p> <p>choices 20:4 29:14</p> <p>choose 15:24</p> <p>chose 37:6</p> <p>chosen 28:18 38:6</p> <p>circuit 38:15 39:1 46:17 52:8</p> <p>circumstance 41:16</p> <p>circumstances 23:15,18 24:8 43:13 52:4</p> <p>citation 18:4</p>	<p>cite 5:21</p> <p>cited 48:9</p> <p>cities 43:18,18</p> <p>citizen 12:9 35:24 46:23</p> <p>citizens 17:13 42:6 44:18 47:11 52:25</p> <p>City 34:15 43:9</p> <p>claim 8:21 33:6 39:8,11</p> <p>claimed 41:4</p> <p>claiming 54:14</p> <p>Claims 49:5</p> <p>clarify 4:5</p> <p>Clause 7:16 11:4 19:9 25:8</p> <p>clean 20:21 21:1</p> <p>clear 30:7 37:24 49:19 50:18</p> <p>coffers 33:14</p> <p>come 16:6 24:2 30:18 39:23 46:24 47:23</p> <p>comes 13:6 18:3</p> <p>commission 5:6 5:7</p> <p>COMMISSIO... 1:8</p> <p>common 41:15 42:17 43:6</p> <p>Commonwealth 5:16 7:23 8:1 8:12 9:24 10:4 14:1 16:15 29:14 47:8</p> <p>company 3:25 6:17,18</p> <p>complaint 19:1 29:19</p> <p>compliance 11:16 21:15 25:22</p> <p>complies 31:15</p> <p>comply 22:14 25:25</p>	<p>25:25</p> <p>concede 53:4</p> <p>concepts 33:4</p> <p>concern 9:23</p> <p>concerned 20:12 22:12</p> <p>concession 38:18</p> <p>condition 19:10</p> <p>conditioned 51:16</p> <p>conduct 26:18</p> <p>conflict 40:7,13</p> <p>confused 23:1 33:4</p> <p>Congress 5:18 10:15 12:10 14:21 19:22 30:16 31:22,23 31:23 32:3,5 33:25 34:5,6 36:11 50:2,5,5 50:8,14,16 51:15,15,18 53:24</p> <p>Congress's 50:2</p> <p>consciously 33:20</p> <p>consent 29:7 30:22 33:2 42:10</p> <p>consented 30:19 33:20</p> <p>consequence 54:19</p> <p>consequences 36:21</p> <p>considered 36:7</p> <p>consistent 27:2</p> <p>Constitution 31:11,17 33:17 34:18 36:5</p> <p>constitutional 15:10 47:15</p> <p>contest 49:18</p> <p>continually 6:1</p>
---	---	--	--	---

<p>contrary 17:23 contributes 21:3 control 8:8 39:24 45:5 controversy 18:12 copy 3:13 corporate 6:14 6:15,24 corporation 6:12 11:21 corporations 43:21 Corps 20:21 21:1 correct 3:22 5:15 13:24,25 20:18 25:14 32:2 54:5 correctly 13:16 corruption 26:18 counsel 3:24 8:16 13:17 18:17 23:21 29:15 40:8 47:24 52:9 55:6 countries 53:2 County 34:14 43:10 course 27:20,20 49:18 55:1 court 1:1,15 3:10 3:22 4:3 5:25 6:3,8 7:8,12 9:19 12:1,8 14:11 16:22 17:16 18:23 19:6 21:23 22:2 22:21 23:9,17 24:2,17,18 28:16 29:4 30:21,23 31:24 32:9,13,15 33:2 35:12 36:2,3,12 36:17,20 37:5 37:14,19,21 38:12,15,17,21</p>	<p>39:2,6 41:7,24 41:24 42:8,10 44:11,14,15,19 44:20 45:9,19 45:24 46:9,15 46:24 48:10,14 48:21 49:7,15 49:18 50:20,23 51:6 52:20,22 53:9 54:19,24 courts 29:6 30:23 36:17 44:24 45:16 46:7,7 50:5 Court's 5:17 24:6 52:25 create 12:10 20:7 28:18 44:24,24 55:3 created 12:22,25 38:7 42:22 51:4 creating 30:4 45:4 creator 47:16 critical 8:11 curiae 1:22 2:8 18:20 curiosity 55:7 current 15:5 55:4</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 1:20 2:6 3:1 18:19 dam 6:5 48:3,5 damages 54:16 dams 6:5 14:20 17:22 day 7:9 day-to-day 8:7 DD 18:25 20:6 deal 5:10 29:10 35:23 dealing 7:17 December 1:13 decide 7:8 19:25</p>	<p>decided 54:19 deciding 31:18 44:16 52:5 decision 9:25 24:6 31:17 46:17 48:10 52:8 decisions 12:9 declaration 36:21 declare 40:7 declared 41:7 default 34:21,21 defendant 28:1 31:13 defendants 28:6 definitely 26:6 department 1:8 1:21 12:10 14:20 31:8,9 depends 15:21 deprive 44:14 deprives 44:15 dereliction 19:20 designate 11:18 desire 45:5 destroys 35:19 determine 19:4 determined 51:25 DEVELOPM... 1:10 difference 11:23 30:1 39:17 different 6:17,18 6:19,19 7:22 32:3 35:20 43:23 differently 38:19 41:17 dignified 29:9,16 dignity 3:21 29:5 45:15 47:3 49:9 direct 33:6 direction 10:18</p>	<p>directly 45:6 disabled 50:3 discovery 14:12 37:20 discredit 26:20 discriminating 4:8 disheveling 30:4 dismiss 15:7 dismissed 14:25 dispute 4:2 7:6 49:20 54:8 disputes 17:9 dissolve 5:13 7:21,24 14:11 21:11,14 dissolved 14:15 divisions 6:22,23 doctrinally 49:19 52:7 doctrine 30:5,22 32:25 39:3,3 51:22 documentary 37:20 documents 37:24 doing 10:21 37:5 49:21 dramatically 43:3 drawing 55:13 dream 39:11 dredge 21:2 dual 35:24 42:6 46:2 due 25:3 DUNCAN 1:24 2:10 29:1 duties 54:21 duty 19:20 D.C 1:12,18,21</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 EARLE 1:24</p>	<p>2:10 29:1 East 4:1,2,8 6:9 7:10 effect 10:25 33:17 eight 20:19 either 11:18 12:15 23:16 29:15 elect 17:16 Eleventh 9:15 11:6,12 12:3,7 14:4 17:18 eligible 13:23 eliminate 14:22 eliminated 5:19 53:5 employees 16:12 49:4,5 enacted 5:17 enforce 3:12 16:21 17:12 18:25 22:20 28:19 37:12 50:6 enforcement 33:10 engaged 26:18 Engineers 20:21 21:1 ensure 26:13 33:16 entertain 4:3 6:8 entire 10:9,10 33:8 entirely 46:18 entities 6:14,24 7:7 34:16 entitled 38:5 entity 3:17,18 4:16 6:15,22 8:19 11:19 12:13,15,22 16:21,21 20:16 30:12 37:3 50:3</p>
---	--	---	---	--

<p>54:21 Environmental 44:5 EPA 20:20 21:1 54:2 ESQ 1:18,20,24 2:3,6,10,13 establish 20:11 29:17 established 20:12 30:5 ET 1:10 evaded 46:8 everybody 31:6 31:6 Ex 3:17,19 15:15 15:18,20 16:14 17:3 18:24 19:4 23:19 24:3,15 27:10 28:6,8 31:12 33:8,24 33:25 34:7,10 34:17,20 35:1 35:23 39:6,9,11 41:5,10,12,16 42:2,4 44:2,17 44:22 45:20 46:8,25 47:10 47:17 49:20 50:24 51:6 52:22,24 53:1,3 53:6 55:4 exact 37:5 46:21 exactly 28:7 46:22 example 6:4 15:6 16:6 22:1 26:22 42:20 examples 22:24 exception 34:21 35:2,2 exchange 27:7 excuse 8:9 24:20 34:5 52:19 executive 4:21</p>	<p>10:10 55:15 executive's 55:9 exercise 17:16 exercised 43:3 exercising 8:14 existence 14:23 existing 32:25 55:4 exists 42:13 44:14 expect 32:9 33:25 expectation 47:19 expected 34:4,6 experience 43:5 expert 42:15 explain 46:19 explicitly 46:6 expressed 45:4 extend 35:5 44:16,23 47:21 50:24 extended 35:3,4 42:2 47:18 49:21 extension 15:18 35:9 49:20 extent 47:9 extracurricular 26:19 extraordinary 37:21 extreme 24:8</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>faced 50:23 facilities 20:9 fact 7:16 13:18 20:3 31:16 50:21 fairly 38:25 52:4 familiar 44:6 far 11:25 favor 40:23 52:5</p>	<p>Federal 3:12,22 3:23 4:2,6 5:4 6:2,3,4,5 7:8,12 7:16 8:12,21 9:20,25 10:6,6 10:21 11:1,16 11:21 12:14,17 12:23 13:2,6,7 14:11,17,18 15:16 16:4,7,17 16:22,24 17:6,8 17:9,10,13,16 17:17,22 18:10 18:11 19:9,10 19:21 20:7,8 21:15,17 22:15 22:19,21 23:9 23:16,16 24:2 24:18,25 25:11 27:10,13,18 28:15,19 30:7 30:21,23 31:11 31:14,24 32:9 32:13 33:2,10 33:17 34:25 35:12,25 36:2 36:10,12,17,25 37:1,5,7,11,12 38:4 39:6,8,10 39:11 41:2,23 41:24 42:7,8,14 42:20,23 43:2 44:12,15,18,24 45:3,19,23 46:6 46:9,24 48:4,7 48:14,21 49:7 49:18 50:5,6,20 51:6 52:21,21 53:9 54:2,20,21 54:22,22,23,24 55:2,2 federalism 49:21 49:22 fiction 27:12 42:5 42:5,6 44:17</p>	<p>45:19 46:1 fictional 17:4 file 41:9 files 14:12 find 34:2 finds 21:12 fired 23:25 first 4:5 9:10 11:3 16:1 20:6 22:19 29:20 31:15,22 32:5 52:14 FOIA 12:8 follow 15:12 following 13:17 15:16 Ford 3:25 4:1,1,2 4:2,8,8 6:9,9 7:5,8,9,10,10 foreign 53:2 forgetting 45:2 former 47:4 forth 19:2 Forty-eight 31:2 forum 17:10 38:3 forward 9:7 15:1 52:18 for-cause 26:24 27:1,4 found 29:25 53:7 founding 34:22 36:8,9 49:24 Fourth 46:17 52:8 Francisco 34:15 fraught 52:6 free 7:18,21,24 Frew 54:19 friend 47:24 full 26:12 27:3 function 13:5,7 funding 21:17 funds 19:10,14 19:17 20:7 39:8 45:3 50:23</p>	<p style="text-align: center;">G</p> <hr/> <p>G 3:1 Galanter 1:18 2:3,13 3:6,7,9 4:4,10,13,20 4:24 5:3,15,25 6:10,20 7:1,13 7:23 8:2,5 9:2,8 10:12,23 11:2,9 11:14 12:4,12 12:18,24 13:3 13:25 14:16 15:4,25 16:15 16:18,23 17:7 17:14 18:2,5,9 52:10,11,13 53:11,14,17,20 53:23 54:4,7 55:10,13 general 1:21,24 8:8,13,24 13:21 14:3 15:1,6,13 16:7 23:2,6,11 23:14,23,25 24:14,16 25:1 27:8,25 28:9 39:25 40:6,11 40:12,19,22 47:13 generally 16:18 36:13 43:23 generals 17:12 22:13 Getchell 1:24 2:10 28:25 29:1 29:3,12,20 30:15 31:21 32:7,16,22,25 33:22 34:5,11 34:20 35:22 36:18 37:13,23 38:14,24 39:15 39:18,21 41:3 41:18,21 42:15 42:25 43:15,20</p>
---	---	--	--	---

<p>44:8 45:12,14 45:24 46:11,14 47:5 48:8,15,19 48:25 50:11,15 51:8,12,15,21 52:3 getting 40:20 GINGER 1:20 2:6 18:19 GINSBURG 12:12,19 13:1 20:14 25:10 30:6 36:23 37:16 38:2,20 42:11,19 50:1 give 38:6,10 42:19 50:4,8,8 54:22 given 13:4 30:11 39:19 41:22 43:7 gives 12:14 13:11 47:10 48:7 giving 16:11 Glendale 43:9 go 10:19 12:13 13:7 14:16 15:1 19:3 30:8 31:25 37:11,13,18,19 37:20 38:17,21 48:4 52:18 goes 4:14 going 7:11 11:24 15:23 21:18 27:6 30:1 33:15 33:16 34:19 35:5 37:9 39:4 44:16 45:10,11 50:25 good 5:20,21 46:20 52:2 government 10:6 10:6,21 13:6,21 17:23 19:9,11</p>	<p>19:16,21 21:25 22:6 24:25 29:15 30:9 31:11 34:17,25 43:24 48:4 governmental 10:25 17:5 governments 15:24 government's 19:14 governor 5:7 8:8 8:14 10:9,19,20 15:14,15,16 16:11,11 23:3,6 23:13,25 24:3 25:16,18,18 26:3,20 27:9,9 27:11 40:5,7,10 40:11,20 52:15 governors 22:14 governor's 16:13 grandstanding 44:25 greater 3:20 35:10 45:8 gross 19:20 guess 14:14,24</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>hands 40:6 Hans 35:6 36:4,4 49:23 happen 21:14 22:16 26:15 40:18 50:20 happened 6:24 13:19 21:19 32:2 40:14,15 41:4 happens 31:14 39:22 hard 16:5,6 head 22:6 headed 19:18</p>	<p>heads 21:4 HEALTH 1:9 hear 3:3 heard 52:21 heaven 31:19 held 6:1 10:4 helpful 43:6 46:20 HHS 26:16 HHS's 25:22 highest 38:12 hired 40:8 hold 16:7 holds 16:4 Honor 4:4 12:18 horizon 31:13 horribly 35:18 hospital 37:9 38:10,10 hospitals 3:15 hypothetical 6:21 7:7 33:23 34:6,8</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>ICC 5:18,19,22 5:23 14:18 22:1 idea 16:1 identified 55:14 identity 15:20,21 III 1:7 4:15 9:11 12:1,6,8 18:13 20:23 21:7 22:8 22:12 23:9 52:22 53:19 illegal 26:18 imagining 34:12 34:13 immunities 47:15 immunity 30:20 32:17 33:1,5,9 33:23 34:23 37:14 41:24 43:25 44:13 46:4,5,12,18</p>	<p>48:12 49:1 50:19 51:14 54:13,15 impaired 29:6 impediments 22:17 implement 12:25 42:22 implicated 42:8 44:2 important 9:5 20:2 imposed 3:20 improper 52:7 includes 46:6 incongruous 9:22 incorrect 16:14 independence 5:4 8:18 9:1,4 9:12 22:9 27:2 30:10 independent 4:16,19,19,20 4:21 5:1,5,5 6:1 9:25 10:7 12:17 12:20 13:22 14:2,2 21:9 22:5 25:13,17 26:2,2 38:7 39:14,20 40:2 41:22 42:13 45:4 independently 19:24 Indian 53:1 Indiana 8:10 Indiana's 55:14 indicated 17:21 indication 34:1 individual 17:4,5 24:2 27:11 35:12 individuals 26:13 inevitable 15:17 inevitably 15:13</p>	<p>information 12:11 informs 39:2 infringement 35:11 injunctive 8:23 54:15 injurious 47:3 inmates 16:12 inquiries 19:2 inquiry 4:13 9:17 49:22,22 inspect 3:13 instance 51:19 instances 15:10 instantly 23:25 institutions 13:8 13:13 instruction 50:4 intended 35:23 interest 5:22,23 19:14 29:5 30:3 36:1 40:7,13 51:14 interesting 29:21 interests 19:4,7 23:20 25:7 28:13,17 33:12 47:3 49:9,12 interfere 33:15 Interior 14:20 interlocutory 11:11 29:23 46:16 51:24 internal 7:6 intertwined 9:9 intramural 49:17 intrusion 33:19 40:25 investigations 13:14 invoked 18:24 involuntary 49:7 involve 4:15 involved 52:21</p>
---	---	--	---	--

<p>54:8 involving 6:2 Iowa 17:25 35:14 IPAS 8:7,9,9 issue 3:21,23 6:17,18 9:10,15 11:25 17:9,20 29:21,24 33:13 41:1,25,25 42:1 42:3 44:2 52:21 issues 9:9 17:17 30:18 54:23</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>JAMES 1:7 Jersey 55:15 JR 1:24 2:10 29:1 Judge 46:17 judicially 27:1 jurisdiction 44:12 53:10 jurisdictional 12:2,5 Justice 1:21 3:3 3:9,24 4:7,11 4:18,23,25 5:9 5:20 6:7,13,23 7:4,20,25 8:4 8:16 9:3,11 10:2,14,24 11:8 11:13,22 12:10 12:12,19 13:1 13:17,18 14:6,9 14:24 15:9 16:10,16,20 17:1,11,19 18:4 18:7,17,22 19:8 19:16 20:14,20 20:25 21:10,19 22:10,12,25 23:5,12,22 24:5 24:9,11,12,13 24:20,22,23 25:10,15,24</p>	<p>26:10,17 27:6,7 27:15,20,24 28:5,7,8,14,21 28:21,23 29:3,9 29:13 30:6,24 31:2,5,25 32:11 32:20,23 33:3 34:3,8,9,12 35:8 36:14,23 37:16 38:2,20 39:13,16,19 40:14 41:10,19 42:11,19 43:5 43:18 44:4 45:1 45:13,21 46:3 46:12,19,21 47:22 48:13,17 48:22 50:1,13 51:2,10,13,18 52:2,9 53:7,13 53:16,18,21,25 54:6 55:6,11,16 Justice's 6:21</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kennedy 15:9 16:10,16,20 17:1,11,19 18:4 18:7 22:12 27:6 27:15,20 47:22 48:13,17,22 kind 28:4 40:17 44:6 53:19 kinds 16:16 54:1 54:2 knew 33:19 51:3 51:19 know 7:15 8:2 10:10,11 12:9 14:6,9,10,21 17:20,24 21:2 25:16,25 26:19 26:21 27:12 29:13,19 33:11 34:23 35:3 36:5</p>	<p>37:3,25 38:6,15 42:11,12,17,24 42:25 43:13 44:22,23 47:17 48:8 49:6,11 53:22 54:20 known 3:12</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>labor 6:3 14:18 large 45:25 Lassen 22:2 24:18 Laughter 14:8 15:3 29:11 31:1 31:4,20 law 3:23 4:6 5:17 7:15 11:16 13:4 15:16 17:15 21:9 22:15 23:2 23:5,12,15,24 23:24 24:1 25:20 26:15,22 26:23 32:12 38:11 41:15 42:16 45:23 48:3,7 51:21,23 52:15,17 54:9 laws 17:23 33:14 33:17,18 lawsuit 23:13,16 25:2 lawsuits 31:7 lawyers 31:3 law-of-nations 34:23 legal 6:14,22 9:5 22:17 26:13 31:19 legislation 12:14 legislative 34:2 40:21 legislature 14:1 legitimately 16:4 letter 23:24</p>	<p>letting 33:20 51:5 let's 3:25 10:2,8 29:12 50:21 level 53:9 license 48:4 licenses 6:4 licensing 14:19 limit 32:18 49:15 49:16 55:8 limitation 46:8 limited 34:24 line 17:20 50:1 litigable 18:12 litigate 6:2 17:17 litigated 29:24 54:23 litigating 14:2 39:14,20 47:2 litigation 5:14 7:2,14 14:17 21:12 26:9 27:5 30:25 little 7:22 22:10 live 32:23 logic 44:22 long 19:12,24 33:12 39:22 45:14 look 8:24 15:5 24:19 43:4,16 47:6 looking 8:22 18:7 26:1 31:13,13 lose 21:16,16 25:5 loses 7:10 lost 28:5 lot 16:23 39:25 40:1 41:8 43:12 43:19 45:2 47:11 53:8,11 love 32:12,14 loves 30:25 lower 43:16</p>	<hr/> <p style="text-align: center;">M</p> <hr/> <p>M 1:18 2:3,13 3:7 52:11 making 8:3 17:8 18:10 30:17 50:18 mandamus 37:15 37:22 38:13,22 38:24 Massachusetts 44:5 matter 1:14 25:20 49:18 55:19 matters 33:11 mean 12:8 14:12 22:11 23:5 29:13 32:2 35:9 36:18 37:17 39:16 49:4,10 50:20 meant 8:2 mechanism 40:5 Medicaid 19:17 19:18 members 5:7 25:16,19 26:7 mention 32:15 41:12 merits 37:25 39:10 met 34:18 52:23 middle 14:12 Middlesex 34:14 43:10 midstream 21:25 minutes 52:10,14 mistreated 13:14 modest 39:5 money 10:15 11:1,18 13:23 29:16,17 30:3 36:21 39:10 45:3,10 50:18 51:3,16,20</p>
---	--	--	---	---

<p>54:20 55:2 motivation 41:8 Motor 3:25 moving 9:7 municipalities 17:24</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 nagging 53:18 name 47:7,23 54:17 named 54:17 natural 34:23 54:18 necessary 19:3 42:5,6 need 9:12 needed 33:21 needs 18:10 neglect 13:9 neither 3:20 8:13 never 15:1,19 23:25 25:2 35:4 37:25 41:4 42:3 New 55:15 newly 38:7 Nixon 14:24 15:6 22:1 nobody's 41:4 nonprofit 11:21 normally 10:18 notion 9:20 10:5 54:12 number 15:9</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objective 19:15 obligation 17:12 obligations 18:25 36:25 observe 13:8 obtain 11:1 obviously 13:10</p>	<p>occurring 13:9 22:17 offend 33:9 offended 45:15 offends 35:15 offered 10:15 office 1:3 3:4,11 6:19 16:3 19:19 38:16,20,22 officers 15:10 24:19 official 26:21 27:10 33:7 45:22 46:25 officials 3:14 8:6 9:22 11:15 16:24,25 26:8 26:18,24 47:7 52:20 53:2,3 54:16 55:5 Oh 8:4 20:25 okay 7:18 10:14 18:8 23:14 24:1 31:25 34:11 39:16 46:7 51:7 onerous 5:14 14:14 21:12 ones 9:6 one-third 25:18 26:4 open 51:5 opening 47:25 55:8 opinion 7:5 23:23 opportunity 19:25 opposed 8:3 45:9 opt 7:19 20:1,6 25:9 opted 28:19 oral 1:14 2:2,5,9 3:7 18:19 29:1 order 10:25 28:19 40:7 46:2 ordinarily 32:8</p>	<p>37:19 ordinary 30:22 31:12 32:17 34:17 49:4 organization 29:18 34:14 38:8 44:5 organizations 50:10 organize 24:25 31:18 ought 35:5 49:21 overlook 50:21 oversights 13:15 owned 6:25</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 20:8,11,19 page 2:2 5:9 26:14 PAIMI 18:25 20:7 26:15 parent 6:25 48:6 48:23 part 6:11,16 8:25 9:21 13:19 16:8 33:25 36:10,11 36:11 41:5,6,13 41:13,14,14 46:13 48:25 parte 3:17,19 15:15,19,21 16:14 17:3 18:24 19:5 23:19 24:3,15 27:11 28:6,8 31:12 33:8,24 33:25 34:7,10 34:17,20 35:1 35:23 39:6,9,11 41:5,10,12,17 42:2,4 44:2,17 44:23 45:20 46:9,25 47:10 47:18 49:20</p>	<p>50:24 51:6 52:23,25 53:1,3 53:6 55:4 participate 36:15 particular 8:19 particularly 16:8 54:25 parties 7:14,21 7:24 parts 34:16 43:8 44:10 47:14 48:20,21 party 5:22,23 14:10 27:21,22 33:9 party's 40:6 pass 28:22 31:7 peculiar 52:4 people 13:12 21:6 38:10 50:4 percent 31:2 peril 52:6 period 53:9 permissibility 15:20 permission 13:20 13:24 18:11 permit 3:18 34:15 45:11 permits 23:2 41:5,12,14 person 17:4 19:19 28:3 personal 28:10 49:3 personally 38:14 38:19 42:25 personnel 16:13 perspective 25:23 27:2 Pete's 35:13 petition 26:14 38:12 petitioned 9:15 Petitioner 1:5,19</p>	<p>1:23 2:4,8,14 3:8,17 18:21 52:12 Petitioners 21:11 21:21 52:6 picking 38:8 pitted 29:6 47:6 place 13:15 plaintiff 5:13 15:22 27:25 28:10 31:14 33:12 plaintiffs 34:16 plaintiff's 17:7 please 3:10 18:23 29:4 pleases 31:5 point 13:5,19 14:4 17:3,6,8 18:9,13 21:17 22:23 25:23 28:13 36:19 52:2 54:11 points 52:13 policy 39:23 political 40:16,22 41:8 44:25 48:2 49:17 53:4 pollution 21:3 population 31:3 40:24 portion 9:18 posited 34:7 36:9 position 9:1 15:13,18 27:16 28:14 34:21,21 37:18 38:16,23 possession 3:14 posture 29:22 power 8:7 17:15 17:16 24:14,16 26:20 43:2 50:17 52:17 55:9 powers 10:5,17</p>
---	---	---	---	--

<p>35:20 48:6 practical 40:16 49:14,16 practice 21:14 precisely 46:11 predecessors 12:24 premise 8:17 33:8 premised 46:18 present 25:7 28:17 President 10:8 14:25 pressed 16:5,6 presume 49:5 presumed 36:6 prevent 28:15 31:18 previous 47:19 previously 21:24 38:16,23 pre-emptive 33:16 pre-existing 12:23 primarily 13:7 primary 13:5 principal 48:7,9 principle 44:12 49:16 prison 16:12 Prisons 43:11 private 3:17,25 11:19 12:15 13:8 17:4 20:9 20:12,16 27:21 27:22 29:17 30:12 35:12 37:3,10 38:4 40:8 42:21 50:7 50:9 privileges 47:15 probably 43:4,12 problem 10:21</p>	<p>11:3,4,6 20:23 21:7,8 22:8,9 22:12 24:10 25:3,22 35:9 38:3 49:15 53:19 procedural 29:22 proceed 44:15 proceedings 27:1 process 25:3 program 7:19 12:23,25 13:2 19:18 20:16 36:15,25 37:4 37:11,13 42:14 42:20,23 50:3 51:5 programs 20:7 prohibited 52:16 prohibition 26:4 26:7 prohibits 34:19 proliferate 40:2 promulgated 15:7 properly 18:24 proposition 5:21 prosecutor 15:8 prospective 7:17 8:23 11:16 prospectively 33:10 protect 41:2 protection 1:3 3:4,11 11:19 13:11 16:3,12 26:13 53:14 provision 26:1 26:11 38:25 provisions 26:25 public 11:19 12:9 13:7 20:19 37:11 38:4 42:22,22 50:10 purpose 30:14</p>	<p>42:14 purposes 23:9 31:7 43:25 49:1 pursue 26:12 27:3 put 12:20 14:13 48:6 p.m 55:18</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>question 4:6,14 4:15 6:8 9:14 11:6,9,10,11 12:1,3,8 13:18 13:18 16:20 28:17 32:3,4,5 33:4,25 35:6,7 35:20 36:4,5 37:25 41:16,20 49:23 50:24 52:16 55:7 questions 18:15 29:22 quite 8:17 42:16</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 race 4:9 raise 23:20 36:6 36:22 raises 29:21 49:8 reach 12:5,6 39:9 reached 38:1 reaching 12:3 read 38:19 reading 3:22 real 5:22,23 reality 15:6 realize 11:5 really 5:22 17:5 28:5 33:11 39:2 42:24 46:3,4,15 reason 47:2 49:10 reasonably</p>	<p>19:13 reasons 50:12 REBUTTAL 2:12 52:11 receipt 19:10 receives 39:8 receiving 39:10 51:16 reciprocal 49:9 recognized 33:13 45:15,25 47:13 record 34:2 records 3:13,23 13:10,12 33:20 37:1,8,10 38:4 38:5,9 recovery 49:4 referring 33:22 regarded 36:13 43:23 49:24 regarding 9:11 regardless 7:11 regulation 15:7 19:15 regulations 16:13 regulatory 10:7 12:21 related 19:13 relations 6:3 14:19 relevant 9:13,17 relief 7:17 8:23 relies 48:7 rely 8:20 9:19 remaining 52:10 remedies 26:13 27:3 remedy 37:15 50:22 51:1 remember 29:23 51:23 removable 19:19 removal 21:6 22:6 26:25 27:4</p>	<p>remove 25:16,19 removed 5:8,18 26:25 removing 26:5,7 renews 55:1 repeal 5:16 reputation 4:12 request 14:13 requested 13:11 require 13:20 required 27:18 requirement 19:13 26:12 requirements 34:18 52:22 requires 5:3,4 37:2 41:15 requiring 10:24 11:3 reserve 18:16 resolve 7:8,9 resolved 3:21 9:23 respect 5:11 33:24 54:10 respected 33:18 respects 33:14 Respondents 1:25 2:11 3:16 4:21 8:5,6 16:2 16:5 18:25 29:2 53:4 responsibilities 13:3 15:12 restraints 40:16 restrict 50:2 restrictions 48:5 restructure 32:4 restructuring 32:6,8 result 20:4 26:8 resulted 47:12 results 39:23 retained 34:22 retains 5:12</p>
---	--	---	---	--

<p>retired 31:3 Richmond 1:25 riding 10:19 right 3:13 4:19 6:10 7:10,25 8:13,15 9:20 11:22 12:11 13:12 16:4,7,25 17:6,8,14 20:17 22:19 23:16 24:17,23 27:10 27:13,17,19 28:1,2,7 30:14 31:23 33:10 34:9 37:12,24 41:11,19 44:15 46:19,22 50:6 51:22 54:22,23 rights 9:25 11:21 16:17,24 17:13 20:8 28:19 35:25 41:2 42:7 44:17 47:11 53:24 54:2 rights-conferri... 38:1 ROBERTS 3:3 3:24 4:7,11,18 4:23,25 5:9,20 6:7,23 7:4,20 7:25 8:4 11:22 14:6,9 18:17 20:20,25 21:10 21:19 25:15,24 26:10,17 28:23 50:13 52:9 55:6 55:11,16 rogue 40:19 rule 6:14 8:24 31:12 47:13 rules 31:12 32:17 ruling 5:24 run 3:14 5:8</p> <hr/> <p style="text-align: center;">S</p> <hr/>	<p>S 2:1 3:1 sake 35:13 San 34:15 satisfies 19:1 saying 11:24 15:7,14 24:12 46:5 52:17 says 5:2 7:12 8:21 23:24 25:17 26:2 30:7 31:7 37:8,9 38:5 40:21 42:20 Scalia 10:2,14,24 11:8,13 14:24 24:11,13,22 28:5,8,21 29:9 29:13 35:8 39:13,16,19 46:3,12,21 51:2 51:10,13,18 52:2 Scalia's 13:18 scheme 20:1 21:16 25:9 28:20 Seattle 18:3 second 9:14 20:10 30:19 33:24 52:24 Secondly 47:9 Secretary 50:22 see 35:17 44:20 53:18 seek 13:20 33:9 seeking 54:16 seeks 3:12 seen 44:11 Seminole 50:25 sense 45:25 sentiments 40:23 separate 6:12,14 6:15,24 10:7 15:11,11 separation 10:5</p>	<p>10:17 35:19 serious 32:4 served 36:1 serves 13:6 service 13:12 SERVICES 1:10 set 19:2 30:13 31:15 45:3 49:17 50:6 SETH 1:18 2:3 2:13 3:7 52:11 sheriff 34:14 43:10 side 28:22 significance 9:6 similar 8:9 simple 8:20 9:16 37:7 38:3,9 simply 35:21 single 6:22 situation 10:3 14:10 21:5,7,18 22:23 35:24 41:17 52:5 situations 22:8 23:10 43:7 sole 20:2 42:13 42:23 Solicitor 1:20,24 somebody 40:19 49:3 sorry 33:3 50:13 sort 35:9 Sotomayor 6:13 8:16 9:3 13:17 22:10 33:3 34:3 34:9 40:14 45:1 45:13,21 sound 43:11 44:6 sounds 43:12 sovereign 5:12 5:16 20:4 29:5 29:7,9 30:3,20 32:17,18 33:1,5 33:9,12,22</p>	<p>34:23 35:24 37:14 42:7 43:25 44:13 46:4,5,12,18 48:12 49:1 50:19 54:13,14 sovereignty 5:11 19:4,7 23:20 25:7 28:13 33:13,19 35:11 35:15 40:25 45:8 46:2 49:8 51:13 special 15:8 23:20 25:7 specialized 52:5 specific 22:11 36:20 specifically 32:12 specification 12:16 specify 30:21 31:24 specifying 41:23 spending 7:16 11:4 19:9 25:8 30:2 43:2 50:17 stage 39:9 stand 8:12 27:8 43:1 standing 4:14 9:12 15:5 22:22 State 3:14,18,21 5:1,11,13,13 7:17,20,25 8:6 8:18,23 9:20,21 10:1,15,16,17 10:24 11:15,18 11:25 12:15,16 12:20 13:4,4,15 13:20 14:13,14 15:14,14 16:8 16:12,21,21,24 17:11,15,23</p>	<p>19:4,7,11,17 19:25 20:4,5,9 20:11,17 21:9 22:3,13 23:2,5 23:12,13,15,19 23:24 24:1,19 24:25 25:2,12 25:12,17,20 26:2 28:13,18 29:18 30:2,7,11 30:16,17,19,24 31:8,10,16,18 32:4,6,8,19,21 33:7,7,19,19 34:3,13,17,17 34:24,25,25 35:1,11,11,15 35:16,16,19,25 36:1,2,3,3,10 36:11,12,17,24 37:5,9,13 38:7 38:12,21 39:7 39:12 40:18 41:5,6,13,13 41:14,15,22 42:9,9,10,13 42:20 43:7,8,9 44:1,5,10,18 45:9,9,15,18 45:22,22 46:7 46:10,24,25 47:1,2,4,5,7,14 48:2,3,11,20 48:21,24 49:1,4 49:6,7,10 50:19 51:3,4 52:14,15 52:15,17,19,19 52:20,20 53:2,3 53:6,8,9 54:8,9 54:9,15,17 55:3 55:5,12,15 statement 41:20 46:21 50:18 States 1:1,15,22 2:7 5:18 10:4</p>
---	--	---	--	---

10:13 12:14 14:25 15:10,23 17:13 18:20 20:15 34:19,22 36:7 40:1,1 41:1 43:17,17 43:21,22 44:9 47:14 50:8 55:8 State's 9:4 19:10 31:17 33:14,14 37:20 42:10 State-operated 3:14 status 3:18 statute 5:1,3,4 7:16 11:4,17 12:17 13:11 25:11 30:2,7 31:7 37:1,8 38:1,5,19,24 38:25 42:12 55:3,3 statutory 3:13 Stewart 1:7 3:5 stop 6:15 8:14 32:5 stops 31:11 straightforward 9:17 19:2 strange 49:10 strong 40:23 structure 10:25 15:23 19:11 55:4 suable 37:4 subdivision 48:2 48:2 subdivisions 43:16 53:5 subject 20:9 21:6 22:5 26:24 49:5 submit 17:18 submitted 55:17 55:19 subordinate	43:24 47:13,14 subsidiaries 4:1 6:12 subsidiary 48:23 sue 4:12,22 8:22 8:23 10:19 11:14 13:21,23 15:14 16:14 20:20 23:3,6,25 24:2 25:13 27:9 27:11 28:9,10 30:10 31:8,24 32:9,13,14 33:20 34:24,25 35:1,16 36:2,11 39:2,6,11,25 40:10,10 41:6 41:13,14,23 42:9 43:8 44:10 44:18 45:6 46:24 48:14,21 49:11 52:15,16 52:17 53:2,3 54:23 sued 15:15 30:20 30:22 35:12 36:3,16 44:10 46:6 47:7 50:19 sues 4:2 31:16 53:9 sufficient 20:23 23:8 sufficiently 12:5 22:4 suggest 9:16 suggested 47:24 suggesting 54:18 suggestion 52:24 suing 6:15 8:20 8:24 22:13,14 24:3 27:9,24 31:6,14 48:23 49:7 suit 3:18,25 15:1 15:21 20:2 22:3	28:2,16 30:21 33:6,7 34:19 37:2 39:1 40:2 40:24 44:6 45:8 45:13,16 46:9,9 51:6 52:18 suits 6:4 32:18 32:18 41:9 54:15 55:5 superintend 50:3 superior 35:25 supporting 1:23 2:8 18:21 suppose 12:1 19:16 23:12 24:23 25:4 30:24 51:17 supposition 42:18 43:1 supreme 1:1,15 37:20 38:17,21 sure 8:17 10:3 11:8 13:8,13 25:15 37:17 45:1 surrogate 37:24 system 10:8,16 11:20 20:8,11 34:13 35:19 46:2 53:15 systems 20:19	term 19:19 terms 15:5 48:12 territory 30:19 test 8:21 Thank 18:17 28:23 52:9 55:6 55:16 theory 17:2 21:24 22:22 24:3 51:6 they'd 50:9 thing 28:4 30:19 37:6,7 things 16:1 30:16 31:21 43:16 think 4:7,13 6:11 6:17 10:20 11:2 11:3 12:4,7 14:13 15:4,4,17 15:19 16:2 17:23 18:3 19:3 19:6,8,8,12,23 19:25 20:1,22 21:5,13,17,20 21:22,22,23 22:2,7,16,18 22:19,22,24 23:1,9 24:4,7,9 24:18 25:6,21 26:9,15,24 27:15,17 28:8 28:12 32:7,16 32:25 33:3 36:8 36:12 39:1,2,3 39:21,21,23 40:1,15,15,18 41:21,21,25 42:1,3,4,18 43:8,9,14,15 44:8,11,12,16 44:25 45:7,12 45:14,17 46:14 48:15,16,17,19 48:20 49:8,14 49:19,21,22,25	50:11,14,14,15 50:15 51:9 52:6 52:14 54:3,4,7 thinking 18:3 thinks 4:8 third 5:6 9:18 54:11 thought 7:5 22:25 24:21 28:6 30:15 34:7 42:16 43:4 44:21 48:1 49:2 three 9:9 38:9 52:13 time 18:16 36:8 54:8 titles 44:11 today 8:12 told 45:5 tolerant 44:9 tolerate 46:1 Tort 49:5 totally 34:9 44:19 tradition 47:20 traditional 36:22 49:8 50:16 51:22 treasury 3:20 treated 41:17 43:22 Tribe 50:25 tribes 53:1 tried 49:3,13 tries 24:1 true 6:13 7:13,15 15:19 try 25:21 trying 4:17,22 18:14 33:23 turn 29:16 37:1,8 37:9 TVA 14:21 two 4:1 16:1 20:4 22:3 29:14 30:8
T				
T 2:1,1 take 20:7 29:8 29:17 45:10 50:18 55:1 taken 30:2 36:25 38:16,22 takes 11:18 talking 9:10 18:1 34:9 39:22 tell 16:10 24:25 40:4 Tenth 9:23				

30:15 31:21 43:15,16 50:11 52:18 type 27:4	vast 15:18 venue 44:24 Verizon 9:17 19:2 24:7 27:18 27:21,22 Verizon's 8:20 versa 23:14 version 24:19 vest 9:25 53:24 vested 8:12 11:20 vice 23:14 view 46:11 vindicate 35:25 42:7 violating 17:5,7 20:21 45:23 Virginia 1:3,8,25 3:4,11 8:14 10:8,13 13:19 16:3 20:3,10 21:11,14 25:8 25:11,19,23 26:16,21,22,23 28:18 36:14,15 37:6,14 38:6,11 39:21,24 40:4,9 43:21 45:2 48:14 55:1 Virginian 35:13 vis-à-vis 9:6 voluntary 9:24 VOPA 3:12 4:16 5:4,8,17 8:9,13 8:14 12:21 13:23 14:2,12 18:24 20:3 21:8 21:11,15 25:16 25:17 26:7,8,12 26:17 27:18 33:5,20 36:16 39:6 47:7 48:14 48:23,25 49:4 49:11 55:3 VOPA's 3:18	19:1 22:9 26:8 26:24 27:2,5 <hr/> W <hr/> W 1:7 waive 50:19 waived 30:20 33:5 37:14 44:14 49:12 54:13 waiver 29:24,25 30:4,6 32:17 33:1 36:19,22 46:5,6 50:16 51:11,16,22,25 51:25 54:12 waiving 41:24 48:12 want 12:20 13:22 14:21 19:17 23:22 25:11 34:15 37:17,19 38:9,17 40:11 41:1 44:20,23 47:20 50:5,17 wanted 40:10 47:17 48:11 49:11 wants 6:5 7:9 21:1,2 25:1 34:13 38:4 50:2 Washington 1:12 1:18,21 17:25 wasn't 8:3 29:25 water 20:21 21:1 21:2 43:10 way 10:15 21:2 22:21 27:12 31:19 37:6 38:11 55:8 ways 30:8 Wednesday 1:13 weird 43:11 welcomed 40:24 went 14:1	weren't 22:5 West 4:1,2,8 6:9 7:9 we'll 3:3 31:19 we're 7:11 15:22 24:12 30:1 33:15 37:9 39:22 44:16 45:10,11 46:16 50:18,25 52:17 54:12,14,16 we've 15:19 33:13 white 17:20 wholly 6:24 Wilkinson 46:18 willy-nilly 22:13 22:14 win 40:20,20,22 wins 7:10 withdraw 38:18 withholding 50:22 wonder 26:4 word 41:7 work 7:15 29:18 works 27:13 world 11:23 worse 35:18 wouldn't 7:3 8:24 10:20 12:6 23:3 27:4 51:14,20 51:23 53:25 writ 37:21 38:12 wrong 28:10 wrote 32:11 <hr/> X <hr/> x 1:2,11 <hr/> Y <hr/> year 55:1 years 43:3 Young 3:17,19 15:15,19,21	16:14 17:3 18:24 19:5 23:20 24:3,15 27:11 28:6,9 31:12 33:8,24 34:1,7,10,18 34:20 35:1,23 39:6,9,11 41:5 41:11,12,17 42:2,4 44:3,17 44:23 46:9,25 47:10,18 49:20 50:24 51:6 52:23,25 53:1,3 53:6 55:4 Ysursa 47:12,20 <hr/> 0 <hr/> 09-529 1:5 3:4 <hr/> 1 <hr/> 1 1:13 11:01 1:16 3:2 12:01 55:18 18 2:8 <hr/> 2 <hr/> 20-year 19:19 2010 1:13 27 5:9 28 2:11 <hr/> 3 <hr/> 3 2:4 52:10,14 <hr/> 4 <hr/> 49 10:13 55:8 <hr/> 5 <hr/> 50 10:13 55:8 501(c)(3) 38:8 52 2:14 52a 26:14
--	---	---	---	--