

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALABAMA, ET AL., :

4 Plaintiffs : No. 132, Orig.

5 v. :

6 NORTH CAROLINA :

7 - - - - -x

8 Washington, D.C.

9 Monday, January 11, 2010

10

11 The above-entitled matter came on for
12 oral argument before the Supreme Court of the United
13 States at 10:06 a.m.

14 APPEARANCES:

15 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf
16 of Plaintiffs.

17 EDWIN S. KNEEDLER ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on
19 behalf of the United States, as amicus curiae,
20 supporting neither party.

21 WALTER DELLINGER, ESQ., Washington, D.C.; on behalf
22 of Defendant.

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	CARTER G. PHILLIPS, ESQ.	
4	On behalf of the Plaintiffs	3
5	EDWIN S. KNEEDLER, ESQ.	
6	On behalf of Neither Party	34
7	WALTER DELLINGER, ESQ.	
8	On behalf of the Defendant	44
9	REBUTTAL ARGUMENT OF	
10	CARTER G. PHILLIPS, ESQ.	
11	On behalf of the Plaintiffs	77
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
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14
15
16
17
18
19
20
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22
23
24
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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 132 on our original docket, Alabama v. North Carolina.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PLAINTIFFS

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

North Carolina breached the Southeast Compact in this case. Whether you examine it from the perspective of the sanctions that were imposed by the Commission, or whether you evaluate it from the perspective of the repeated statements by the executives of the Commission that there had been a material breach and a repudiation, or whether you examine it from the perspective of the undisputed record that was collected by the Special Master, the conclusion, it seems to me, is inescapable that what North Carolina did here by taking no action between December 1997 and July of 1996 simply does not fulfill the responsibilities that they had -- that North Carolina had assumed, and therefore the only issue should be: What is the appropriate remedy for

1 this extraordinary breach?

2 To go to the specific record, just to be
3 clear about this, the Special Master says at page 10
4 of his report: "The parties do not dispute that
5 North Carolina did not take additional steps to
6 pursue a license for a waste facility during that
7 period." Our undisputed statement of facts is that
8 North Carolina took no further steps to license
9 between 1997 and 1999.

10 JUSTICE GINSBURG: Mr. Phillips, the point
11 that North Carolina makes is it would be throwing
12 away the taxpayers' money to no purpose. That is,
13 what is the point of continuing to pursue a license
14 when North Carolina does not have the funding to
15 continue the process and to open the disposal
16 facility?

17 So North Carolina's point of view is: What
18 does it mean to continue to seek the license when
19 they are not going to have the money to get to the
20 end of the line?

21 MR. PHILLIPS: Right. Well, North Carolina
22 assumed the responsibility more than a decade prior
23 to that time to take all appropriate steps in order
24 to provide for licensing and for construction of a
25 facility. "Appropriate steps" in that context has to

1 mean something more than simply doing nothing,
2 declaring categorically that you are going to
3 repudiate the agreement, and attempting to extort
4 from the compact and its Commission additional monies
5 that it is absolutely clear that the Commission has
6 no responsibility to North Carolina to pay.

7 JUSTICE GINSBURG: But the --

8 JUSTICE SCALIA: But how much -- how much
9 did the Commission give before this? It just did
10 that out of the goodness of its heart?

11 MR. PHILLIPS: No, it did it with -- with
12 the approval of the other States in the compact, for
13 the purpose of promoting the ultimate objective of
14 the -- of the contract --

15 JUSTICE SCALIA: And -- and I think that
16 one of the best indications of what -- what a
17 contract means is the manner in which the parties act
18 under the contract, and that suggests to me that it
19 was never contemplated that North Carolina alone
20 would foot the bill for -- for obtaining this
21 license.

22 MR. PHILLIPS: The language of the -- of
23 the compact itself, Justice Scalia, is quite plain.
24 It's clear that the Commission has no responsibility
25 to create -- to pay for the creation of this -- of

1 this facility. That was clear from day one.

2 North Carolina, not only in its legislation
3 authorizing its authority, but also its governor
4 repeatedly saying, we understand that we have a
5 responsibility to create this facility, that --

6 JUSTICE SOTOMAYOR: At what cost?

7 MR. PHILLIPS: At whatever cost --

8 JUSTICE SOTOMAYOR: What the Special Master
9 said was, I believe, that there was never an
10 obligation to do it at all costs. They didn't have
11 to bankrupt their treasury to do this; is that
12 correct?

13 MR. PHILLIPS: Well --

14 JUSTICE SOTOMAYOR: Do you accept that as a
15 working proposition?

16 MR. PHILLIPS: I would say that the -- that
17 the State of North Carolina would have -- have a
18 defense of impossibility if they could argue that
19 going down this path would have bankrupted North
20 Carolina.

21 JUSTICE SOTOMAYOR: Well, I think there was
22 certainly a significant amount of evidence that the
23 cost of completing this project was way above any
24 reasonable expectation of the parties at the time of
25 contracting, correct?

1 MR. PHILLIPS: Yes, but the -- but the
2 payment of \$80 million by the Commission was way
3 above what any of the parties expected at the
4 beginning of the process as well.

5 JUSTICE SOTOMAYOR: What -- what do you
6 believe the evidence shows with respect to the
7 reasonable cost of completing this project?

8 MR. PHILLIPS: I think it was reasonable to
9 assume that the construction of the facility itself
10 would have cost an additional \$75 million.

11 JUSTICE SOTOMAYOR: And about a -- an
12 additional 34,000 to get the license?

13 MR. PHILLIPS: Probably 34 million to
14 complete the license.

15 JUSTICE SOTOMAYOR: So -- I'm sorry. I
16 misspoke. So over \$100 million?

17 MR. PHILLIPS: Right, but the -- the --

18 JUSTICE SOTOMAYOR: An amount equal to what
19 they had already -- everybody had already put in?

20 MR. PHILLIPS: To be sure, but the -- but
21 the --

22 JUSTICE SOTOMAYOR: And about how many
23 times greater than the initial estimates?

24 MR. PHILLIPS: I don't know that there were
25 any initial estimates, at least that I recall.

1 JUSTICE SOTOMAYOR: I thought it was about
2 20 or 30 million dollars was initially estimated to -
3 - to do this project.

4 MR. PHILLIPS: I doubt that that would have
5 included the full construction.

6 JUSTICE SOTOMAYOR: I -- I'm only going
7 through these to try to get a sense from you of at
8 what point did North Carolina have a right to claim
9 impossibility? You are saying that --

10 MR. PHILLIPS: Yes. I mean, I think North
11 Carolina -- first of all, North Carolina never did
12 assert a right of impossibility.

13 JUSTICE SOTOMAYOR: Well, it did by saying,
14 we can't complete this project.

15 MR. PHILLIPS: Well, it said it wouldn't
16 complete this project. It imposed upon us and
17 unilaterally imposed upon the other States to the
18 compact the obligation to fund, an obligation none of
19 them had -- had assumed under the contract.

20 To be sure, they had provided moneys to
21 North Carolina with the expectation that North
22 Carolina would use those moneys ultimately to build a
23 project. But the reality is in 1997, in December,
24 North Carolina unilaterally declared that they were
25 not going to complete the project and that they were

1 going to take no actions further -- in furtherance --

2 JUSTICE GINSBURG: So your argument is then
3 that they acted 2 years too late. When they gave
4 notice that they were not able to go forward, but
5 they were going to keep this thing going, so if the
6 funds should somehow become available, they would
7 have the -- they would have things still in place.
8 They wouldn't have terminated the effort.

9 MR. PHILLIPS: Right. Yes, Justice
10 Ginsburg. Our argument is that -- you know, whether
11 -- you know --

12 JUSTICE GINSBURG: So if they had done
13 everything the same --

14 MR. PHILLIPS: I think there's an open
15 question of whether the withdrawal in '97 would have
16 been in good faith or not. That would be a separate
17 issue. But there is no question that the one thing
18 that a contracting party does not have the right to
19 do is to unilaterally decide to repudiate the
20 agreement, get the benefit of the agreement --

21 JUSTICE GINSBURG: But they told you what -
22 - it was totally up-front. They said: Look, we
23 can't go forward with this. We haven't got the
24 money. We'll let everything sit, to see if someone
25 will come up with the money.

1 That's -- it's -- you paint a picture of
2 repudiating the contract, when North Carolina gave
3 notice in '97 that it would have to fold if it didn't
4 get the money.

5 MR. PHILLIPS: Right, and -- and the
6 question then, obviously, that -- the legal issue
7 that that presents is whether or not a party to a
8 contract who is not entitled to expect the other
9 participants to the agreement to pay any more money
10 or in fact any money whatsoever has the authority
11 essentially to attempt to extort that money while
12 continuing to gain the benefits of the contract for
13 an additional year and a half; at that point, then
14 they -- then they withdraw.

15 We can debate about whether the withdrawal
16 was in good faith or not. But the bottom line is
17 there is no substantial difference between the
18 repudiation and the complete disregard of the
19 contractual obligations.

20 JUSTICE GINSBURG: What were the benefits
21 that North Carolina was getting by paying whatever it
22 was -- 400-odd thousand dollars -- to keep it going
23 for another 2 years?

24 MR. PHILLIPS: Well, the benefits of being
25 a part of the compact is all of the powers that the

1 Commission had to deal with other compacts in terms
2 of how to license -- not how to license, but how to
3 dispose of waste. They got all of the benefits of
4 being a part of a compact during the entirety of that
5 period. So, you know, it was not in their interest
6 to repudiate this agreement or to withdraw from it
7 until they got to the point where they were -- where
8 they recognized that they were about to be sanctioned
9 for their failure to comply with their
10 responsibilities.

11 JUSTICE SCALIA: Were there any benefits to
12 the contract at all until -- unless and until there
13 was a waste facility constructed?

14 MR. PHILLIPS: Well, there were huge
15 benefits, Justice Scalia.

16 JUSTICE SCALIA: What?

17 MR. PHILLIPS: The Barnwell facility in
18 South Carolina was disposing of waste and was only
19 going to take wastes from the compact States in the
20 Southeast Compact. So North Carolina had -- had
21 ample access to that South Carolina facility that, if
22 it had never joined the compact, it never would have
23 had available to it.

24 JUSTICE GINSBURG: At what point did South
25 Carolina withdraw?

1 MR. PHILLIPS: In 1995, Justice Ginsburg.

2 JUSTICE GINSBURG: And so they -- by 1997,
3 they didn't have any access to Barnwell anymore.

4 MR. PHILLIPS: Right, but they still had
5 the benefit of the compact's -- the Commission's
6 authority to negotiate on behalf of the member States
7 deals with other compacts for the disposal in those
8 facilities which you otherwise don't have the benefit
9 of.

10 JUSTICE SCALIA: It sounds to me pretty
11 hypothetical. And I find it difficult to believe
12 that there is an obligation to commit money and a
13 liability for failure to do so in a compact which
14 says that the State can withdraw at any time. You
15 talk about good faith withdrawal. What would be bad
16 faith withdrawal? North Carolina simply says: It's
17 no longer worth our trouble.

18 MR. PHILLIPS: Well, this would be bad
19 faith withdrawal.

20 JUSTICE SCALIA: Why?

21 MR. PHILLIPS: Where the State assumes --
22 accepts \$80 million, goes down a path, is not
23 entitled to any of that money or to any other money,
24 and then unilaterally withdraws --

25 JUSTICE KENNEDY: Did it misspend that

1 money? Are you saying the money was misspent?

2 MR. PHILLIPS: That's an open issue at this
3 point. We haven't analyzed that. That's part of
4 what I think what would be involved with the last
5 three counts of the -- of the complaint. We don't
6 know exactly whether that money was properly spent or
7 not.

8 But -- but either way, I think it is
9 important to recognize that, even if it were not,
10 quote "misspent", at the end of the day which entity
11 has the benefit of the \$80 million? Is it the six
12 members of the compact today? No. It's North
13 Carolina.

14 If the -- if the Federal Government were to
15 declare tomorrow, in response to some terrorist
16 problem, that on-site storage of low-level nuclear
17 waste is no longer permissible and that those wastes
18 have got to be disposed of somewhere other -- in some
19 other kind of a facility, the State that is -- other
20 than Texas, which is about to start one up, but the
21 State that's clearly in the best position to do that
22 today is North Carolina. Why? Because they have got
23 a \$134 million jump on everybody, \$80 million the
24 benefit of which was conferred by the Commission and
25 the compact and the sister States that were a part of

1 --

2 JUSTICE STEVENS: But, Mr. Phillips, I
3 really don't quite understand a part of your
4 argument. I'm not sure what happened to the \$80
5 million, and I guess you aren't, either. And if in
6 fact -- and maybe it was -- they had in good faith
7 used that money to try and complete the facility and
8 then decided it's just not worth it, would you still
9 be entitled to get the 80 million back?

10 MR. PHILLIPS: I -- I think if -- it would
11 be a tougher case if they had taken the 80 million
12 and come to the conclusion of this and there was a
13 finding by the State authorities that this facility
14 simply cannot be built consistent with health and
15 safety. I think that would be an argument that we
16 are not entitled to the money back.

17 But what I think you are not entitled to
18 do, as North Carolina, is to decide unilaterally that
19 more money should be paid, which is not provided for
20 under the agreement, and insist on that as a
21 condition of fulfilling any of its responsibilities
22 under the agreement.

23 JUSTICE ALITO: What is your position --
24 what do you say that the States contemplated
25 regarding the financing of these -- of these

1 projects? That the State that was unfortunate enough
2 to be selected as the second State would have to pay
3 the full cost, even if it was \$200 million, and then
4 would -- how long would it take for that State to get
5 that money back? Would it have to wait until, you
6 know, 80, 100 years later to get the benefit of some
7 other State having to finance a project?

8 MR. PHILLIPS: No. I mean, well, the
9 working assumption is that the facilities would be in
10 operation for 20 years. And the reality, Justice
11 Alito, is that once you have one of these facilities
12 built, given that there are not very many of them and
13 they are and would be a monopoly within the compact
14 region, you have virtually limited -- unlimited
15 authority to dictate whatever price you want to
16 require for taking on the disposal. And if you look
17 at the sites that exist -- it was true in Barnwell;
18 it's certainly true in Utah and in Washington -- I
19 mean, those are licenses to print money, essentially,
20 at this point. And the expectation --

21 JUSTICE GINSBURG: But in -- but in the --

22 MR. PHILLIPS: I'm sorry.

23 JUSTICE GINSBURG: -- case of this compact
24 and the other ones, as I -- do I understand
25 correctly, Mr. Phillips, that none of these -- none

1 of these compacts that were negotiated around the
2 same time, none of them yielded a disposal -- an
3 operative disposal facility?

4 MR. PHILLIPS: None so far. Texas I think
5 is as -- is as far along in its process as -- as
6 anyone, and it's -- and it's part of a compact. But
7 you know, obviously there is a "not in my backyard"
8 mentality here. But the -- at the end of the day,
9 the fundamental question remains, you know, what --
10 who bears the responsibility?

11 North Carolina -- it wasn't as though North
12 Carolina was the unfortunate recipient of this
13 particular decision and then said, you know, we don't
14 want to do this, we can't pay for this, there's no
15 way we can accomplish this. North Carolina, after
16 having been designated as the host State,
17 affirmatively passed legislation accepting that
18 responsibility and committing the State to actually
19 providing for a facility.

20 Now, Justice Stevens, I agree, if it had
21 turned out that as a matter of public health and
22 safety -- that's the big bugaboo here -- if that had
23 been an obstacle, or maybe, Justice Sotomayor, if the
24 expense had been so far out of the range of what's
25 conceivable, maybe there's an impossibility element

1 to it. But the --

2 JUSTICE SOTOMAYOR: Could I interrupt just
3 a moment?

4 MR. PHILLIPS: Of course.

5 JUSTICE SOTOMAYOR: Let's assume they
6 hadn't taken the 80 million. Let's assume they had
7 sunk all of that money themselves --

8 MR. PHILLIPS: Right.

9 JUSTICE SOTOMAYOR: -- and they looked and
10 said: It's going to take us another 120 million to
11 complete this; we just can't. What in the compact
12 stopped them from withdrawing? Because the only
13 provision I see in the contract about withdrawing is
14 the one that says once the facility is completed --

15 MR. PHILLIPS: Right.

16 JUSTICE SOTOMAYOR: -- you have to keep --
17 you have to give notice, four-year notice.

18 MR. PHILLIPS: Right. The only thing --
19 there is nothing express in the contract, in the
20 compact, that would prevent them from doing that. I
21 do think there is an implied duty of good faith. But
22 in the situation you pose, Your Honor, I don't think
23 there's any question that they acted in good faith.

24 JUSTICE SOTOMAYOR: Right, okay. So
25 assuming they are acting in good faith, I still don't

1 quite understand what the difference is except the
2 fact that they took what you've described in other
3 counts as an unjust enrichment. You got us to give
4 you some money to help you along in this project.
5 But the situation hasn't changed. We can't spend
6 more money. We certainly can't spend the amount of
7 money it will take to complete this project. I'm not
8 sure what turns that into bad faith, other than your
9 claim that they --

10 MR. PHILLIPS: Well, other than -- other
11 than the fact that to say "We can't" strikes me as
12 utterly implausible. To say "We don't want to"
13 strikes me as much more arguable.

14 JUSTICE SOTOMAYOR: Well, but the
15 hypothetical I gave you before you described as good
16 faith: Just too much money.

17 MR. PHILLIPS: Right. But the problem was
18 --

19 JUSTICE SOTOMAYOR: What turns it into bad
20 faith?

21 MR. PHILLIPS: Well, I think the problem --
22 what turns it into bad faith is taking the 80
23 million, consistently committing to going forward
24 with it, and then walking away right before you are
25 going to get sanctioned for failure to comply with

1 the -- with the agreement. I think those are the
2 elements that make it --

3 JUSTICE SCALIA: Do you have any precedent
4 from this Court for reading into a contract between
5 States an obligation of good faith?

6 MR. PHILLIPS: I don't have any -- any
7 decision of this Court. I do have an opinion by the
8 D.C. Circuit some years ago that says that every
9 contract carries with it an implied duty of good
10 faith and fair dealing. You may remember that
11 opinion.

12 JUSTICE BREYER: Then how do you -- what is
13 -- is that absolutely necessary? Any party State may
14 withdraw from the compact by enacting a law repealing
15 the compact. That sentence seems to me your toughest
16 point because that's what they did. They simply
17 withdrew.

18 MR. PHILLIPS: Right.

19 JUSTICE BREYER: Now, where in the contract
20 is it something that says -- I mean, maybe that was
21 foolish, to put that in there, but they did put it
22 in. And so how do you deal with that sentence, which
23 is one that Justice Scalia brought up in his --

24 MR. PHILLIPS: Well, the only -- the only
25 argument we have with respect to that -- and it's

1 important to recognize, we don't have to win this
2 issue in order to win the breach of contract claim in
3 this particular case.

4 JUSTICE BREYER: Well -- all right. Well,
5 go ahead, explain.

6 MR. PHILLIPS: Well, because there's
7 massive repudiation long before the -- the question
8 still is, what do you do with 1997 to 1999? Before
9 they withdraw, they have repudiated the agreement.
10 They have breached it totally. The very essence of
11 the agreement was lost once North Carolina refused to
12 take any steps, much less appropriate steps.

13 JUSTICE BREYER: Is there in this implicit
14 that the State of North Carolina, prior to their
15 withdrawal, while they are still acting, will
16 appropriate reasonable amounts of money for this?

17 MR. PHILLIPS: And take -- well, what they
18 are supposed to do is take appropriate steps to
19 license, which means --

20 JUSTICE BREYER: Do appropriate steps
21 include --

22 MR. PHILLIPS: -- continue to do what's
23 necessary to get a license.

24 JUSTICE BREYER: -- do they -- does this --
25 if we have a lend-lease agreement entered into a

1 treaty and absolutely ratified, I suppose that if
2 Congress decides not to lend and won't appropriate
3 the money to do it, we are in breach of the treaty.

4 MR. PHILLIPS: Yes.

5 JUSTICE BREYER: And I assume if there is a
6 similar agreement here and North Carolina's
7 legislature doesn't appropriate any money for
8 whatever internal reasons, North Carolina is in
9 breach of the treaty.

10 MR. PHILLIPS: Right.

11 JUSTICE BREYER: Do I understand this
12 correctly?

13 MR. PHILLIPS: Yes, that's absolutely
14 right, Justice Breyer.

15 JUSTICE BREYER: Is there any authority for
16 the proposition that when a legislature does not
17 appropriate the money that the executive of a State
18 has committed to another State, that State is in
19 breach, irrespective of whose fault it is within the
20 State?

21 MR. PHILLIPS: I don't know that there is
22 specific authority for that proposition. But,
23 Justice Breyer, it seems to me what you describe
24 there is exquisitely close to what this -- what this
25 Court resolved in Mobil Oil Exploration, where

1 Congress passed a statute saying that the
2 administrative side would not be permitted to go
3 forward, and this Court said that action constituted
4 a repudiation of the underlying obligation, even
5 though it was far from clear that there would ever be
6 any exploration or production of oil on this -- on
7 the outer continental shelf sites that were in there.

8 This Court said that when -- that if an
9 obligor will commit a breach that would of itself
10 give the obligee a claim for damages for total
11 breach, so that it so substantially impairs the value
12 of the contract, and the government said it would
13 break or did break an important contractual promise,
14 impairing the value of the contract, then the
15 government must give the companies back the money.

16 JUSTICE BREYER: Okay. So this case then
17 boils down to, am I correct, in the years prior to
18 their withdrawal, did they take the steps,
19 appropriate steps, that this contract obliges them to
20 make?

21 MR. PHILLIPS: Yes, I think that's a fair -
22 -

23 JUSTICE BREYER: And you say they did not?

24 MR. PHILLIPS: But we have other arguments,
25 obviously, but then -- but on the breach --

1 JUSTICE BREYER: But that's -- but if you
2 win on that one, you win.

3 MR. PHILLIPS: -- we should win. In my
4 judgment, that's -- the conduct of North Carolina
5 between 1997 and 1999 is exactly the same conduct
6 that the United States entered into in Mobil
7 Exploration.

8 JUSTICE BREYER: And the state of the
9 finding of the Commission in respect to that precise
10 point, and it's called -- what is it called? The
11 "Impact Commission"? Do we have the same thing in
12 mind, the Commission? Is that what it's called?

13 MR. PHILLIPS: Yes, it's a --

14 JUSTICE BREYER: They have -- they are the
15 ones who are the judge, it says.

16 MR. PHILLIPS: I believe that they are the
17 sole judge, yes.

18 JUSTICE BREYER: All right. That's what it
19 says.

20 MR. PHILLIPS: Article 7(C).

21 JUSTICE BREYER: The findings in respect to
22 that specific 2-year point are what, and where are
23 they in the record?

24 MR. PHILLIPS: Okay. That's in the -- that
25 will be in the sanctions order that's in the

1 appendix, so that -- in the record. I think it's
2 around page 400. I will get that for you, Justice
3 Breyer.

4 But the specific finding is that North
5 Carolina had a duty to go forward and -- and stopped
6 completely. It repudiated.

7 In addition to that, when North Carolina
8 announced that it was shutting down the project and
9 that it was not going forward, that it was just going
10 to run out and wait and hope, frankly, that
11 additional funding would come forward, the -- the
12 compact -- the director of the compact specifically
13 wrote to the governor twice, saying: These are acts
14 in repudiation and in violation of the agreement; it
15 is your responsibility.

16 JUSTICE GINSBURG: But they also -- you
17 said -- you said in your brief that the -- in 1997,
18 the Commission came forward with some kind of
19 additional funding proposal, which North Carolina
20 came down -- turned down.

21 MR. PHILLIPS: Refused, right.

22 JUSTICE GINSBURG: What -- what was that?

23 MR. PHILLIPS: The basic proposal -- the
24 draft memorandum of understanding would have -- would
25 have led to the Commission providing, I think, about

1 \$21 million, and the generators in the Southeast
2 States providing a loan to North Carolina of an
3 additional -- I think it was \$13 million. And that
4 gets you the \$34 million -- comes from -- for the --
5 for the finalized elements of getting a license put
6 in place. So we had -- you know, we thought we had
7 in place an offer to fund. I mean, that's what makes
8 North Carolina --

9 JUSTICE GINSBURG: Why did -- why did North
10 Carolina turn it down?

11 MR. PHILLIPS: You might want to ask Mr.
12 Dellinger that question. They didn't -- they didn't
13 provide us with any explanation for why they didn't --
14 - why they turned that down.

15 JUSTICE GINSBURG: But you say there was a
16 package, that there was a -- an offer in place where
17 the Commission would pay X and the generators would
18 kick in an additional amount as well.

19 MR. PHILLIPS: Right. And that would have
20 been a loan for the future.

21 JUSTICE GINSBURG: And that was -- that --
22 everybody had signed -- everybody who was part of
23 that offer had signed onto it?

24 MR. PHILLIPS: Right. Everybody on our
25 side had agreed to that, including the -- the other

1 members of the compact.

2 JUSTICE SCALIA: Why did they agree to it?

3 MR. PHILLIPS: Because the --

4 JUSTICE SCALIA: Once again, they are just
5 tender-hearted? I mean, even though North Carolina
6 had an obligation to fund all of it? They just come
7 forward and say: Yes, extort us. I mean, I --

8 MR. PHILLIPS: Well, you know, when you --
9 when you've got the power to extort, you know, the
10 temptation to go down that path, Justice Scalia, is
11 obviously pretty strong. And the reason they did it
12 was --

13 JUSTICE SCALIA: I suggest it's not the
14 power to extort; it's the power to withdraw. And
15 that power to withdraw suggests that there is no
16 absolute obligation to come up with the funding. The
17 two seem to me so -- so inconsistent with -- with one
18 another.

19 MR. PHILLIPS: Well, the difficulty --

20 JUSTICE SCALIA: So long as you can
21 withdraw at any time --

22 MR. PHILLIPS: Right. But remember, you
23 are talking now also about the Commission and the
24 other compact States having sunk \$80 million in the
25 investment to get this site up and running. So we've

1 -- I mean, we've already got \$80 million in the hole.

2 CHIEF JUSTICE ROBERTS: Would your position
3 be the -- be the same if it were \$20 million?

4 MR. PHILLIPS: Yes, our position would be
5 exactly the same.

6 CHIEF JUSTICE ROBERTS: So whatever the
7 Commission contributed? In other words, it doesn't
8 have to be enough to trigger an obligation on the
9 part of North Carolina to move forward. I assume
10 there is some level where you would say, you know,
11 they took their chances, and it didn't work out -- as
12 opposed to they obviously committed in light of the
13 money they accepted.

14 MR. PHILLIPS: Well, I think the answer to
15 your question is -- you know, of course, is: What's
16 the appropriate remedy for the particular breach in
17 any given case? In this context, if we were talking
18 about a couple thousand dollars --

19 CHIEF JUSTICE ROBERTS: No, I don't think
20 so. I think it's a question of whether there's a
21 breach. I would say that if you gave them \$1
22 million, you should not view that as: Well, we've
23 supported your efforts; you are committed to do this,
24 no matter how much it costs, because we have given
25 you \$1 million.

1 It seems to me at some point the amount
2 becomes pertinent in assessing whether you have a
3 claim.

4 MR. PHILLIPS: But I -- well, I think the
5 ultimate question is still: What is the obligation?
6 And Justice Breyer identified it, I think, quite
7 precisely. And again, this is only with respect to
8 count 2 in that breach claim.

9 But our argument there is that they had a
10 responsibility from December 1997 until July of 1999
11 to take appropriate steps. And they massively
12 repudiated that obligation and repudiated the
13 entirety of --

14 JUSTICE SOTOMAYOR: My -- my problem
15 remains --

16 MR. PHILLIPS: -- of the contract.

17 JUSTICE SOTOMAYOR: -- with that answer, is
18 that you earlier said that they could -- forgetting
19 if they didn't take any money -- under the terms of
20 this compact -- and Justice Scalia has been noting
21 this repeatedly -- have withdrawn at any time because
22 they didn't want to sink any more money into this
23 project; is that correct?

24 MR. PHILLIPS: Yes. Subject to what I
25 would think was a duty of good faith, they could have

1 done that. But they didn't do that.

2 JUSTICE SOTOMAYOR: Well, let's put aside
3 that duty of good faith --

4 MR. PHILLIPS: Right.

5 JUSTICE SOTOMAYOR: -- because with that
6 duty of good faith, you're suggesting that merely
7 because they took a million -- that's what the Chief
8 Justice is asking you -- or 80 million, that that
9 somehow converted or changed the express terms of the
10 contract and bound them in some way to find funding
11 that they chose not to. That -- that's really the
12 argument I'm hearing you make.

13 MR. PHILLIPS: No, I think it's more subtle
14 than that, Justice Sotomayor. I mean, my point is
15 they always had an obligation to take appropriate
16 steps to get licensed. That was an obligation that
17 lasted until they withdrew. And from -- from
18 December 1997 on, they refused to take any steps
19 toward getting a license. And we don't know today
20 whether something could have happened in that year
21 and a half that might have changed the entire dynamic
22 of this and allowed it to in fact be completed in a
23 way that all of the parties would have been satisfied
24 with.

25 JUSTICE SOTOMAYOR: May I ask you just one

1 question on the sovereign immunity issue?

2 MR. PHILLIPS: Of course.

3 JUSTICE SOTOMAYOR: Is there any factual
4 development that needs to occur before the Special
5 Master to address the legal questions that have been
6 presented? And I see the legal questions as whether
7 or not, in fact, the claim belongs to the Commission
8 or to the States for the \$80 million and the \$10
9 million in lost revenue.

10 MR. PHILLIPS: Right.

11 JUSTICE SOTOMAYOR: Is there any factual
12 development that needs to occur, or is that a pure
13 legal question based on the arguments that are
14 contained in the briefs before us?

15 MR. PHILLIPS: I think it's a pure legal
16 argument. I think we have put forward everything
17 before the Special Master that we think is relevant
18 for the -- for a disposition of that --

19 JUSTICE KENNEDY: What is there in the
20 record that shows that the claims of the States are
21 identical to the claim the Commission is asserting,
22 which was the -- which was the instance in the
23 Arizona-California case?

24 MR. PHILLIPS: Right. The bill of
25 complaint itself doesn't distinguish between claims

1 based on any particular party. They list the parties
2 and they list the claims, and there is no effort to
3 mix and match as between them. In terms --

4 JUSTICE KENNEDY: It seems to me that it's
5 the obligation of the Commission to show that there
6 is an absolute parallel between the claims. And I
7 just don't see where I can infer from the record or
8 conclude that that is the case. And if -- and if
9 that is not so, then the Commission is not like the
10 Indian tribes in the Arizona case.

11 MR. PHILLIPS: Well, I would think at a
12 minimum we are very much like the private oil
13 companies in the Maryland v. Louisiana case, in any
14 event, where, you know, the claims were out there; it
15 was far from clear exactly how those claims were
16 going to play out in one way or another. And this
17 Court didn't sit down and say: We have to sort that
18 out ahead of going forward with the litigation. What
19 the Court said was: These all look to be pretty
20 close and there's no basis on which to assume that
21 they are doing more -- that they are asking for more,
22 and therefore there's no Eleventh Amendment problem.

23 And, of course, remember the Special Master
24 has held open the possibility that if for some reason
25 the claims of the Commission were to deviate from the

1 claims of -- of any of the compact States, which as
2 far as I can tell to this point they have -- they
3 have not deviated one iota, then the Special Master
4 would allow North Carolina to revisit -- to renew its
5 motion at that point.

6 JUSTICE SOTOMAYOR: But isn't there an
7 obligation before we exercise original jurisdiction
8 to ensure that there is at least a potential viable
9 claim by the States that they have a cause of action?
10 I mean, that then becomes a legal question. Is the
11 compact -- is the Commission an agent?

12 MR. PHILLIPS: Right.

13 JUSTICE SOTOMAYOR: Do the States own these
14 revenues?

15 MR. PHILLIPS: Well --

16 JUSTICE SOTOMAYOR: You are suggesting that
17 --

18 MR. PHILLIPS: But that -- it seems to me,
19 Justice Sotomayor, what you are doing there is
20 collapsing the question on the merits into the
21 jurisdictional issue of --

22 JUSTICE SOTOMAYOR: But we do that all the
23 time, for example, with -- with sovereign immunity.
24 We --

25 MR. PHILLIPS: Right.

1 JUSTICE SOTOMAYOR: We tell district courts
2 when there is a sovereign immunity issue, do the --
3 whatever discovery you need on the question, but
4 address it, because it's jurisdictional.

5 MR. PHILLIPS: Right. Although --

6 JUSTICE SOTOMAYOR: There has to be a basis
7 for the claim.

8 MR. PHILLIPS: Right. Although this --
9 this Court has also recognized in Georgia v. United
10 States, for instance, that if -- if there are clearly
11 claims that exist, that are legitimately litigable,
12 notwithstanding the Eleventh Amendment, and there may
13 be some question about others, that the Court
14 nevertheless should go forward and figure out --

15 JUSTICE SOTOMAYOR: I'm not -- I'm not --

16 MR. PHILLIPS: -- which ones work and which
17 ones don't.

18 JUSTICE SOTOMAYOR: I don't question that
19 the States may have some legitimate claims. The
20 question is do they have legitimate claims to what
21 the Commission is seeking. I think that's the
22 question.

23 MR. PHILLIPS: Right. And I think the
24 answer to that is -- just as the Special Master said,
25 it's premature to try to judge that until we get to a

1 point in the litigation where it becomes clear that
2 there is some departure between what the States are
3 doing and what the Commission is doing.

4 JUSTICE KENNEDY: Well, I am conscious of
5 your white light, but it does seem to me --

6 MR. PHILLIPS: I get --

7 JUSTICE KENNEDY: -- that the Commission is
8 -- is asking for the money for itself.

9 MR. PHILLIPS: No, the Commission is asking
10 for the money on behalf of the -- of the compact
11 States, and the compact States are asking for the
12 money on their own behalf. I do think it's an easier
13 vehicle for the Court to be able to provide a remedy
14 by giving money under these circumstances.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr.
16 Phillips.

17 Mr. Kneedler.

18 ORAL ARGUMENT OF EDWIN S. KNEEDLER

19 ON BEHALF OF THE UNITED STATES

20 AS AMICUS CURIAE,

21 IN SUPPORT OF NEITHER PARTY

22 MR. KNEEDLER: Mr. Chief Justice, and may
23 it please the Court:

24 The United States has participated in this
25 case both, at the Court's invitation, at the motion

1 for leave to file stage and then before the Special
2 Master, primarily on the issues that were addressed
3 in the Special Master's preliminary report, which go
4 to questions of the assertion of Eleventh Amendment
5 immunity in original actions as well as the structure
6 of the compact and the compact's power to assess
7 monetary sanctions itself.

8 Today we make two principal arguments:
9 one, that the Court should deny North Carolina's
10 motion to dismiss the Commission as a party,
11 rejecting at this time or for the time being the
12 assertion of Eleventh Amendment immunity; and second,
13 that the Court should deny the claim that the
14 Commission has the power itself to impose monetary
15 sanctions under article 7(F).

16 That's not to say that the States party may
17 not seek monetary relief, appropriate monetary
18 relief, themselves in an original action in this
19 Court. It's only to say that the compact Commission
20 is not a forum established by the compact itself,
21 which is not only a compact between the States, but
22 an Act of Congress, to do that.

23 JUSTICE SOTOMAYOR: Can I ask you, what is
24 the policy advantage of the rule you are proposing
25 with respect to the first question, the joinder of

1 the Commission in this original action, of us
2 proceeding to answer substantive questions about the
3 interpretation of the compact, et cetera, without
4 addressing initially the right of the Commission to
5 bring this action as an original action at all?

6 It seems to be putting the cart before the
7 horse, or -- because I'm not sure why we should be
8 reaching the merits, deciding the merits, before
9 identifying which are the parties and what claims
10 they have before us.

11 MR. KNEEDLER: Well, I -- I, think, as Mr.
12 Phillips suggested, this Court's decision in -- in
13 the United States v. Georgia establishes the Court is
14 not required to, and in some circumstances it -- it
15 may be possible to dispose of the case on -- on the
16 merits because the plaintiff States in this case I
17 think undoubtedly have a cause --

18 JUSTICE SOTOMAYOR: But this one won't.

19 MR. KNEEDLER: Well, the plaintiff States
20 undoubtedly have a cause of action for breach of the
21 compact. They are parties to the compact, and as
22 parties to the compact, they can bring an action
23 whether or not the Commission is properly before --
24 before the Court. And the question of whether the --
25 North Carolina violated the compact therefore can be

1 adjudicated solely on the basis of -- of the
2 plaintiff States' claim, without having to reach the
3 question of -- of whether the Commission could
4 properly be made a party.

5 If this Court were to agree with the
6 Special Master that there was no violation of the
7 compact, then the question of whether the Commission
8 could be -- could also bring that claim and what --
9 what remedy there might be for that, either to the
10 States or to the Commission, would never have to be -
11 - to be reached. So there is, I think, some
12 efficiency with -- with respect to that.

13 But on the Eleventh Amendment question --

14 JUSTICE GINSBURG: Do we have -- Mr.
15 Kneedler --

16 MR. KNEEDLER: I'm sorry.

17 JUSTICE GINSBURG: Mr. Kneedler, do we have
18 any decision that deals with the standing of a
19 commission to sue a State in its own right? Or this
20 is a novel question?

21 MR. KNEEDLER: This is -- this is a novel
22 question as -- as far as I -- as far as I am aware.
23 And -- and that may be one reason why the Court would
24 prefer not to specifically address the question. But
25 I -- but I do think on the -- on the basic principles

1 of Eleventh Amendment immunity, that this Court's
2 decision in Arizona v. California, at least at this
3 stage of the case, is dispositive. Because there the
4 Court concluded that the States -- because the United
5 States had intervened, they had no assertion of
6 Eleventh Amendment immunity with respect to the
7 subject matter of the dispute. As the Court put it,
8 the tribes are not bringing any new claims or issues
9 before the Court, and therefore the judicial power of
10 this Court would not be enlarged and the State's
11 sovereign immunity would not be compromised by the
12 Indian tribes' participation in the case.

13 We think that's an important principle, at
14 least with respect to Indian tribes, who this Court
15 recognized in Arizona --

16 JUSTICE KENNEDY: But here the Commission
17 is seeking sums for itself. What assurance do we
18 have that the Commission, if it received the money,
19 would give it back to the States exactly in the ratio
20 the States demand it?

21 MR. KNEEDLER: Well, I -- I don't think the
22 Court --

23 JUSTICE KENNEDY: I -- I think it's their
24 obligation to show the complete parallel between --
25 between the claims, and that that has not been done.

1 MR. KNEEDLER: Well, two things about that.
2 In Maryland v. Louisiana, which was a suit brought by
3 a number of States to challenge a -- a Louisiana tax
4 on Commerce Clause grounds, that case went forward on
5 the suit of the -- of those States, but the natural
6 gas companies who paid the tax were permitted to
7 intervene, and the Court did that, notwithstanding
8 the Eleventh Amendment. Surely, the claim of the
9 States *parens patriae* was not identical to the claims
10 of the individual natural gas companies to get a
11 refund on their own behalf, but the Court nonetheless
12 allowed them to intervene, and the Court's judgment
13 in this case awarded -- required the State of
14 Louisiana to make refunds to -- to all taxpayers.

15 So I -- I don't think -- especially in an
16 original action where the State has a certain *parens*
17 *patriae* responsibility, I don't think that the claims
18 have to be identical in the precise way that they
19 were in -- in *Arizona v. California*.

20 JUSTICE STEVENS: Mr. Kneedler, can I ask
21 you sort of a basic question about the Eleventh
22 Amendment argument? You -- you framed it entirely in
23 terms of the Eleventh Amendment, but is there not
24 also a common law immunity that the States can plead
25 against non-sovereigns?

1 MR. KNEEDLER: Yes, although I -- I think -
2 - I think -- I don't know whether this falls within
3 the precise terms of the Eleventh Amendment. It
4 would depend on whether the compact Commission is
5 regarded as a citizen of another State, which I think
6 it would not be. But, yes, it would be the -- the
7 principle recognized in Alden. But I -- the
8 principles that I am describing here I think would
9 apply equally to that immunity, as they would to the
10 other --

11 JUSTICE BREYER: Why is it -- to go back to
12 the word "sanctions," when I read the word
13 "sanctions" in the law, the thing that comes to my
14 mind first and foremost is the money, like a fine;
15 and sort of second, imprisonment. But paying a fine,
16 that -- that seems to me the most primitive and basic
17 sanction of anything. And -- and why -- and
18 particularly, if you say the fine was limited to
19 giving back money you previously took.

20 So, why wouldn't you read this clause here
21 which says "including" -- and then it doesn't mention
22 money, but it includes some other things, and you say
23 well, sure, they include the other things because the
24 word "sanction" doesn't automatically call to mind
25 those other things, but it does automatically call to

1 mind a fine.

2 MR. KNEEDLER: There -- there are several
3 points that I think are important to bear in mind
4 with this. I think this Court has always recognized
5 that monetary liability on the part of a State is
6 distinct from prospective relief, and I think the
7 Court should not lightly assume that States have
8 agreed to have a nonjudicial forum, like a --

9 JUSTICE BREYER: Now, are we supposed to --
10 are we supposed to treat compacts among States as if
11 we are dealing with those who want to impose
12 obligations on the States?

13 MR. KNEEDLER: No, but --

14 JUSTICE BREYER: Here, aren't we trying to
15 say what obligations did the States themselves want
16 to impose on themselves?

17 MR. KNEEDLER: Yes, and as we point out in
18 pages 26 and 27 of our -- of our brief, there were
19 three -- it's actually four compacts that were
20 adopted or approved in the very same Act of Congress
21 which specifically provide for monetary sanctions --
22 or monetary -- monetary remedies, which shows that
23 the compacting parties knew how to do it when they
24 wanted to.

25 But beyond that, I think it's important to

1 look at the overall structure of article 7, where the
2 sanctions power appears. First of all, article 7(F),
3 which is on page 19a of the blue brief, refers to any
4 party State which fails to comply, et cetera, "may be
5 subject to sanctions, including suspension of rights
6 under the compact and revocation."

7 Those are all forward-looking sanctions.
8 But -- but I think what really reinforces that is if
9 you look at the title of article 7, which is on page
10 17a, it says -- it deals with eligible parties,
11 withdrawal, revocation, entry into force, and
12 termination. Article 7 is all about membership in
13 the -- in the Commission. The Commission's powers,
14 by contrast, are set out in article 4 of the -- of
15 the compact. There are enumerated powers there and,
16 for example, article 4(E)(11), on page 11a -- the
17 only enumerated power with respect to sanctions
18 there, at the bottom of 11a, is to revoke the
19 membership of a party State in accordance with
20 article 7(F).

21 One would think, if there -- if there was
22 an extraordinary power to grant monetary sanctions,
23 that it would have appeared in the enumerated powers,
24 and in fact, in the one compact adopted at the same
25 time that provides for imposition of fines, it

1 actually appears in the enumerated powers portion of
2 the relevant compact, not in the membership.

3 And, Justice Breyer, you asked about
4 section -- article 7(C), with respect to the power of
5 the Commission to be the judge of -- of certain
6 matters. I think it's pretty clear that what that's
7 driving at is the Commission being the judge of the
8 qualifications of the -- of the States and the
9 members of the Commission appointed by the States to
10 participate.

11 It's like the power of any legislative
12 body, the power of Congress to determine the
13 qualifications of someone who's about -- who has been
14 voted in, should that person be seated. I think
15 article 7(C) is directed at that, not at some power
16 of --

17 JUSTICE BREYER: Well, it adds -- it adds -
18 - it starts "Qualifications." It says it's the judge
19 of qualification and it's the judge of their
20 compliance with the conditions and requirements of
21 this compact.

22 MR. KNEEDLER: But if you continue -- "And
23 the laws" --

24 JUSTICE BREYER: "And the laws of the
25 States relating to the enactment of the compact."

1 MR. KNEEDLER: Right, but -- but -- the --
2 the laws of the parties -- if I may finish?

3 "The laws of the parties State," the final
4 phrase relating to the enactment of the compact, I
5 think would modify the qualifications -- compliance
6 with the conditions and requirements of the compact
7 with respect to membership.

8 Again, I think that comes from the first
9 part of article 7(C), but I think it's -- it's the
10 overall thrust of article 7 that it deals with
11 membership.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Kneedler.

14 Mr. Dellinger.

15 ORAL ARGUMENT OF WALTER DELLINGER

16 ON BEHALF OF THE DEFENDANT

17 MR. DELLINGER: Mr. Chief Justice, and may
18 it please the Court:

19 I think I should begin with a simple
20 question that my grandson asked me, which is why did
21 North Carolina quit? Which I think sheds light on
22 what its obligations were and what the understanding
23 was.

24 This is a compact. It is not based upon a
25 coercive model. You could have one, where States --

1 all the States are required to remain in the compact,
2 withdrawal is a nullity, the Commission can enforce
3 financial sanctions, and the compact members waive
4 sovereign immunity and can be sued in Federal court.

5 This compact is based on a consensual
6 model, where it -- each -- each State can withdraw,
7 and therefore the compact has to be in the rough
8 financial interest of each of the States at any point
9 in time, which is what --

10 CHIEF JUSTICE ROBERTS: You took -- you
11 took \$80 million, and they got nothing for it. That
12 would be a question your grandson might ask.

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: What did you do
15 with the \$80 million?

16 MR. DELLINGER: The \$80 million came from -
17 - not the State -- the statement that the States gave
18 North Carolina \$80 million and North Carolina has
19 kept it and didn't give it back is a shorthand that
20 is misleading in every single respect.

21 The funds, of course, didn't come from the
22 States. They contributed \$25,000 apiece. It came
23 from charges on generators from all over the country.
24 The funds went to the authority established under
25 North Carolina law and could only be used for the

1 purposes of the Low-Level Waste Authority, and indeed
2 they all were used for the purposes of the Low-Level
3 Waste Authority.

4 The master assumes that -- that all --

5 JUSTICE SOTOMAYOR: How did that help the
6 other compacting States, giving them the \$80 million
7 and North Carolina walking away?

8 MR. DELLINGER: Well, Justice Sotomayor, no
9 one was helped by this process or the process of the
10 other compacts, none of which resulted in a -- in a
11 facility. But what North Carolina did was to carry
12 out its responsibilities to take appropriate steps
13 and, as I will show in a moment, fully in accord with
14 the understanding of the Commission and North
15 Carolina, that they would be -- it would be jointly
16 financed, even though the Commission had no legal
17 obligation. But the key reason --

18 JUSTICE SOTOMAYOR: I'm hard-pressed to
19 understand where that comes from. Under the terms of
20 the contract -- the compact, the compact expressly
21 says that none of the contracting States have any
22 liabilities with respect to this --

23 MR. DELLINGER: That is correct, and it
24 says that the Commission does not have any legal
25 obligation --

1 JUSTICE SOTOMAYOR: Exactly.

2 MR. DELLINGER: -- under the compact to
3 fund it, either. But it was because this is a
4 consensual compact and because of the right to
5 withdrawal, as the master noted, it would have been
6 surprising if a facility were constructed without
7 significant assistance from the States that were not
8 the host State because of the right to withdraw, and
9 that indeed was recognized from the very beginning.

10 For example, in 1996, when the -- the
11 chairman of the Commission was hoping to speed up the
12 completion, the chairman noted that the opening of a
13 new regional facility in North Carolina would ensure
14 a source of revenues for site development in the
15 third host State.

16 Indeed, it's not surprising that, from the
17 beginning of the compact, the Commission provided a
18 substantial amount of the funding because North
19 Carolina could have withdrawn at any point. And the
20 Commission repeatedly recognized that it was, quote,
21 "necessary and appropriate and reasonable and
22 equitable" for the Commission to contribute to this.

23 Mr. Phillips cites the North Carolina
24 legislation -- the North Carolina legislation, which
25 notes that, among the Commission's -- the authority's

1 corporate powers, when it sets up the authority or
2 the financing -- but the North Carolina legislation,
3 as the Commission expressly recognized and cited in
4 providing the money, provides that North Carolina may
5 accept funds from its general assembly. The North
6 Carolina authority may accept funds from the North
7 Carolina general assembly, from the Commission
8 compact, from other States, from the Federal
9 Government, or from generators. And they begin to
10 say it's necessary and appropriate.

11 At every step, they -- the Commission says
12 that in -- in February of '88, October of '89,
13 September of '92, November of '92, "reasonable and
14 equitable to provide this funding," and of course it
15 makes sense, given the consensual nature of the
16 compact.

17 So, what happened? Why did North Carolina
18 quit? What happened was, because of the right to
19 withdraw, South Carolina withdrew in 1995. When
20 South Carolina withdrew, this of course deprived the
21 Commission of a ready source of funding from the fees
22 that were being paid to the facility in Barnwell,
23 South Carolina.

24 But much -- or of equal significance is the
25 fact that South Carolina, having withdrawn, no longer

1 had to comply with the compact requirement, that
2 South Carolina ceased operating a facility on
3 December 31, 1992.

4 Why was that important? Because the
5 compact creates, as Mr. Phillips noted, something
6 like a monopoly within the region, and when you are
7 financing the facility you know, if you are the
8 financing authority, that you will have a captive
9 market --

10 JUSTICE BREYER: Okay. I see. So --

11 MR. DELLINGER: Unless -- unless States can
12 withdraw.

13 JUSTICE BREYER: So I was thinking of this,
14 is: What we have are a group of States, each of whom
15 feels it's necessary to build a cholera plant. And
16 they know that the cholera plant will be hated by
17 everybody in their State, but it's necessary. So
18 they each say: We'll undertake it, okay? But the
19 deal is you do, too. Now, that's their basic deal.

20 I don't know that they ever would have
21 entered into this as part of the basic deal that
22 State A depends for 4 years on State B doing it, but
23 when it's State A's turn, they run away. Well,
24 that's the deal. They can run away. But in
25 addition, take \$80 million? Okay. That's where we

1 are back with the Chief's question.

2 Now, I don't know whether it is an
3 appropriate step or not an appropriate step to keep
4 the 80 million as well as running away. But it seems
5 to me that we have an arbitrator that was supposed to
6 decide whether it was or whether it wasn't, and they
7 said it was an appropriate step. They foresaw you
8 would take the 80 million, never give it back, at
9 least.

10 But the Commission thinks it isn't. And
11 the arbitrator paid no attention whatsoever to the
12 Commission. And what the Commission says in the
13 language that I quoted is that the Commission is the
14 judge of the members' compliance with the
15 requirements of this contract. So when I read that,
16 I think: Surely, he should have paid some attention
17 to the fact that the Commission thought that what was
18 keeping the 80 million was not an appropriate step.

19 Now, there we are. That's my question.
20 And the only answer I've heard so far is, if I read
21 the rest of the sentence, it talks about laws of
22 States relating to the enactment of this contract --
23 compact. And I don't know that you read "enactment"
24 so narrowly to refer to laws that talked about how
25 you adopt it. There might be a whole lot of laws. I

1 guess you pay attention to all of them. So I don't
2 see what the last phrase has to do with it. But
3 anyway, that's my basic question in the case.

4 MR. DELLINGER: All right. I'll -- I'll
5 answer them in reverse order: The keeping the 80
6 million and the Commission's judgment about that.
7 Their argument is either that, you know, the
8 Commission is somehow the sole judge of these issues
9 or that there's some -- that you should treat a State
10 as something like a regulated industry under an
11 agency model. And they -- and they point to 7(C), or
12 at least the part of 7(C) that they leave in their
13 quote, as establishing that. And what I think Mr.
14 Kneedler was attempting to say when his time ran out
15 is that, if you just read 7(C), it's about
16 membership.

17 7(C) is in a five-provision sequence: (A),
18 (B), (C), (D), and (E). (A) lists the initial State
19 members; (B) says how other States can become
20 members; (D) provides that the first three States
21 which enact and pay their fees will bring the compact
22 into existence. And (E) states that members of other
23 compacts are not eligible for membership.

24 Then (C), in the middle, says that each
25 State shall be declared a party State upon payment of

1 the fees and enactment, and the Commission is the
2 judge of the qualifications of the party States and
3 of its members and their compliance with the
4 conditions and requirements of the compact -- and if
5 I may go "dot, dot, dot" -- relating to the enactment
6 of this compact.

7 Now, that phrase "relating to the
8 enactment" might refer just to the preceding phrase
9 about laws of the party States. But Mr. Kneedler and
10 I both read it more naturally in the context of the
11 Commission as judge, that this is about how you judge
12 who's a member. It is, in that sense, like the House
13 of Representatives provision they quote, except it
14 doesn't say "sole judge."

15 JUSTICE BREYER: So, in your opinion, the
16 Commission is not the judge of anything other than
17 membership?

18 MR. DELLINGER: Not with --

19 JUSTICE BREYER: So, therefore, the six
20 pages or so of this compact that has to do with a lot
21 of detailed issues that might appear before the
22 Commission -- it is not the judge of whether there is
23 compliance with those issues --

24 MR. DELLINGER: With respect to -- with
25 respect to --

1 JUSTICE BREYER: -- because this concerns
2 only membership?

3 MR. DELLINGER: With respect to parties to
4 the compact, the Commission, of course, has to
5 interpret the compact when it engages in its sanction
6 authority. If it's going to sanction a State that is
7 blocking the transmit of other States, it has to
8 interpret what it is applying.

9 I think what the -- counsel is arguing that
10 it was entitled to some special deference, and what
11 the master is saying is: Given the right to
12 withdraw, why should North Carolina -- why should it
13 be allowed any deference over a determination by the
14 State that's not a party to the compact? It was not
15 required to -- not a party to -- at that point, to
16 the compact.

17 Now, I do want to answer your question
18 about North Carolina keeping the money, because this
19 is important. Where --

20 JUSTICE SCALIA: Before you get to that --

21 MR. DELLINGER: Yes.

22 JUSTICE SCALIA: While we are on 7(C), I'm
23 not clear on how you are reading that last section.
24 Is the last phrase -- "relating to the enactment of
25 this compact" -- is it your position that that phrase

1 is joined not only with the immediately preceding
2 words -- "the laws of the party States" relating to
3 the enactment of this compact -- but that it also
4 refers back to compliance with the conditions and
5 requirements of this compact relating to the
6 enactment of this compact?

7 MR. DELLINGER: Yes, I am. And that's not
8 grammatically compelled; it is permitted.

9 JUSTICE SCALIA: It certainly isn't
10 grammatically compelled, but does it make any sense?

11 MR. DELLINGER: Yes, it does.

12 JUSTICE SCALIA: Conditions and
13 requirements relating to the enactment of the
14 compact?

15 MR. DELLINGER: Yes. This is about -- it's
16 not very beautifully done, but it's about the
17 Commission judging who becomes a member. In (A),
18 (B), (C), (D), and (E), and as Mr. Kneidler noted, in
19 the other compacts that were based on a model, this -
20 - the seventh article is all about eligibility for
21 membership. The powers and sanctions and parts are
22 elsewhere in the compact.

23 JUSTICE GINSBURG: Are you relying on the
24 caption to article 7 -- "Eligible Parties;
25 Withdrawal; Revocation; Entry into Force;

1 Termination"? The caption to article 7?

2 MR. DELLINGER: Yes. And it's -- it's also
3 captions about that subject.

4 But if I may return to the question of
5 who's got the money: The \$80 million coming from
6 fees generated by users around the country went
7 through the Commission to the authority. It was set
8 up in a special separate account just for the
9 purposes of the authority. All of the funds were
10 expended over this process of a massive amount of
11 studies that were done. Not a penny of it could ever
12 be spent by the North Carolina General Assembly for
13 any purposes whatsoever.

14 JUSTICE GINSBURG: Mr. Dellinger, what of -
15 - what of Mr. Phillips's argument that that \$80
16 million gave North Carolina a leg up, should there
17 ever be any revival of the development of a disposal
18 facility; North Carolina is much better situated than
19 anyone else to do this, because they have already
20 sunk \$80,000 into pursuing a license?

21 MR. DELLINGER: Well, it has been 10 or 12
22 years since this occurred, Justice Ginsburg, and
23 there has been no effort and no plan in North
24 Carolina to build a facility, and to begin the
25 licensing process anew. Some of the information they

1 -- the authority retained, which would be of use to
2 the Commission anywhere, whether there is any site-
3 specific information that would still be good 15 or
4 20 years out, I think is just pure speculation.

5 JUSTICE KENNEDY: Take a hypothetical case
6 where North Carolina did have a real advantage and
7 they used the money to create a facility, would that
8 bear on the unjust enrichment claim or even the
9 sanctions claim?

10 MR. DELLINGER: Yes. It might well bear on
11 the unjust enrichment, if there was, you know, an
12 enrichment. What happened here is that the North
13 Carolina General Assembly appropriated money that
14 went to the authority. Properly considered, North
15 Carolina -- the Commission provided money to the
16 authority. The North Carolina General Assembly
17 provided money for the authority. All the funds were
18 spent. The only State that contributed money to this
19 process was North Carolina, and North Carolina
20 contributed \$34 million.

21 Now, why did they -- I think one of the
22 most useful documents we have is in the --

23 JUSTICE KENNEDY: I just want -- you said
24 the only State that contributed money to the
25 Commission was North Carolina? I just want to make

1 sure I heard that right.

2 MR. DELLINGER: Every State contributed
3 \$25,000 --

4 JUSTICE KENNEDY: That's it?

5 MR. DELLINGER: -- to sign up.

6 JUSTICE KENNEDY: Right.

7 MR. DELLINGER: But aside from that, North
8 Carolina General Assembly appropriated \$34 million to
9 the North Carolina authority, the -- the waste
10 disposal authority. They were the only State to do
11 so.

12 So 80 million had come from the fees
13 generated at Barnwell, 34 million from North
14 Carolina, and the -- what happened was -- once South
15 Carolina withdrew from the compact, was liberated
16 from this obligation to close, was announcing that it
17 was now going to continue and is open to the world,
18 they had a cost advantage and a location advantage
19 over North Carolina.

20 So in -- in 1996, the joint supplemental
21 fact brief at -- appendix at page 143, is where the
22 head of the North Carolina authority writes to the
23 head of the Commission and notes that, with the
24 withdrawal of South Carolina and their decision to
25 continue the operation at Barnwell, the financing

1 options have been substantially changed.

2 Under the current compact, any State can
3 withdraw up until the North Carolina facility becomes
4 operational. With an available alternative disposal
5 facility now in South Carolina, there is no assurance
6 to potential bondholders or financiers that there
7 will be a revenue stream from which to repay any
8 indebtedness. Therefore, the authority is in a
9 position where the intended vehicles for financing
10 are no longer possible.

11 One possibility is to modify the compact to
12 preclude withdrawal from the compact, once the
13 license is issued for the North Carolina facility,
14 and that would -- such an amendment would allow --
15 future use of the facility would be assured, and
16 revenue financing could be considered.

17 It was not practical to submit that to all
18 seven of the other -- all seven legislatures and to
19 Congress, but the other problem is it would not have
20 -- its -- its passage would, by no means, have been
21 assured. The States, at that moment, could either
22 stay in or go.

23 So North Carolina is faced, after South
24 Carolina's withdrawal, with the prospect of advancing
25 -- trying to advance bonds for another, at minimum,

1 \$75 million for construction costs, which would bring
2 the whole project up to 223 million, close to a
3 quarter of a billion dollars, and with now a South
4 Carolina facility that is closer to every State in
5 the compact, except Virginia, and where, because it
6 was built in 1981, it has a competitive cost
7 advantage.

8 So why is Georgia going to stay in the
9 compact, when it has what may be a -- a less costly
10 and less distant alternative in going to Barnwell,
11 South Carolina?

12 JUSTICE BREYER: Well, why -- why would
13 anyone stay in the contract? I take it that your
14 point, which is an awfully good one, is that this
15 compact was designed, like others, to solve a
16 political problem.

17 It's necessary for the country to store
18 low-level radioactive waste, necessary for health and
19 safety, but because of the politics and people's
20 understanding, incomplete, no one wants it, and so,
21 now, the States have formed a series of compacts.

22 And we are told, in an amicus brief, that,
23 if this compact is interpreted to allow one State to
24 take advantage of another State's having done so for
25 years and then run away and keep \$80 million to boot,

1 it will be impossible for many other States to resist
2 that same route.

3 And that will be the end of compacts
4 through the United States, and what we will have is
5 low-level waste without storage. That's argument,
6 roughly, that's made in an amicus brief in this case,
7 and I would like to know your opinion.

8 MR. DELLINGER: My response to that is that
9 the amicus' suggestion that a decision for North
10 Carolina would impair the very useful mechanism of
11 interstate compacts has it exactly backwards.

12 States establishing compacts remain
13 entirely free to include or add provisions limiting
14 the right to withdraw; permitting the imposition of
15 sanctions, including financial sanctions; imposing
16 those on States that are no longer members; defining
17 whether the limits will be a million dollars or a
18 hundred million for what they will impose -- or no
19 limits at all; and, as the Central Compact did,
20 requiring a waiver of sovereign immunity so that
21 these judgments can be enforced in Federal court.
22 All that's possible.

23 But a decision in -- whether or not you
24 decide for North Carolina, if that's what you want in
25 a compact, you can have that compact, and nothing in

1 a decision for North Carolina would change that.

2 A decision in favor of North Carolina
3 would, in fact, benefit the compacting process
4 because it would provide assurances to State
5 legislators that you can pick up a copy of the
6 proposed compact and read it and know that that is
7 the extent of the liabilities to which you are
8 imposing your -- exposing your State, and that is the
9 limit of the obligations you are taking on to --

10 JUSTICE GINSBURG: In this case -- in this
11 case, how did it come about that the right to
12 withdraw any time until the second plant was
13 operable, was that -- that was North Carolina's
14 proposal after it was designated to be the site?

15 MR. DELLINGER: Justice Ginsburg, the
16 original compact had no limits whatsoever on
17 withdrawal, and when North Carolina was chosen as the
18 site, it proposed, as a necessary condition to its
19 not -- not withdrawing, that the compact be admitted
20 to add a provision, 7(H), which would say that after
21 -- 30 days after the second facility becomes
22 operational, no State may withdraw without the
23 consent of all the other States.

24 So North -- North Carolina added a
25 limitation on the -- at their behest, a limitation on

1 the right to withdraw. When South Carolina pulled
2 out, it was clear that that limitation on the right
3 to withdrawal wasn't good enough because it meant
4 that States could withdraw at any time up until the
5 new facility became operational, in which case it was
6 going to be too late.

7 If they pulled out then and went to -- to
8 Barnwell, that made it unbondable because there's no
9 guarantee -- what made it possible to contemplate
10 financing this by bonds and by other financing
11 mechanisms was the insurance of a market and the
12 right to withdraw --

13 JUSTICE SCALIA: Well, why didn't you
14 withdraw? I mean, all this is very good. You had
15 that absolute right to withdraw, but you didn't
16 withdraw in -- when was it -- '97. You went on for 2
17 years, still as a member of the compact and still
18 subject to obligations under the compact. How could
19 it be said that you were taking all appropriate
20 steps? What is the language -- all --

21 MR. DELLINGER: Yes. Appropriate steps --

22 JUSTICE SCALIA: Yes.

23 MR. DELLINGER: -- to ensure that a license
24 is held and obtained.

25 JUSTICE SCALIA: You took no steps at all.

1 You took zero steps.

2 MR. DELLINGER: North --

3 JUSTICE SCALIA: Why didn't you withdraw?

4 MR. DELLINGER: Because North Carolina
5 hoped that -- and no longer spending 2 million a
6 year, it spent half a million to get -- to keep the
7 authority going, North Carolina kept open the
8 possibility that there would be some possible
9 financing that might allow this project to be
10 completed.

11 They did not, as Mr. Phillips suggested, I
12 think in error -- they did not have access by staying
13 in the compact to the facility at Barnwell, South
14 Carolina. South Carolina was -- would close that to
15 North Carolina, so -- so --

16 JUSTICE SCALIA: They had no benefit from
17 the compact for those 2 years?

18 MR. DELLINGER: But the steps North
19 Carolina took for those last 19 months were exactly
20 the steps that were appropriate. Because they did
21 not have an obligation to fund this at whatever cost
22 and because they were willing -- North Carolina's
23 willingness to continue the same ratio of funding
24 that had been a part of the process for the preceding
25 8 years was not going to provide the sums necessary

1 to complete it, it would have been a waste and a
2 squandering of the money of North Carolina's
3 taxpayers and the Commission to take any steps that
4 required the expenditure --

5 JUSTICE SOTOMAYOR: What --

6 JUSTICE SCALIA: Well, you are not arguing
7 impossibility, though. I mean, the other side --

8 MR. DELLINGER: No, Justice Scalia. I'm
9 not arguing that it's impossible. What -- what I'm
10 arguing is that, if North Carolina had continued the
11 level of funding, about \$3 million a year, on -- on
12 average, North Carolina had been contributing; the
13 Commission, an average of \$7 million had been -- if
14 North Carolina had contributed that and some -- it
15 would not have come close -- after the withdrawal of
16 South Carolina, it would not have come close to
17 providing the funds needed to complete the facility.

18 Therefore, any funds expended would have
19 been wasteful and inappropriate.

20 JUSTICE GINSBURG: Mr. Dellinger, your
21 brief makes -- I think the reply brief made some
22 reference to North Carolina's attempting to get
23 funding from another source after Barnwell -- the
24 revenues from Barnwell were no longer available to
25 it.

1 I think, in -- in your reply brief, you
2 make some reference to an effort on North Carolina's
3 part to get -- what -- what was that effort?

4 MR. DELLINGER: Well, the document I cited,
5 December 13, '96, begins to set out some of the
6 proposals. One proposal, for example, was to ask
7 generators -- major generators to take an equity
8 position in the authority, that the North Carolina
9 General Assembly would continue its funding at the
10 same rate it had. Till the last day, North Carolina
11 was willing to spend at that rate.

12 JUSTICE BREYER: But what -- what -- you
13 just said -- I may not have misunderstood, but I
14 thought you said, in response to Justice Scalia,
15 that, during 1997 and '98, when he said why didn't
16 you take appropriate steps, that you said you didn't
17 do anything, and that was the appropriate step; is
18 that right? If you -- if you said that --

19 MR. DELLINGER: Yes.

20 JUSTICE BREYER: If I heard you correctly.
21 All right. But then it shows in the -- in the
22 Special Master's report that, during that time, you
23 received from the Commission funds over \$7 million.
24 So you may not have done anything, but you did take
25 \$7 million at that time from other people. And so

1 they are saying, fine, if you didn't take any
2 anything, didn't do anything, and that was the
3 appropriate step, why isn't it the appropriate step
4 now to give us the 7 million back?

5 MR. DELLINGER: Justice Breyer, there is a
6 -- I -- there is a disconnect between when funds are
7 expended and when they are paid into. There is some
8 deficit financing, so that the Commission's payment
9 in 1998 would have been to provide for expenditures
10 that occurred earlier. So there was no -- there was
11 -- and there's no suggestion that there is any money
12 left over. And -- and, how can I put it? North
13 Carolina doesn't -- never had that money. It went to
14 the authority in a separate and dedicated fund that
15 could only be used for the authority's purposes.

16 JUSTICE SCALIA: Did North Carolina
17 continue to fund the authority during this interim
18 period?

19 MR. DELLINGER: Yes, North Carolina spent
20 half a million dollars a year to fund the authority
21 for the remaining 19 months.

22 JUSTICE SCALIA: So it didn't do nothing
23 during this period?

24 MR. DELLINGER: That's correct. And let me
25 read you --

1 JUSTICE BREYER: You say -- well -- in
2 other words, North Carolina's money in '97 and '98,
3 which was \$4 million, went to pay for current
4 expenditures during North -- during that year,
5 '97/'98, but the Commission's money, which amounted
6 to \$7 million in that time, was not spent on current
7 things? It was rather a payment for things done in
8 the past?

9 This sounds not -- I'm not -- I mean,
10 that's possible, but I just don't recall anything
11 that suggests that.

12 MR. DELLINGER: North Carolina's 2 million
13 also would have been paid for past -- there was not
14 \$2 million spent on activities in 1998. That's --
15 that's the payment of prior bills. There's -- these
16 --

17 JUSTICE BREYER: So the whole formula --

18 MR. DELLINGER: These funds are coming into
19 the -- coming into the authority.

20 JUSTICE BREYER: -- and the whole --

21 JUSTICE SCALIA: You have the authority
22 still in existence, right?

23 MR. DELLINGER: Right.

24 JUSTICE SCALIA: Don't they have any
25 employees?

1 MR. DELLINGER: Yes, they do. That's --

2 JUSTICE SCALIA: So somebody has to be
3 keeping the authority alive, right? Who did that?

4 MR. DELLINGER: The admission of -- the
5 authority with funds from -- that had come from the
6 Commission and from the North Carolina General
7 Assembly. Here's the actual --

8 JUSTICE SCALIA: So -- wait, wait, wait.
9 You said all the Commission funds were for prior
10 expenditures.

11 MR. DELLINGER: Well, not necessarily.

12 JUSTICE SCALIA: Oh.

13 MR. DELLINGER: That is to say -- there was
14 not \$6 million expended during that period. There's
15 not an exact match-up between that list of when
16 payments were made and when expenditures were made.
17 But the record showed that North Carolina spent about
18 -- I believe about -- the authority spent about half
19 a million dollars those last 19 months.

20 Now, here's the -- here's the actual
21 admission that North Carolina, quote, "did nothing."
22 Paragraph -- this is at the Plaintiffs' appendix 460.
23 The admission request was: Admit that North Carolina
24 took no further steps after December 19th to ensure
25 that an application for a license was filed.

1 Response: It is admitted that the
2 authority was deprived of funding upon notification
3 from the Commission in or around 1997 that the
4 Commission was terminating its transmittal to the
5 authority of portions of funds derived from fees and
6 surcharges imposed on generators. It is further
7 admitted that the authority had justifiably relied --
8 the North Carolina authority -- on the continued
9 provision of these funds in light of the Commission's
10 previous words and actions. For this reason, the
11 authority did not thereafter take -- thereafter take
12 additional steps to site --

13 JUSTICE GINSBURG: What about the offer --
14 what about the offer that Mr. Phillips brought up,
15 said Commission was ready to pay another \$21 million,
16 and there was going to be loans from the generators?

17 MR. DELLINGER: That proposal, first of
18 all, left a significant shortfall, as the master
19 found. Even with that proposal, which North Carolina
20 thought there were some legal problems with whether
21 it would be -- that loans from private generators
22 would allow bonding of the remaining financing -- the
23 master says it was still a substantial gap left, even
24 if North Carolina continued to pay the same amount of
25 money.

1 So, with North Carolina willing to continue
2 to pay at the same rate it had for the previous 8
3 years, and the Commission unwilling or unable to do
4 so, it meant that that level of expenditure by North
5 Carolina would be a worthless expenditure of its
6 taxpayers' money and the Commission's money.

7 The Commission's position seems to be that
8 they should have taken steps just for the sake of
9 taking steps, like building half a bridge to nowhere,
10 when you know that there's no financing in sight.
11 They could have withdrawn on December 19th, and they
12 took exactly the steps that were appropriate, which
13 is not to spend money that is futile and wasteful.

14 JUSTICE SOTOMAYOR: Could I ask you a
15 question? Is all of this money that has been spent
16 or was spent up until 1999 -- has it been washed
17 away? Meaning -- and this may be what remains for
18 the unjust enrichment claims, but is there any value
19 left to what occurred?

20 MR. DELLINGER: I don't know that there is,
21 Justice Sotomayor. I would not assume there is any -
22 - any value.

23 JUSTICE SOTOMAYOR: There's no facility --

24 MR. DELLINGER: There's no -- as far as I
25 know, there's no value to North Carolina. There's no

1 -- in that sense. The -- of the quasi-contract
2 claims.

3 Could I turn, if I could, to the
4 participation of the Commission, which we think
5 raises a -- a substantial constitutional question?

6 This is actually, and should be, a very
7 simple question. States, either at common law or
8 constitutionally -- for these purposes, it doesn't
9 matter which side of the fence you are on in Alden.
10 States have a right not to be subject to suit by
11 parties that aren't the United States or a sister
12 State, absent a valid abrogation.

13 The Commission is neither. It's not a
14 State, and that should be pure and simply the answer
15 to the question. The issues are whether somehow
16 there should be an exception for a compact. It
17 should be treated like a State and allowed to sue;
18 or, even if it's treated like any other private
19 litigant, there is some kind of same-claims exception
20 -- in fact, there is one case, Arizona, only, which
21 really addresses this point -- there should be a
22 same-claims exception.

23 First of all, with respect to whether the
24 compact ought to be able to sue as if it were a
25 State, I think that's resolved -- and this Court,

1 when it rejected a compact suit in number 131 -- of -
2 - the Commission suit, might have thought the same --
3 by the Hess case. It says that compacts cannot claim
4 sovereign immunity. If they don't have the dignity
5 or status to claim sovereign immunity, they surely
6 ought not be able to affirmatively pierce the
7 sovereign immunity of something that is undoubtedly a
8 State. They are not --

9 JUSTICE GINSBURG: But that was in -- Hess
10 came up in a different posture. It wasn't -- I think
11 -- it was an attempt to sue the authority, wasn't it?

12 MR. DELLINGER: That is -- that is correct.

13 JUSTICE GINSBURG: So I don't think that
14 they are at all comparable. This is a case of does
15 the -- does the authority have standing or -- to
16 bring the claim.

17 MR. DELLINGER: You could distinguish them
18 -- but -- distinguish the two situations. But that
19 would cut in favor of this situation. You might
20 think that a compact has the right to sue as if it
21 were a State, another State, a State, and still think
22 that -- you might think it had sovereign immunity,
23 but not that it could bring a suit against a State.
24 But you certainly wouldn't think that if it's not
25 even entitled to invoke sovereign immunity on its own

1 behalf, that it ought to be able to bring it.

2 But no matter. There's no good argument.
3 With or without Hess, there is no good argument for
4 treating a compact as if it were a State. That is a
5 slippery road --

6 JUSTICE GINSBURG: Why -- why not? I mean,
7 if it's totally a creature of States -- that's all
8 it's -- there's no other shareholders, nobody in the
9 picture, just -- they are all States that create it?

10 MR. DELLINGER: The States do not control
11 this private -- this separate entity.

12 JUSTICE GINSBURG: They create it, though.
13 They -- the States create the --

14 MR. DELLINGER: The States created it. It
15 is run by a group of commissioners, two from each
16 State, who vote individually and are not bound. For
17 example, the representatives from Georgia and
18 Mississippi on the Commission voted to bring this
19 litigation against North Carolina. The States of
20 Georgia and Mississippi did not decide to join. They
21 -- they voted differently from where their States
22 are.

23 And -- and one of the things about the --
24 the Commission doesn't have the same constraints that
25 a State has. The attorney general of Alabama might

1 think long and hard before submitting an onerous
2 document discovery request on a sister State and
3 making that kind of scorched-earth litigation a
4 practice. Something that's not a State doesn't have
5 those constraints.

6 JUSTICE KENNEDY: Suppose -- suppose we
7 think that the same State -- or the same-claim rule
8 applies, and that if the Commission is asserting the
9 same claim as the State, that then it can sue.
10 Suppose that's the rule. Are these the same claims?

11 MR. DELLINGER: They are -- first of all,
12 they are not the same claims. The States who gave
13 \$25,000 are trying to claim that the Commission
14 either is their agent or that they can bring a suit
15 that restitution ought to be made to the Commission,
16 that is a -- the short answer is those are different
17 routes. They are not the same claims, but --

18 JUSTICE GINSBURG: How can -- how could
19 they not be, Mr. Dellinger? There's only one
20 complaint, and that complaint is on behalf of all the
21 Plaintiffs, not --

22 MR. DELLINGER: Yes. But you would have
23 the same last line of a complaint if 1 million people
24 joined the State who brought an antitrust suit
25 against another State. It is simply that -- award

1 the Plaintiffs such damages as this Court deems just
2 and proper.

3 JUSTICE GINSBURG: But there's no discrete
4 claim made by the Commission as distinguished from
5 South Carolina.

6 MR. DELLINGER: Yes, the Commission is
7 making a straight-up restitution claim, which, as the
8 -- the entity that provided the funds, it does not.

9 But let me say why I think the separate and
10 -- even if the claims were identical, we don't know,
11 at this point, that they will wind up being
12 identical, and States shouldn't have to litigate
13 until we find out.

14 The master just says it's not necessarily
15 the case that they will wind up being identical. Mr.
16 Phillips says -- counsel for the Plaintiffs said they
17 would not concede that they would not, at the end of
18 the day, forgo any claim on behalf of the -- of the
19 States that the Commission didn't have.

20 But, most importantly, there is Alden.
21 Alden makes this a civil case because Alden says that
22 private suits against non-consenting States present
23 the indignity of subjecting a State to the coercive
24 processes of judicial tribunals.

25 If you allow another party in that's not a

1 State, you are subjecting a State to all of the
2 discovery, all of the different theories, all of the
3 depositions, all of the document requests. A sister
4 State may, in its attorney general's office, think
5 twice about doing that. A private litigant will not.

6 So I think this case is that -- I believe
7 if you didn't want to overrule Arizona, you could say
8 it's a case where the United States brought a case in
9 its role as trustee for the Indian tribes and the
10 tribes themselves were allowed to intervene, and they
11 were, therefore, virtually one and the same party.
12 And you wouldn't need to overrule it. I don't think,
13 if it stands for any broader principle, it can
14 survive *Alden v. Maine*.

15 Now, if the Commission is out, then we
16 think there is -- and if you agree that there was no
17 breach of contract, then I think the Court should
18 direct the dismissal of the quasi-contract claims
19 because only the States will be left as a party.

20 And those claims -- quasi-contract claims
21 of restitution, it's -- they are claims that are
22 governed by the subject matter of the compact between
23 the States, and as to parties to the compact, there
24 can't be any such claims, and I think that should be
25 the end of it.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, Mr.
3 Dellinger.

4 Mr. Phillips, have you 10 minutes.

5 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS
6 ON BEHALF OF THE PLAINTIFFS

7 MR. PHILLIPS: Thank you, Mr. Chief
8 Justice.

9 I would like to respond to a number of the
10 points that have been made. It seems to me the most
11 fundamental one that Mr. Dellinger relies upon is the
12 notion that this \$80 million was not the money of the
13 compact States, and he -- he keeps saying that
14 repeatedly -- you know, based solely on the fact that
15 the money doesn't come through the treasury of the
16 States.

17 But he ignores, on 12A, article 4(H)(2)(b),
18 which says, with respect to the levying of the
19 special fees or surcharges, which was the basis upon
20 which the entirety of the \$80 million comes, that
21 this must represent the financial commitments of all
22 party States to the Commission.

23 It was the understanding that, in
24 exercising the authority to levy these amounts of
25 money in order to generate this, that that was the

1 States' money, all of the States' money, and
2 ultimately, if this Court would have determined that
3 the money --

4 JUSTICE SOTOMAYOR: That provision just
5 says the States don't have to give anything more than
6 that, that that's what satisfies whatever obligations
7 they may or may have. But where does it say that
8 money belongs to them?

9 MR. PHILLIPS: It says each State hosting -
10 - you know, "shall annually levy surcharges." The
11 total of those surcharges represent the financial
12 commitments of all of the party States to the
13 Commission. That seems to me to say that it is the
14 commitment of the party States that's -- that's being
15 provided for in that context.

16 It's not the money of the Commission. It's
17 not the money of the generators. It's the money of
18 the compact States that's being used for whatever
19 purpose is necessary in order to fulfill the overall
20 objectives of the compact. In this context, it was
21 used to ask North Carolina to go forward to site a
22 facility.

23 JUSTICE SCALIA: Wait. I don't -- I don't
24 understand that.

25 MR. PHILLIPS: I'm sorry.

1 JUSTICE SCALIA: It never passes through
2 the States, and this provision just waves a magic
3 wand and says that it represents the financial
4 commitments of all party States to the Commission.
5 What proportion from each State? Do we know?

6 MR. PHILLIPS: We don't know, and we
7 wouldn't -- and the truth is, at the end --

8 JUSTICE SCALIA: I think all this means is
9 that that is the only financial commitment that the
10 States are obliged to -- to make.

11 MR. PHILLIPS: I think there's no question
12 that it -- that it can be read as -- as saying that,
13 which, of course, then tells you, if it's not the
14 Commission's responsibility and it's not the States'
15 responsibility, then it was clearly, from the outset
16 and has always been, North Carolina's.

17 But I think it goes beyond that, Justice
18 Scalia. I think it actually tells you, as an
19 agreement among all of the party States to this
20 compact, that this is the money of the States, and
21 ultimately --

22 JUSTICE SCALIA: It can't be the money of
23 the States if you can't say how much of it belongs to
24 each State.

25 MR. PHILLIPS: Oh, no. You --

1 JUSTICE SCALIA: That just doesn't make any
2 sense.

3 MR. PHILLIPS: Well, there would be a way
4 to allocate it. It seems to me that maybe -- that
5 either the Commission, based on the vote of the
6 parties -- the party States, could either allocate it
7 back on a pro rata basis, or they can do it on the
8 basis of the percentage of the -- of the waste that
9 was used in any particular fund.

10 There's no specific provision on that, but
11 it seems to me that doesn't detract, Justice Scalia,
12 from the fundamental point that what the compact
13 members agreed upon was that this money would be the
14 money of all of the States. And, therefore, we can't
15 keep it as a Commission.

16 JUSTICE STEVENS: But the money that's --
17 but the money that is talked about in that section,
18 as I read it, that's money that would be generated
19 after the facility was completed.

20 MR. PHILLIPS: Right, South Carolina, in
21 this particular context. The -- immediately, it
22 would be South Carolina, and ultimately, then --
23 assuming North Carolina or another State were to site
24 a facility, then, from there on, that money would
25 continue to be their commitment.

1 JUSTICE STEVENS: So you're saying the
2 money generated by the South Carolina facility was
3 the money of the compact members?

4 MR. PHILLIPS: Yes.

5 JUSTICE STEVENS: And that was the money
6 that was given to North Carolina?

7 MR. PHILLIPS: Right, because the compact
8 agreed among themselves, as part of this agreement,
9 that the -- that they would have authority to impose
10 those surcharges on the generators, as they brought
11 the money in.

12 CHIEF JUSTICE ROBERTS: But then -- but
13 those States couldn't take the money. They couldn't
14 say, I want my share?

15 MR. PHILLIPS: Well, I think they could
16 have, actually.

17 CHIEF JUSTICE ROBERTS: You are saying it
18 was their money, but they had no access to it.

19 MR. PHILLIPS: Well, no, but I -- through
20 their membership, they certainly did. If the States
21 agreed to disband the compact and the -- the
22 Commission disappears and there's \$80 million in the
23 pot, that money's going somewhere. It's not staying
24 in -- it may get paid for legal fees, but other than
25 that --

1 JUSTICE BREYER: How does it work? I mean,
2 how does it work? The-- there's a -- there's a plant
3 in South Carolina, and a truck comes up filled with
4 radioactive waste out of Georgia.

5 MR. PHILLIPS: Right.

6 JUSTICE BREYER: And they go to a booth,
7 and now they are charged something. And is the fee
8 and special surcharge, which this refers to, the
9 total charge?

10 MR. PHILLIPS: Yes.

11 JUSTICE BREYER: Total charge. And what
12 does that amount to, primarily? Do we have any idea
13 on a typical --

14 MR. PHILLIPS: You mean, in terms as a
15 percentage off the -- off the normal charges?

16 JUSTICE BREYER: No -- well, I don't know
17 how they did it. But, anyway, there's a charge. Say
18 it's \$1,000, or maybe it's \$10,000.

19 MR. PHILLIPS: Yes, that would be a bit
20 high.

21 JUSTICE BREYER: So -- so the truck company
22 has to pay \$10,000 to the authority.

23 MR. PHILLIPS: Right, the generator does.

24 JUSTICE BREYER: And they are saying here
25 that that \$10,000 represents --

1 MR. PHILLIPS: Represents the commitment of
2 the States.

3 JUSTICE BREYER: -- the financial
4 commitment of all party States to the Commission.

5 MR. PHILLIPS: Right. And all that's
6 saying is that that money, even though that -- I
7 mean, the alternative way to do it, obviously --

8 JUSTICE BREYER: That money might -- seems
9 to come from a private company.

10 MR. PHILLIPS: Right.

11 JUSTICE BREYER: It comes from a private
12 company. It goes to the -- it goes to the Commission
13 -- it goes to South Carolina --

14 MR. PHILLIPS: Right, and then it comes to
15 the Commission --

16 JUSTICE BREYER: -- and they give it to the
17 Commission.

18 MR. PHILLIPS: -- and the Commission then
19 used it in this context. But that's the basic point,
20 Justice Breyer. If they didn't have this provision,
21 you would -- you might assume it was the generators'
22 money or somebody else's money.

23 The whole point of this provision was to
24 say these moneys, which can only be levied because of
25 the compact and the Commission's authority, remain

1 the responsibility of the States and, ultimately, to
2 my mind at least, would clearly go back to them.

3 Justice Breyer, I wanted to answer your
4 question with respect to findings of breach. January
5 '98, there is -- the joint supplemental appendix,
6 page 55, makes the -- is the Commission sanction
7 order, and April '99 -- and, again, at appendix 323
8 and appendix 412 -- those are specific findings by
9 the Commission that there have been breaches.

10 JUSTICE SOTOMAYOR: Could I just understand
11 -- and I don't know if I am missing something -- your
12 theory that this belongs to the States relies
13 exclusively on either an agency or an ownership
14 theory as alternatives?

15 MR. PHILLIPS: Well, I mean --

16 JUSTICE SOTOMAYOR: There's nothing else
17 that would make it --

18 MR. PHILLIPS: Well, I'm relying on this
19 provision of the compact that says it is the --

20 JUSTICE SOTOMAYOR: That's -- that's -- if
21 we disagree with that --

22 MR. PHILLIPS: Then we have an agency
23 theory as well.

24 JUSTICE SOTOMAYOR: All right. And then we
25 have to address that. Is there any other theory that

1 would give the States the right to make the claims
2 the Commission is making?

3 MR. PHILLIPS: Well, I mean, yes --

4 JUSTICE SOTOMAYOR: For the return of the
5 \$80 million.

6 MR. PHILLIPS: I -- I think that the Court
7 -- yes, I think the Court would still have the
8 authority, even in dealing with what is the
9 appropriate rule of restitution, because we are too
10 far away from that at this stage. We're not -- we're
11 not there.

12 But I think, if the Court finds that North
13 Carolina breached the compact, it ought to try to
14 find a reasonable way to remedy that particular
15 problem, even if the technical standards didn't
16 apply.

17 JUSTICE SOTOMAYOR: If we don't do that,
18 what are you left with?

19 MR. PHILLIPS: Well, no, Justice Sotomayor,
20 you do do that. I mean, when the Court in Kansas v.
21 Colorado was trying --

22 JUSTICE SOTOMAYOR: I already posed a
23 hypothetical. Don't -- if we don't, what is left of
24 this case?

25 MR. PHILLIPS: It seems to me the Court

1 still has the authority, in deciding what is the
2 appropriate standard of restitution in a problem as
3 unique as this one, to do what it did in Kansas v.
4 Colorado, which is to say: How do we measure the
5 damages to this party? Let's look at what the injury
6 was to the farmers who were completely unrelated to
7 it. They clearly wouldn't -- they weren't parties to
8 that litigation, and the Court said that's a
9 perfectly legitimate way to figure out the right
10 damages. So I think we would still have an argument
11 that you -- that the Court would have the authority
12 to grant that form of restitution under these
13 circumstances.

14 Mr. Dellinger spent a lot of time on what
15 strikes me as sort of a complete fantasy with respect
16 to the funding situation that North Carolina faced.
17 You know, once South Carolina left, to be sure, we
18 lost the ability to take money and help North
19 Carolina. But the notion that North Carolina, if it
20 had completed this facility, was not going to have a
21 license to print money in the -- in going forward and
22 that funding wouldn't have been available back in
23 those days is not in the record. And, frankly, it's
24 completely counterintuitive, because they have a
25 monopoly. That's what the compact specifically

1 provides for them, is the monopoly to be able to
2 control the fees that -- on these particular wastes.

3 Yes, Your Honor?

4 JUSTICE SCALIA: The ability to withdraw
5 terminates upon completion of the facility?

6 MR. PHILLIPS: Yes. Six months afterwards.

7 JUSTICE SCALIA: Six months afterwards. So
8 the -- the facility's completed. It's clear they are
9 going to have to -- they are going to be charging
10 more than South Carolina, which is a lower cost
11 facility, having been in existence for longer. Why
12 wouldn't everybody get out?

13 MR. PHILLIPS: Because the risk that South
14 Carolina is going to pull up stakes and stop because
15 it's been making that noise from the beginning --
16 that was the reason for the crisis. Washington and
17 South Carolina said: We're not going to take every
18 other -- every other State's waste, and we are
19 getting out of this business. So the risk you would
20 take in jumping out in the six months is that you
21 then find out at the back end you have no place to
22 dispose of your waste.

23 So the reality is, they had -- all of the
24 incentives to go forward existed as much in 1997 as
25 they did in 1995, as they did in 1999. The only

1 thing that's fundamental here is they had a
2 responsibility not just to do what was appropriate;
3 it was to do what was appropriate to get a license,
4 and that's what they never did. They walked away.
5 They took no action. Trying to negotiate funding in
6 the abstract doesn't have anything to do with moving
7 forward to get a license. On that score, the
8 authority shut down and closed.

9 Justice Sotomayor, you asked: Is there any
10 benefit that remains? Well, the reality is, geology
11 studies and hydrology studies that get done, those
12 things don't change for a billion years. So every
13 one of those studies that was done is going to be
14 just as valid today 12 years later, although I do
15 think the right way to analyze this is not in terms
16 of 12 years later, but what would have happened at
17 the time.

18 I thank Your Honors.

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
20 The case is submitted.

21 (Whereupon, at 11:37 a.m., the case in the
22 above-entitled matter was submitted.)

23
24
25

<p>A</p> <p>ability 86:18 87:4</p> <p>able 9:4 34:13 71:24 72:6 73:1 87:1</p> <p>above-entitled 1:11 88:22</p> <p>abrogation 71:12</p> <p>absent 71:12</p> <p>absolute 26:16 31:6 62:15</p> <p>absolutely 5:5 19:13 21:1,13</p> <p>abstract 88:6</p> <p>accept 6:14 48:5 48:6</p> <p>accepted 27:13</p> <p>accepting 16:17</p> <p>accepts 12:22</p> <p>access 11:21 12:3 63:12 81:18</p> <p>accomplish 16:15</p> <p>accord 46:13</p> <p>account 55:8</p> <p>act 5:17 35:22 41:20</p> <p>acted 9:3 17:23</p> <p>acting 17:25 20:15</p> <p>action 3:21 22:3 32:9 35:18 36:1 36:5,5,20,22 39:16 88:5</p> <p>actions 9:1 35:5 69:10</p> <p>activities 67:14</p> <p>acts 24:13</p> <p>actual 68:7,20</p> <p>add 60:13 61:20</p> <p>added 61:24</p> <p>addition 24:7 49:25</p> <p>additional 4:5 5:4 7:10,12</p>	<p>10:13 24:11,19 25:3,18 69:12</p> <p>address 30:5 33:4 37:24 84:25</p> <p>addressed 35:2</p> <p>addresses 71:21</p> <p>addressing 36:4</p> <p>adds 43:17,17</p> <p>adjudicated 37:1</p> <p>administrative 22:2</p> <p>admission 68:4 68:21,23</p> <p>Admit 68:23</p> <p>admitted 61:19 69:1,7</p> <p>adopt 50:25</p> <p>adopted 41:20 42:24</p> <p>advance 58:25</p> <p>advancing 58:24</p> <p>advantage 35:24 56:6 57:18,18 59:7,24</p> <p>affirmatively 16:17 72:6</p> <p>agency 51:11 84:13,22</p> <p>agent 32:11 74:14</p> <p>ago 19:8</p> <p>agree 16:20 26:2 37:5 76:16</p> <p>agreed 25:25 41:8 80:13 81:8 81:21</p> <p>agreement 5:3 9:20,20 10:9 11:6 14:20,22 19:1 20:9,11,25 21:6 24:14 79:19 81:8</p> <p>ahead 20:5 31:18</p> <p>AL 1:3</p> <p>Alabama 1:3 3:5</p>	<p>73:25</p> <p>Alden 40:7 71:9 75:20,21,21 76:14</p> <p>Alito 14:23 15:11</p> <p>alive 68:3</p> <p>allocate 80:4,6</p> <p>allow 32:4 58:14 59:23 63:9 69:22 75:25</p> <p>allowed 29:22 39:12 53:13 71:17 76:10</p> <p>alternative 58:4 59:10 83:7</p> <p>alternatives 84:14</p> <p>amendment 31:22 33:12 35:4,12 37:13 38:1,6 39:8,22 39:23 40:3 58:14</p> <p>amicus 1:19 34:20 59:22 60:6,9</p> <p>amount 6:22 7:18 18:6 25:18 28:1 47:18 55:10 69:24 82:12</p> <p>amounted 67:5</p> <p>amounts 20:16 77:24</p> <p>ample 11:21</p> <p>analyze 88:15</p> <p>analyzed 13:3</p> <p>anew 55:25</p> <p>announced 24:8</p> <p>announcing 57:16</p> <p>annually 78:10</p> <p>answer 27:14 28:17 33:24 36:2 50:20 51:5 53:17 71:14</p>	<p>74:16 84:3</p> <p>antitrust 74:24</p> <p>anymore 12:3</p> <p>anyway 51:3 82:17</p> <p>apiece 45:22</p> <p>appear 52:21</p> <p>APPEARAN... 1:14</p> <p>appeared 42:23</p> <p>appears 42:2 43:1</p> <p>appendix 24:1 57:21 68:22 84:5,7,8</p> <p>application 68:25</p> <p>applies 74:8</p> <p>apply 40:9 85:16</p> <p>applying 53:8</p> <p>appointed 43:9</p> <p>appropriate 3:25 4:23,25 20:12 20:16,18,20 21:2,7,17 22:19 27:16 28:11 29:15 35:17 46:12 47:21 48:10 50:3,3,7 50:18 62:19,21 63:20 65:16,17 66:3,3 70:12 85:9 86:2 88:2 88:3</p> <p>appropriated 56:13 57:8</p> <p>approval 5:12</p> <p>approved 41:20</p> <p>April 84:7</p> <p>arbitrator 50:5 50:11</p> <p>arguable 18:13</p> <p>argue 6:18</p> <p>arguing 53:9 64:6,9,10</p> <p>argument 1:12</p>	<p>2:2,9 3:4,7 9:2 9:10 14:4,15 19:25 28:9 29:12 30:16 34:18 39:22 44:15 51:7 55:15 60:5 73:2 73:3 77:5 86:10</p> <p>arguments 22:24 30:13 35:8</p> <p>Arizona 31:10 38:2,15 39:19 71:20 76:7</p> <p>Arizona-Calif... 30:23</p> <p>article 23:20 35:15 42:1,2,9 42:12,14,16,20 43:4,15 44:9,10 54:20,24 55:1 77:17</p> <p>aside 29:2 57:7</p> <p>asked 43:3 44:20 88:9</p> <p>asking 29:8 31:21 34:8,9,11</p> <p>assembly 48:5,7 55:12 56:13,16 57:8 65:9 68:7</p> <p>assert 8:12</p> <p>asserting 30:21 74:8</p> <p>assertion 35:4,12 38:5</p> <p>assess 35:6</p> <p>assessing 28:2</p> <p>assistance 47:7</p> <p>assume 7:9 17:5 17:6 21:5 27:9 31:20 41:7 70:21 83:21</p> <p>assumed 3:24 4:22 8:19</p> <p>assumes 12:21 46:4</p> <p>assuming 17:25</p>
---	---	---	--	--

80:23	A's 49:23	34:19 39:11	27:16,21 28:8	C 2:1 3:1 51:18
assumption 15:9	a.m 1:13 3:2	44:16 73:1	36:20 76:17	51:24 54:18
assurance 38:17	88:21	74:20 75:18	84:4	California 38:2
58:5	<hr/> B <hr/>	77:6	breached 3:11	39:19
assurances 61:4	B 49:22 51:18,19	behest 61:25	20:10 85:13	call 40:24,25
assured 58:15,21	54:18	believe 6:9 7:6	breaches 84:9	called 23:10,10
attempt 10:11	back 14:9,16	12:11 23:16	break 22:13,13	23:12
72:11	15:5 22:15	68:18 76:6	Breyer 19:12,19	can't 76:24
attempting 5:3	38:19 40:11,19	belongs 30:7	20:4,13,20,24	caption 54:24
51:14 64:22	45:19 50:1,8	78:8 79:23	21:5,11,14,15	55:1
attention 50:11	54:4 66:4 80:7	84:12	21:23 22:16,23	captions 55:3
50:16 51:1	84:2 86:22	benefit 9:20 12:5	23:1,8,14,18,21	captive 49:8
attorney 73:25	87:21	12:8 13:11,24	24:3 28:6 40:11	Carolina 1:6 3:5
76:4	backwards	15:6 61:3 63:16	41:9,14 43:3,17	3:11,21,24 4:5
authorities 14:13	60:11	88:10	43:24 49:10,13	4:8,11,14,21
authority 6:3	backyard 16:7	benefits 10:12,20	52:15,19 53:1	5:6,19 6:2,17
10:10 12:6	bad 12:15,18	10:24 11:3,11	59:12 65:12,20	6:20 8:8,11,11
15:15 21:15,22	18:8,19,22	11:15	66:5 67:1,17,20	8:21,22,24 10:2
45:24 46:1,3	bankrupt 6:11	best 5:16 13:21	82:1,6,11,16,21	10:21 11:18,20
48:1,6 49:8	bankrupted 6:19	better 55:18	82:24 83:3,8,11	11:21,25 12:16
53:6 55:7,9	Barnwell 11:17	beyond 41:25	83:16,20 84:3	13:13,22 14:18
56:1,14,16,17	12:3 15:17	79:17	bridge 70:9	16:11,12,15
57:9,10,22 58:8	48:22 57:13,25	big 16:22	brief 24:17 41:18	20:11,14 21:8
63:7 65:8 66:14	59:10 62:8	bill 5:20 30:24	42:3 57:21	23:4 24:5,7,19
66:17,20 67:19	63:13 64:23,24	billion 59:3	59:22 60:6	25:2,8,10 26:5
67:21 68:3,5,18	based 30:13 31:1	88:12	64:21,21 65:1	27:9 32:4 36:25
69:2,5,7,8,11	44:24 45:5	bills 67:15	briefs 30:14	44:21 45:18,18
72:11,15 77:24	54:19 77:14	bit 82:19	bring 36:5,22	45:25 46:7,11
81:9 82:22	80:5	blocking 53:7	37:8 51:21 59:1	46:15 47:13,19
83:25 85:8 86:1	basic 24:23 37:25	blue 42:3	72:16,23 73:1	47:23,24 48:2,4
86:11 88:8	39:21 40:16	body 43:12	73:18 74:14	48:6,7,17,19,20
authority's	49:19,21 51:3	boils 22:17	bringing 38:8	48:23,25 49:2
47:25	83:19	bondholders	broader 76:13	53:12,18 55:12
authority's	basis 31:20 33:6	58:6	brought 19:23	55:16,18,24
66:15	37:1 77:19 80:7	bonding 69:22	39:2 69:14	56:6,13,15,16
authorizing 6:3	80:8	bonds 58:25	74:24 76:8	56:19,19,25
automatically	bear 41:3 56:8,10	62:10	81:10	57:8,9,14,15,19
40:24,25	bears 16:10	boot 59:25	bugaboo 16:22	57:22,24 58:3,5
available 9:6	beautifully 54:16	booth 82:6	build 8:22 49:15	58:13,23 59:4
11:23 58:4	beginning 7:4	bottom 10:16	55:24	59:11 60:10,24
64:24 86:22	47:9,17 87:15	42:18	building 70:9	61:1,2,17,24
average 64:12,13	begins 65:5	bound 29:10	built 14:14 15:12	62:1 63:4,7,14
award 74:25	behalf 1:15,19,21	73:16	59:6	63:14,15,19
awarded 39:13	2:4,6,8,11 3:8	breach 3:17 4:1	business 87:19	64:10,12,14,16
aware 37:22	12:6 34:10,12	20:2 21:3,9,19	<hr/> C <hr/>	65:8,10 66:13
awfully 59:14		22:9,11,25		66:16,19 68:6

68:17,21,23 69:8,19,24 70:1 70:5,25 73:19 75:5 78:21 80:20,22,23 81:2,6 82:3 83:13 85:13 86:16,17,19,19 87:10,14,17 Carolina's 4:17 21:6 35:9 58:24 61:13 63:22 64:2,22 65:2 67:2,12 79:16 carries 19:9 carry 46:11 cart 36:6 CARTER 1:15 2:3,10 3:7 77:5 case 3:4,12 14:11 15:23 20:3 22:16 27:17 30:23 31:8,10 31:13 34:25 36:15,16 38:3 38:12 39:4,13 51:3 56:5 60:6 61:10,11 62:5 71:20 72:3,14 75:15,21 76:6,8 76:8 85:24 88:20,21 categorically 5:2 cause 32:9 36:17 36:20 ceased 49:2 Central 60:19 certain 39:16 43:5 certainly 6:22 15:18 18:6 54:9 72:24 81:20 cetera 36:3 42:4 chairman 47:11 47:12 challenge 39:3	chances 27:11 change 61:1 88:12 changed 18:5 29:9,21 58:1 charge 82:9,11 82:17 charged 82:7 charges 45:23 82:15 charging 87:9 Chief 3:3,9 27:2 27:6,19 29:7 34:15,22 44:12 44:17 45:10,14 77:2,7 81:12,17 88:19 Chief's 50:1 cholera 49:15,16 chose 29:11 chosen 61:17 Circuit 19:8 circumstances 34:14 36:14 86:13 cited 48:3 65:4 cites 47:23 citizen 40:5 civil 75:21 claim 8:8 18:9 20:2 22:10 28:3 28:8 30:7,21 32:9 33:7 35:13 37:2,8 39:8 56:8,9 72:3,5 72:16 74:9,13 75:4,7,18 claims 30:20,25 31:2,6,14,15,25 32:1 33:11,19 33:20 36:9 38:8 38:25 39:9,17 70:18 71:2 74:10,12,17 75:10 76:18,20 76:20,21,24	85:1 clause 39:4 40:20 clear 4:3 5:5,24 6:1 22:5 31:15 34:1 43:6 53:23 62:2 87:8 clearly 13:21 33:10 79:15 84:2 86:7 close 21:24 31:20 57:16 59:2 63:14 64:15,16 closed 88:8 closer 59:4 coercive 44:25 75:23 collapsing 32:20 collected 3:19 Colorado 85:21 86:4 come 9:25 14:12 24:11 26:6,16 45:21 57:12 61:11 64:15,16 68:5 77:15 83:9 comes 25:4 40:13 44:8 46:19 77:20 82:3 83:11,14 coming 55:5 67:18,19 Commerce 39:4 commission 3:14 3:16 5:4,5,9,24 7:2 11:1 13:24 23:9,11,12 24:18,25 25:17 26:23 27:7 30:7 30:21 31:5,9,25 32:11 33:21 34:3,7,9 35:10 35:14,19 36:1,4 36:23 37:3,7,10 37:19 38:16,18 40:4 42:13 43:5 43:7,9 45:2	46:14,16,24 47:11,17,20,22 48:3,7,11,21 50:10,12,12,13 50:17 51:8 52:1 52:11,16,22 53:4 54:17 55:7 56:2,15,25 57:23 64:3,13 65:23 68:6,9 69:3,4,15 70:3 71:4,13 72:2 73:18,24 74:8 74:13,15 75:4,6 75:19 76:15 77:22 78:13,16 79:4 80:5,15 81:22 83:4,12 83:15,17,18 84:6,9 85:2 commissioners 73:15 Commission's 12:5 42:13 47:25 51:6 66:8 67:5 69:9 70:6 70:7 79:14 83:25 commit 12:12 22:9 commitment 78:14 79:9 80:25 83:1,4 commitments 77:21 78:12 79:4 committed 21:18 27:12,23 committing 16:18 18:23 common 39:24 71:7 compact 3:12 5:4 5:12,23 8:18 10:25 11:4,19 11:20,22 12:13	13:12,25 15:13 15:23 16:6 17:11,20 19:14 19:15 24:12,12 26:1,24 28:20 32:1,11 34:10 34:11 35:6,19 35:20,21 36:3 36:21,21,22,25 37:7 40:4 42:6 42:15,24 43:2 43:21,25 44:4,6 44:24 45:1,3,5 45:7 46:20,20 47:2,4,17 48:8 48:16 49:1,5 50:23 51:21 52:4,6,20 53:4 53:5,14,16,25 54:3,5,6,14,22 57:15 58:2,11 58:12 59:5,9,15 59:23 60:19,25 60:25 61:6,16 61:19 62:17,18 63:13,17 71:16 71:24 72:1,20 73:4 76:22,23 77:13 78:18,20 79:20 80:12 81:3,7,21 83:25 84:19 85:13 86:25 compacting 41:23 46:6 61:3 compacts 11:1 12:7 16:1 41:10 41:19 46:10 51:23 54:19 59:21 60:3,11 60:12 72:3 compact's 12:5 35:6 companies 22:15 31:13 39:6,10 company 82:21
---	---	--	---	--

83:9,12 comparable 72:14 compelled 54:8 54:10 competitive 59:6 complaint 13:5 30:25 74:20,20 74:23 complete 7:14 8:14,16,25 10:18 14:7 17:11 18:7 38:24 64:1,17 86:15 completed 17:14 29:22 63:10 80:19 86:20 87:8 completely 24:6 86:6,24 completing 6:23 7:7 completion 47:12 87:5 compliance 43:20 44:5 50:14 52:3,23 54:4 comply 11:9 18:25 42:4 49:1 compromised 38:11 concede 75:17 conceivable 16:25 concerns 53:1 conclude 31:8 concluded 38:4 conclusion 3:20 14:12 condition 14:21 61:18 conditions 43:20 44:6 52:4 54:4 54:12	conduct 23:4,5 conferred 13:24 Congress 21:2 22:1 35:22 41:20 43:12 58:19 conscious 34:4 consensual 45:5 47:4 48:15 consent 61:23 considered 56:14 58:16 consistent 14:14 consistently 18:23 constituted 22:3 constitutional 71:5 constitutionally 71:8 constraints 73:24 74:5 constructed 11:13 47:6 construction 4:24 7:9 8:5 59:1 contained 30:14 contemplate 62:9 contemplated 5:19 14:24 context 4:25 27:17 52:10 78:15,20 80:21 83:19 continental 22:7 continue 4:15,18 20:22 43:22 57:17,25 63:23 65:9 66:17 70:1 80:25 continued 64:10 69:8,24 continuing 4:13 10:12	contract 5:14,17 5:18 8:19 10:2 10:8,12 11:12 17:13,19 19:4,9 19:19 20:2 22:12,14,19 28:16 29:10 46:20 50:15,22 59:13 76:17 contracting 6:25 9:18 46:21 contractual 10:19 22:13 contrast 42:14 contribute 47:22 contributed 27:7 45:22 56:18,20 56:24 57:2 64:14 contributing 64:12 control 73:10 87:2 converted 29:9 copy 61:5 corporate 48:1 correct 6:12,25 22:17 28:23 46:23 66:24 72:12 correctly 15:25 21:12 65:20 cost 6:6,7,23 7:7 7:10 15:3 57:18 59:6 63:21 87:10 costly 59:9 costs 6:10 27:24 59:1 counsel 53:9 75:16 88:19 count 28:8 counterintuitive 86:24 country 45:23 55:6 59:17	counts 13:5 18:3 couple 27:18 course 17:4 27:15 30:2 31:23 45:21 48:14,20 53:4 79:13 court 1:1,12 3:10 19:4,7 21:25 22:3,8 31:17,19 33:9,13 34:13 34:23 35:9,13 35:19 36:13,24 37:5,23 38:4,7 38:9,10,14,22 39:7,11 41:4,7 44:18 45:4 60:21 71:25 75:1 76:17 78:2 85:6,7,12,20,25 86:8,11 courts 33:1 Court's 34:25 36:12 38:1 39:12 create 5:25 6:5 56:7 73:9,12,13 created 73:14 creates 49:5 creation 5:25 creature 73:7 crisis 87:16 curiae 1:19 34:20 current 58:2 67:3,6 cut 72:19	deal 11:1 19:22 49:19,19,21,24 dealing 19:10 41:11 85:8 deals 12:7 37:18 42:10 44:10 debate 10:15 decade 4:22 December 3:22 8:23 28:10 29:18 49:3 65:5 68:24 70:11 decide 9:19 14:18 50:6 60:24 73:20 decided 14:8 decides 21:2 deciding 36:8 86:1 decision 16:13 19:7 36:12 37:18 38:2 57:24 60:9,23 61:1,2 declare 13:15 declared 8:24 51:25 declaring 5:2 dedicated 66:14 deems 75:1 Defendant 1:22 2:8 44:16 defense 6:18 deference 53:10 53:13 deficit 66:8 defining 60:16 Dellinger 1:21 2:7 25:12 44:14 44:15,17 45:16 46:8,23 47:2 49:11 51:4 52:18,24 53:3 53:21 54:7,11 54:15 55:2,14 55:21 56:10
---	--	--	--	--

D

D 3:1 51:18,20
54:18
damages 22:10
75:1 86:5,10
day 6:1 13:10
16:8 65:10
75:18
days 61:21 86:23

57:2,5,7 60:8 61:15 62:21,23 63:2,4,18 64:8 64:20 65:4,19 66:5,19,24 67:12,18,23 68:1,4,11,13 69:17 70:20,24 72:12,17 73:10 73:14 74:11,19 74:22 75:6 77:3 77:11 86:14 demand 38:20 deny 35:9,13 Department 1:18 departure 34:2 depend 40:4 depends 49:22 depositions 76:3 deprived 48:20 69:2 Deputy 1:17 derived 69:5 describe 21:23 described 18:2 18:15 describing 40:8 designated 16:16 61:14 designed 59:15 detailed 52:21 determination 53:13 determine 43:12 determined 78:2 detract 80:11 development 30:4,12 47:14 55:17 deviate 31:25 deviated 32:3 dictate 15:15 difference 10:17 18:1 different 72:10	74:16 76:2 differently 73:21 difficult 12:11 difficulty 26:19 dignity 72:4 direct 76:18 directed 43:15 director 24:12 disagree 84:21 disappears 81:22 disband 81:21 disconnect 66:6 discovery 33:3 74:2 76:2 discrete 75:3 dismiss 35:10 dismissal 76:18 disposal 4:15 12:7 15:16 16:2 16:3 55:17 57:10 58:4 dispose 11:3 36:15 87:22 disposed 13:18 disposing 11:18 disposition 30:18 dispositive 38:3 dispute 4:4 38:7 disregard 10:18 distant 59:10 distinct 41:6 distinguish 30:25 72:17,18 distinguished 75:4 district 33:1 docket 3:5 document 65:4 74:2 76:3 documents 56:22 doing 5:1 17:20 31:21 32:19 34:3,3 49:22	76:5 dollars 8:2 10:22 27:18 59:3 60:17 66:20 68:19 dot 52:5,5,5 doubt 8:4 draft 24:24 driving 43:7 duty 17:21 19:9 24:5 28:25 29:3 29:6 dynamic 29:21 D.C 1:8,15,18,21 19:8 <hr/> E E 2:1 3:1,1 51:18 51:22 54:18 earlier 28:18 66:10 easier 34:12 EDWIN 1:17 2:5 34:18 efficiency 37:12 effort 9:8 31:2 55:23 65:2,3 efforts 27:23 either 13:8 14:5 37:9 47:3 51:7 58:21 71:7 74:14 80:5,6 84:13 element 16:25 elements 19:2 25:5 Eleventh 31:22 33:12 35:4,12 37:13 38:1,6 39:8,21,23 40:3 eligibility 54:20 eligible 42:10 51:23 54:24 else's 83:22 employees 67:25 enact 51:21	enacting 19:14 enactment 43:25 44:4 50:22,23 52:1,5,8 53:24 54:3,6,13 enforce 45:2 enforced 60:21 engages 53:5 enlarged 38:10 enrichment 18:3 56:8,11,12 70:18 ensure 32:8 47:13 62:23 68:24 entered 20:25 23:6 49:21 entire 29:21 entirely 39:22 60:13 entirety 11:4 28:13 77:20 entitled 10:8 12:23 14:9,16 14:17 53:10 72:25 entity 13:10 73:11 75:8 entry 42:11 54:25 enumerated 42:15,17,23 43:1 equal 7:18 48:24 equally 40:9 equitable 47:22 48:14 equity 65:7 error 63:12 especially 39:15 ESQ 1:15,17,21 2:3,5,7,10 essence 20:10 essentially 10:11 15:19 established	35:20 45:24 establishes 36:13 establishing 51:13 60:12 estimated 8:2 estimates 7:23 7:25 et 1:3 36:3 42:4 evaluate 3:14 event 31:14 everybody 7:19 13:23 25:22,22 25:24 49:17 87:12 evidence 6:22 7:6 exact 68:15 exactly 13:6 23:5 27:5 31:15 38:19 47:1 60:11 63:19 70:12 examine 3:12,18 example 32:23 42:16 47:10 65:6 73:17 exception 71:16 71:19,22 exclusively 84:13 executive 21:17 executives 3:16 exercise 32:7 exercising 77:24 exist 15:17 33:11 existed 87:24 existence 51:22 67:22 87:11 expect 10:8 expectation 6:24 8:21 15:20 expected 7:3 expended 55:10 64:18 66:7 68:14
---	---	--	---	--

expenditure 64:4 70:4,5	48:25 50:17 57:21 61:3 71:20 77:14	83:3	88:7	gap 69:23
expenditures 66:9 67:4 68:10 68:16	facts 4:7 factual 30:3,11	financiers 58:6 financing 14:25 48:2 49:7,8 57:25 58:9,16 62:10,10 63:9 66:8 69:22 70:10	forward-looking 42:7 found 69:19 four 41:19 four-year 17:17 framed 39:22 frankly 24:10 86:23 free 60:13 fulfill 3:23 78:19 fulfilling 14:21 full 8:5 15:3 fully 46:13 fund 8:18 25:7 26:6 47:3 63:21 66:14,17,20 80:9	gas 39:6,10 general 1:17 48:5 48:7 55:12 56:13,16 57:8 65:9 68:6 73:25 general's 76:4 generate 77:25 generated 55:6 57:13 80:18 81:2 generator 82:23 generators 25:1 25:17 45:23 48:9 65:7,7 69:6,16,21 78:17 81:10 83:21 geology 88:10 Georgia 33:9 36:13 59:8 73:17,20 82:4 getting 10:21 25:5 29:19 87:19 Ginsburg 4:10 5:7 9:2,10,12 9:21 10:20 11:24 12:1,2 15:21,23 24:16 24:22 25:9,15 25:21 37:14,17 54:23 55:14,22 61:10,15 64:20 69:13 72:9,13 73:6,12 74:18 75:3 give 5:9 17:17 18:3 22:10,15 38:19 45:19 50:8 66:4 78:5 83:16 85:1 given 15:12 27:17,24 48:15 53:11 81:6 giving 34:14
expense 16:24 explain 20:5 explanation 25:13 exploration 21:25 22:6 23:7 exposing 61:8 express 17:19 29:9 expressly 46:20 48:3 exquisitely 21:24 extent 61:7 extort 5:3 10:11 26:7,9,14 extraordinary 4:1 42:22	failure 11:9 12:13 18:25 fair 19:10 22:21 faith 9:16 10:16 12:15,16,19 14:6 17:21,23 17:25 18:8,16 18:20,22 19:5 19:10 28:25 29:3,6 falls 40:2 fantasy 86:15 far 16:4,5,24 22:5 31:15 32:2 37:22,22 50:20 70:24 85:10 farmers 86:6 fault 21:19 favor 61:2 72:19 February 48:12 Federal 13:14 45:4 48:8 60:21 fee 82:7 feels 49:15 fees 48:21 51:21 52:1 55:6 57:12 69:5 77:19 81:24 87:2 fence 71:9 figure 33:14 86:9 file 35:1 filed 68:25 filled 82:3 final 44:3 finalized 25:5 finance 15:7 financed 46:16 financial 45:3,8 60:15 77:21 78:11 79:3,9	find 12:11 29:10 75:13 85:14 87:21 finding 14:13 23:9 24:4 findings 23:21 84:4,8 finds 85:12 fine 40:14,15,18 41:1 66:1 finer 42:25 finish 44:2 first 3:4 8:11 35:25 40:14 42:2 44:8 51:20 69:17 71:23 74:11 five-provision 51:17 fold 10:3 foolish 19:21 foot 5:20 force 42:11 54:25 foremost 40:14 foresaw 50:7 forgetting 28:18 forgo 75:18 form 86:12 formed 59:21 formula 67:17 forum 35:20 41:8 forward 9:4,23 18:23 22:3 24:5 24:9,11,18 26:7 27:9 30:16 31:18 33:14 39:4 78:21 86:21 87:24	fundamental 16:9 77:11 80:12 88:1 funding 4:14 24:11,19 26:16 29:10 47:18 48:14,21 63:23 64:11,23 65:9 69:2 86:16,22 88:5 funds 9:6 45:21 45:24 48:5,6 55:9 56:17 64:17,18 65:23 66:6 67:18 68:5 68:9 69:5,9 75:8 further 4:8 9:1 68:24 69:6 furtherance 9:1 futile 70:13 future 25:20 58:15	
<hr/> F <hr/>			<hr/> G <hr/>	
faced 58:23 86:16 facilities 12:8 15:9,11 facility 4:6,16,25 6:1,5 7:9 11:13 11:17,21 13:19 14:7,13 16:3,19 17:14 46:11 47:6,13 48:22 49:2,7 55:18,24 56:7 58:3,5,13 58:15 59:4 61:21 62:5 63:13 64:17 70:23 78:22 80:19,24 81:2 86:20 87:5,11 facility's 87:8 fact 10:10 14:6 18:2,11 29:22 30:7 42:24			gain 10:12	

<p>40:19 46:6 go 4:2 9:4,23 20:5 22:2 24:5 26:10 33:14 35:3 40:11 52:5 58:22 78:21 82:6 84:2 87:24 goes 12:22 79:17 83:12,12,13 going 4:19 5:2 6:19 8:6,25 9:1 9:5,5 10:22 11:19 17:10 18:23,25 24:9,9 31:16,18 53:6 57:17 59:8,10 62:6 63:7,25 69:16 81:23 86:20,21 87:9,9 87:14,17 88:13 good 9:16 10:16 12:15 14:6 17:21,23,25 18:15 19:5,9 28:25 29:3,6 56:3 59:14 62:3 62:14 73:2,3 goodness 5:10 governed 76:22 government 13:14 22:12,15 48:9 governor 6:3 24:13 grammatically 54:8,10 grandson 44:20 45:12 grant 42:22 86:12 greater 7:23 grounds 39:4 group 49:14 73:15 guarantee 62:9 guess 14:5 51:1</p>	<hr/> <p>H</p> <hr/>	<p>half 10:13 29:21 63:6 66:20 68:18 70:9 happened 14:4 29:20 48:17,18 56:12 57:14 88:16 hard 74:1 hard-pressed 46:18 hated 49:16 head 57:22,23 health 14:14 16:21 59:18 hear 3:3 heard 50:20 57:1 65:20 hearing 29:12 heart 5:10 held 31:24 62:24 help 18:4 46:5 86:18 helped 46:9 Hess 72:3,9 73:3 high 82:20 hole 27:1 Honor 17:22 87:3 Honors 88:18 hope 24:10 hoped 63:5 hoping 47:11 horse 36:7 host 16:16 47:8 47:15 hosting 78:9 House 52:12 huge 11:14 hundred 60:18 hydrology 88:11 hypothetical 12:11 18:15 56:5 85:23</p>	<p>identical 30:21 39:9,18 75:10 75:12,15 identified 28:6 identifying 36:9 ignores 77:17 immediately 54:1 80:21 immunity 30:1 32:23 33:2 35:5 35:12 38:1,6,11 39:24 40:9 45:4 60:20 72:4,5,7 72:22,25 Impact 23:11 impair 60:10 impairing 22:14 impairs 22:11 implausible 18:12 implicit 20:13 implied 17:21 19:9 important 13:9 20:1 22:13 38:13 41:3,25 49:4 53:19 importantly 75:20 impose 35:14 41:11,16 60:18 81:9 imposed 3:13 8:16,17 69:6 imposing 60:15 61:8 imposition 42:25 60:14 impossibility 6:18 8:9,12 16:25 64:7 impossible 60:1 64:9 imprisonment 40:15 inappropriate</p>	<p>64:19 incentives 87:24 include 20:21 40:23 60:13 included 8:5 includes 40:22 including 25:25 40:21 42:5 60:15 incomplete 59:20 inconsistent 26:17 indebtedness 58:8 Indian 31:10 38:12,14 76:9 indications 5:16 indignity 75:23 individual 39:10 individually 73:16 industry 51:10 inescapable 3:20 infer 31:7 information 55:25 56:3 initial 7:23,25 51:18 initially 8:2 36:4 injury 86:5 insist 14:20 instance 30:22 33:10 insurance 62:11 intended 58:9 interest 11:5 45:8 interim 66:17 internal 21:8 interpret 53:5,8 interpretation 36:3 interpreted 59:23 interrupt 17:2</p>	<p>interstate 60:11 intervene 39:7 39:12 76:10 intervened 38:5 investment 26:25 invitation 34:25 invoke 72:25 involved 13:4 iota 32:3 irrespective 21:19 issue 3:25 9:17 10:6 13:2 20:2 30:1 32:21 33:2 issued 58:13 issues 35:2 38:8 51:8 52:21,23 71:15 it's 16:6 23:13 41:19 71:13 73:7,8 76:21 I'll 51:4,4 I'm 84:18</p>
	<hr/> <p>I</p> <hr/>			<hr/> <p>J</p> <hr/>	
				<p>January 1:9 84:4 join 73:20 joinder 35:25 joined 11:22 54:1 74:24 joint 57:20 84:5 jointly 46:15 judge 23:15,17 33:25 43:5,7,18 43:19 50:14 51:8 52:2,11,11 52:14,16,22 judging 54:17 judgment 23:4 39:12 51:6 judgments 60:21 judicial 38:9 75:24 July 3:22 28:10 jump 13:23</p>	

jumping 87:20	61:10,15 62:13	36:11,19 37:15	legislation 6:2	40:18
jurisdiction 32:7	62:22,25 63:3	37:16,17,21	16:17 47:24,24	limiting 60:13
jurisdictional	63:16 64:5,6,8	38:21 39:1,20	48:2	limits 60:17,19
32:21 33:4	64:20 65:12,14	40:1 41:2,13,17	legislative 43:11	61:16
Justice 1:18 3:3	65:20 66:5,16	43:22 44:1,13	legislators 61:5	line 4:20 10:16
3:10 4:10 5:7,8	66:22 67:1,17	51:14 52:9	legislature 21:7	74:23
5:15,23 6:6,8	67:20,21,24	54:18	21:16	list 31:1,2 68:15
6:14,21 7:5,11	68:2,8,12 69:13	knew 41:23	legislatures	lists 51:18
7:15,18,22 8:1	70:14,21,23	know 7:24 9:10	58:18	litigable 33:11
8:6,13 9:2,9,12	72:9,13 73:6,12	9:11 11:5 13:6	legitimate 33:19	litigant 71:19
9:21 10:20	74:6,18 75:3	15:6 16:7,9,13	33:20 86:9	76:5
11:11,15,16,24	77:2,8 78:4,23	21:21 25:6 26:8	legitimately	litigate 75:12
12:1,2,10,20,25	79:1,8,17,22	26:9 27:10,15	33:11	litigation 31:18
14:2,23 15:10	80:1,11,16 81:1	29:19 31:14	lend 21:2	34:1 73:19 74:3
15:21,23 16:20	81:5,12,17 82:1	40:2 49:7,16,20	lend-lease 20:25	86:8
16:23 17:2,5,9	82:6,11,16,21	50:2,23 51:7	let's 17:5,6 29:2	loan 25:2,20
17:16,24 18:14	82:24 83:3,8,11	56:11 60:7 61:6	86:5	loans 69:16,21
18:19 19:3,12	83:16,20 84:3	70:10,20,25	level 27:10 64:11	location 57:18
19:19,23 20:4	84:10,16,20,24	75:10 77:14	70:4	long 15:4 20:7
20:13,20,24	85:4,17,19,22	78:10 79:5,6	levied 83:24	26:20 74:1
21:5,11,14,15	87:4,7 88:9,19	82:16 84:11	levy 77:24 78:10	longer 12:17
21:23 22:16,23	justifiably 69:7	86:17	levying 77:18	13:17 48:25
23:1,8,14,18,21			liabilities 46:22	58:10 60:16
24:2,16,22 25:9	K	L	61:7	63:5 64:24
25:15,21 26:2,4	Kansas 85:20	language 5:22	liability 12:13	87:11
26:10,13,20	86:3	50:13 62:20	41:5	look 9:22 15:16
27:2,6,19 28:6	keep 9:5 10:22	lasted 29:17	liberated 57:15	31:19 42:1,9
28:14,17,20	17:16 50:3	late 9:3 62:6	license 4:6,8,13	86:5
29:2,5,8,14,25	59:25 63:6	Laughter 45:13	4:18 5:21 7:12	looked 17:9
30:3,11,19 31:4	80:15	law 19:14 39:24	7:14 11:2,2	lost 20:11 30:9
32:6,13,16,19	keeping 50:18	40:13 45:25	20:19,23 25:5	86:18
32:22 33:1,6,15	51:5 53:18 68:3	71:7	29:19 55:20	lot 50:25 52:20
33:18 34:4,7,15	keeps 77:13	laws 43:23,24	58:13 62:23	86:14
34:22 35:23	KENNEDY	44:2,3 50:21,24	68:25 86:21	Louisiana 31:13
36:18 37:14,17	12:25 30:19	50:25 52:9 54:2	88:3,7	39:2,3,14
38:16,23 39:20	31:4 34:4,7	leave 35:1 51:12	licensed 29:16	lower 87:10
40:11 41:9,14	38:16,23 56:5	led 24:25	licenses 15:19	low-level 13:16
43:3,17,24	56:23 57:4,6	left 66:12 69:18	licensing 4:24	46:1,2 59:18
44:12,17 45:10	74:6	69:23 70:19	55:25	60:5
45:14 46:5,8,18	kept 45:19 63:7	76:19 85:18,23	light 27:12 34:5	
47:1 49:10,13	key 46:17	86:17	44:21 69:9	M
52:15,19 53:1	kick 25:18	leg 55:16	lightly 41:7	magic 79:2
53:20,22 54:9	kind 13:19 24:18	legal 10:6 30:5,6	limit 61:9	Maine 76:14
54:12,23 55:14	71:19 74:3	30:13,15 32:10	limitation 61:25	major 65:7
55:22 56:5,23	Kneedler 1:17	46:16,24 69:20	61:25 62:2	making 74:3
57:4,6 59:12	2:5 34:17,18,22	81:24	limited 15:14	75:7 85:2 87:15

<p>manner 5:17 market 49:9 62:11 Maryland 31:13 39:2 massive 20:7 55:10 massively 28:11 master 3:19 4:3 6:8 30:5,17 31:23 32:3 33:24 35:2 37:6 46:4 47:5 53:11 69:18,23 75:14 Master's 35:3 65:22 match 31:3 match-up 68:15 material 3:17 matter 1:11 16:21 27:24 38:7 71:9 73:2 76:22 88:22 matters 43:6 mean 4:18 5:1 8:10 15:8,19 19:20 25:7 26:5 26:7 27:1 29:14 32:10 62:14 64:7 67:9 73:6 82:1,14 83:7 84:15 85:3,20 Meaning 70:17 means 5:17 20:19 58:20 79:8 meant 62:3 70:4 measure 86:4 mechanism 60:10 mechanisms 62:11 member 12:6 52:12 54:17 62:17 members 13:12</p>	<p>26:1 43:9 45:3 50:14 51:19,20 51:22 52:3 60:16 80:13 81:3 membership 42:12,19 43:2 44:7,11 51:16 51:23 52:17 53:2 54:21 81:20 memorandum 24:24 mentality 16:8 mention 40:21 merely 29:6 merits 32:20 36:8,8,16 middle 51:24 million 7:2,10,13 7:16 8:2 12:22 13:11,23,23 14:5,9,11 15:3 17:6,10 18:23 25:1,3,4 26:24 27:1,3,22,25 29:7,8 30:8,9 45:11,15,16,18 46:6 49:25 50:4 50:8,18 51:6 55:5,16 56:20 57:8,12,13 59:1 59:2,25 60:17 60:18 63:5,6 64:11,13 65:23 65:25 66:4,20 67:3,6,12,14 68:14,19 69:15 74:23 77:12,20 81:22 85:5 mind 23:12 40:14,24 41:1,3 84:2 minimum 31:12 58:25 minutes 77:4</p>	<p>misleading 45:20 missing 84:11 Mississippi 73:18,20 misspend 12:25 misspent 13:1,10 misspoke 7:16 misunderstood 65:13 mix 31:3 Mobil 21:25 23:6 model 44:25 45:6 51:11 54:19 modify 44:5 58:11 moment 17:3 46:13 58:21 Monday 1:9 monetary 35:7 35:14,17,17 41:5,21,22,22 42:22 money 4:12,19 9:24,25 10:4,9 10:10,11 12:12 12:23,23 13:1,1 13:6 14:7,16,19 15:5,19 17:7 18:4,6,7,16 20:16 21:3,7,17 22:15 27:13 28:19,22 34:8 34:10,12,14 38:18 40:14,19 40:22 48:4 53:18 55:5 56:7 56:13,15,17,18 56:24 64:2 66:11,13 67:2,5 69:25 70:6,6,13 70:15 77:12,15 77:25 78:1,1,3 78:8,16,17,17 79:20,22 80:13 80:14,16,17,18</p>	<p>80:24 81:2,3,5 81:11,13,18 83:6,8,22,22 86:18,21 moneys 8:20,22 83:24 money's 81:23 monies 5:4 monopoly 15:13 49:6 86:25 87:1 months 63:19 66:21 68:19 87:6,7,20 morning 3:4 motion 32:5 34:25 35:10 move 27:9 moving 88:6</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 narrowly 50:24 natural 39:5,10 naturally 52:10 nature 48:15 necessarily 68:11 75:14 necessary 19:13 20:23 47:21 48:10 49:15,17 59:17,18 61:18 63:25 78:19 need 33:3 76:12 needed 64:17 needs 30:4,12 negotiate 12:6 88:5 negotiated 16:1 neither 1:20 2:6 34:21 71:13 never 5:19 6:9 8:11 11:22,22 37:10 50:8 66:13 79:1 88:4 nevertheless 33:14</p>	<p>new 38:8 47:13 62:5 noise 87:15 nonjudicial 41:8 non-consenting 75:22 non-sovereigns 39:25 normal 82:15 North 1:6 3:5,11 3:21,24 4:5,8 4:11,14,17,21 5:6,19 6:2,17 6:19 8:8,10,11 8:21,21,24 10:2 10:21 11:20 12:16 13:12,22 14:18 16:11,11 16:15 20:11,14 21:6,8 23:4 24:4,7,19 25:2 25:8,9 26:5 27:9 32:4 35:9 36:25 44:21 45:18,18,25 46:7,11,14 47:13,18,23,24 48:2,4,5,6,17 53:12,18 55:12 55:16,18,23 56:6,12,14,16 56:19,19,25 57:7,9,13,19,22 58:3,13,23 60:9 60:24 61:1,2,13 61:17,24,24 63:2,4,7,15,18 63:22 64:2,10 64:12,14,22 65:2,8,10 66:12 66:16,19 67:2,4 67:12 68:6,17 68:21,23 69:8 69:19,24 70:1,4 70:25 73:19 78:21 79:16</p>
--	---	---	---	---

<p>80:23 81:6 85:12 86:16,18 86:19 noted 47:5,12 49:5 54:18 notes 47:25 57:23 notice 9:4 10:3 17:17,17 notification 69:2 noting 28:20 notion 77:12 86:19 notwithstandi... 33:12 39:7 novel 37:20,21 November 48:13 nuclear 13:16 nullity 45:2 number 39:3 72:1 77:9</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 objective 5:13 objectives 78:20 obligation 6:10 8:18,18 12:12 19:5 22:4 26:6 26:16 27:8 28:5 28:12 29:15,16 31:5 32:7 38:24 46:17,25 57:16 63:21 obligations 10:19 41:12,15 44:22 61:9 62:18 78:6 obliged 79:10 obligee 22:10 obliges 22:19 obligor 22:9 obstacle 16:23 obtained 62:24 obtaining 5:20 obviously 10:6</p>	<p>16:7 22:25 26:11 27:12 83:7 occur 30:4,12 occurred 55:22 66:10 70:19 October 48:12 offer 25:7,16,23 69:13,14 office 76:4 Oh 68:12 79:25 oil 21:25 22:6 31:12 okay 17:24 22:16 23:24 49:10,18 49:25 once 15:11 17:14 20:11 26:4 57:14 58:12 86:17 onerous 74:1 ones 15:24 23:15 33:16,17 on-site 13:16 open 4:15 9:14 13:2 31:24 57:17 63:7 opening 47:12 operable 61:13 operating 49:2 operation 15:10 57:25 operational 58:4 61:22 62:5 operative 16:3 opinion 19:7,11 52:15 60:7 opposed 27:12 options 58:1 oral 1:12 2:2 3:7 34:18 44:15 order 4:23 20:2 23:25 51:5 77:25 78:19 84:7 Orig 1:4</p>	<p>original 3:5 32:7 35:5,18 36:1,5 39:16 61:16 ought 71:24 72:6 73:1 74:15 85:13 outer 22:7 outset 79:15 overall 42:1 44:10 78:19 overrule 76:7,12 ownership 84:13</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 package 25:16 page 2:2 4:3 24:2 42:3,9,16 57:21 84:6 pages 41:18 52:20 paid 14:19 39:6 48:22 50:11,16 66:7 67:13 81:24 paint 10:1 Paragraph 68:22 parallel 31:6 38:24 parens 39:9,16 part 10:25 11:4 13:3,25 14:3 16:6 25:22 27:9 41:5 44:9 49:21 51:12 63:24 65:3 81:8 participants 10:9 participate 43:10 participated 34:24 participation 38:12 71:4 particular 16:13 20:3 27:16 31:1 80:9,21 85:14</p>	<p>87:2 particularly 40:18 parties 4:4 5:17 6:24 7:3 29:23 31:1 36:9,21,22 41:23 42:10 44:2,3 53:3 54:24 71:11 76:23 80:6 86:7 parts 54:21 party 1:20 2:6 9:18 10:7 19:13 31:1 34:21 35:10,16 37:4 42:4,19 51:25 52:2,9 53:14,15 54:2 75:25 76:11,19 77:22 78:12,14 79:4 79:19 80:6 83:4 86:5 passage 58:20 passed 16:17 22:1 passes 79:1 path 6:19 12:22 26:10 patriae 39:9,17 pay 5:6,25 10:9 15:2 16:14 25:17 51:1,21 67:3 69:15,24 70:2 82:22 paying 10:21 40:15 payment 7:2 51:25 66:8 67:7 67:15 payments 68:16 penny 55:11 people 65:25 74:23 people's 59:19 percentage 80:8 82:15</p>	<p>perfectly 86:9 period 4:7 11:5 66:18,23 68:14 permissible 13:17 permitted 22:2 39:6 54:8 permitting 60:14 person 43:14 perspective 3:13 3:15,18 pertinent 28:2 Phillips 1:15 2:3 2:10 3:6,7,9 4:10,21 5:11,22 6:7,13,16 7:1,8 7:13,17,20,24 8:4,10,15 9:9 9:14 10:5,24 11:14,17 12:1,4 12:18,21 13:2 14:2,10 15:8,22 15:25 16:4 17:4 17:8,15,18 18:10,17,21 19:6,18,24 20:6 20:17,22 21:4 21:10,13,21 22:21,24 23:3 23:13,16,20,24 24:21,23 25:11 25:19,24 26:3,8 26:19,22 27:4 27:14 28:4,16 28:24 29:4,13 30:2,10,15,24 31:11 32:12,15 32:18,25 33:5,8 33:16,23 34:6,9 34:16 36:12 47:23 49:5 63:11 69:14 75:16 77:4,5,7 78:9,25 79:6,11 79:25 80:3,20 81:4,7,15,19</p>
--	--	---	--	---

82:5,10,14,19 82:23 83:1,5,10 83:14,18 84:15 84:18,22 85:3,6 85:19,25 87:6 87:13 Phillips's 55:15 phrase 44:4 51:2 52:7,8 53:24,25 pick 61:5 picture 10:1 73:9 pierce 72:6 place 9:7 25:6,7 25:16 87:21 plain 5:23 plaintiff 36:16,19 37:2 Plaintiffs 1:4,16 2:4,11 3:8 68:22 74:21 75:1,16 77:6 plan 55:23 plant 49:15,16 61:12 82:2 play 31:16 plead 39:24 please 3:10 34:23 44:18 point 4:10,13,17 8:8 10:13 11:7 11:24 13:3 15:20 19:16 23:10,22 28:1 29:14 32:2,5 34:1 41:17 45:8 47:19 51:11 53:15 59:14 71:21 75:11 80:12 83:19,23 points 41:3 77:10 policy 35:24 political 59:16 politics 59:19 portion 43:1 portions 69:5 pose 17:22	posed 85:22 position 13:21 14:23 27:2,4 53:25 58:9 65:8 70:7 possibility 31:24 58:11 63:8 possible 36:15 58:10 60:22 62:9 63:8 67:10 posture 72:10 pot 81:23 potential 32:8 58:6 power 26:9,14,14 26:15 35:6,14 38:9 42:2,17,22 43:4,11,12,15 powers 10:25 42:13,15,23 43:1 48:1 54:21 practical 58:17 practice 74:4 precedent 19:3 preceding 52:8 54:1 63:24 precise 23:9 39:18 40:3 precisely 28:7 preclude 58:12 prefer 37:24 preliminary 35:3 premature 33:25 present 75:22 presented 30:6 presents 10:7 pretty 12:10 26:11 31:19 43:6 prevent 17:20 previous 69:10 70:2 previously 40:19 price 15:15 primarily 35:2 82:12	primitive 40:16 principal 35:8 principle 38:13 40:7 76:13 principles 37:25 40:8 print 15:19 86:21 prior 4:22 20:14 22:17 67:15 68:9 private 31:12 69:21 71:18 73:11 75:22 76:5 83:9,11 pro 80:7 Probably 7:13 problem 13:16 18:17,21 28:14 31:22 58:19 59:16 85:15 86:2 problems 69:20 proceeding 36:2 process 4:15 7:4 16:5 46:9,9 55:10,25 56:19 61:3 63:24 processes 75:24 production 22:6 project 6:23 7:7 8:3,14,16,23,25 15:7 18:4,7 24:8 28:23 59:2 63:9 projects 15:1 promise 22:13 promoting 5:13 proper 75:2 properly 13:6 36:23 37:4 56:14 proportion 79:5 proposal 24:19 24:23 61:14 65:6 69:17,19 proposals 65:6	proposed 61:6 61:18 proposing 35:24 proposition 6:15 21:16,22 prospect 58:24 prospective 41:6 provide 4:24 25:13 34:13 41:21 48:14 61:4 63:25 66:9 provided 8:20 14:19 47:17 56:15,17 75:8 78:15 provides 42:25 48:4 51:20 87:1 providing 16:19 24:25 25:2 48:4 64:17 provision 17:13 52:13 61:20 69:9 78:4 79:2 80:10 83:20,23 84:19 provisions 60:13 public 16:21 pull 87:14 pulled 62:1,7 pure 30:12,15 56:4 71:14 purpose 4:12 5:13 78:19 purposes 46:1,2 55:9,13 66:15 71:8 pursue 4:6,13 pursuing 55:20 put 7:19 19:21,21 25:5 29:2 30:16 38:7 66:12 putting 36:6	qualifications 43:8,13,18 44:5 52:2 quarter 59:3 quasi-contract 71:1 76:18,20 question 9:15,17 10:6 16:9 17:23 20:7 25:12 27:15,20 28:5 30:1,13 32:10 32:20 33:3,13 33:18,20,22 35:25 36:24 37:3,7,13,20,22 37:24 39:21 44:20 45:12 50:1,19 51:3 53:17 55:4 70:15 71:5,7,15 79:11 84:4 questions 30:5,6 35:4 36:2 quit 44:21 48:18 quite 5:23 14:3 18:1 28:6 quote 13:10 47:20 51:13 52:13 68:21 quoted 50:13
<hr/> R <hr/>				
R 3:1 radioactive 59:18 82:4 raises 71:5 ran 51:14 range 16:24 rata 80:7 rate 65:10,11 70:2 ratified 21:1 ratio 38:19 63:23 reach 37:2 reached 37:11 reaching 36:8				
<hr/> Q <hr/>				
qualification 43:19				

read 40:12,20 50:15,20,23 51:15 52:10 61:6 66:25 79:12 80:18	refunds 39:14 refused 20:11 24:21 29:18 regarded 40:5 regarding 14:25 region 15:14 49:6 regional 47:13 regulated 51:10 reinforces 42:8 rejected 72:1 rejecting 35:11 relating 43:25 44:4 50:22 52:5 52:7 53:24 54:2 54:5,13 relevant 30:17 43:2 relied 69:7 relief 35:17,18 41:6 relies 77:11 84:12 relying 54:23 84:18 remain 45:1 60:12 83:25 remaining 66:21 69:22 remains 16:9 28:15 70:17 88:10 remedies 41:22 remedy 3:25 27:16 34:13 37:9 85:14 remember 19:10 26:22 31:23 renew 32:4 repay 58:7 repealing 19:14 repeated 3:15 repeatedly 6:4 28:21 47:20 77:14 reply 64:21 65:1	report 4:4 35:3 65:22 represent 77:21 78:11 representatives 52:13 73:17 represents 79:3 82:25 83:1 repudiate 5:3 9:19 11:6 repudiated 20:9 24:6 28:12,12 repudiating 10:2 repudiation 3:17 10:18 20:7 22:4 24:14 request 68:23 74:2 requests 76:3 require 15:16 required 36:14 39:13 45:1 53:15 64:4 requirement 49:1 requirements 43:20 44:6 50:15 52:4 54:5 54:13 requiring 60:20 resist 60:1 resolved 21:25 71:25 respect 7:6 19:25 23:9,21 28:7 35:25 37:12 38:6,14 42:17 43:4 44:7 45:20 46:22 52:24,25 53:3 71:23 77:18 84:4 86:15 respond 77:9 response 13:15 60:8 65:14 69:1 responsibilities	3:23 11:10 14:21 46:12 responsibility 4:22 5:6,24 6:5 16:10,18 24:15 28:10 39:17 79:14,15 84:1 88:2 rest 50:21 restitution 74:15 75:7 76:21 85:9 86:2,12 resulted 46:10 retained 56:1 return 55:4 85:4 revenue 30:9 58:7,16 revenues 32:14 47:14 64:24 reverse 51:5 revisit 32:4 revival 55:17 revocation 42:6 42:11 54:25 revoke 42:18 right 4:21 7:17 8:8,12 9:9,18 10:5 12:4 17:8 17:15,18,24 18:17,24 19:18 20:4 21:10,14 23:18 24:21 25:19,24 26:22 29:4 30:10,24 32:12,25 33:5,8 33:23 36:4 37:19 44:1 47:4 47:8 48:18 51:4 53:11 57:1,6 60:14 61:11 62:1,2,12,15 65:18,21 67:22 67:23 68:3 71:10 72:20 80:20 81:7 82:5 82:23 83:5,10	83:14 84:24 85:1 86:9 88:15 rights 42:5 risk 87:13,19 road 73:5 ROBERTS 3:3 27:2,6,19 34:15 44:12 45:10,14 77:2 81:12,17 88:19 role 76:9 rough 45:7 roughly 60:6 route 60:2 routes 74:17 rule 35:24 74:7 74:10 85:9 run 24:10 49:23 49:24 59:25 73:15 running 26:25 50:4
<hr/> S <hr/>				
S 1:17 2:1,5 3:1 34:18 safety 14:15 16:22 59:19 sake 70:8 same-claim 74:7 same-claims 71:19,22 sanction 40:17 40:24 53:5,6 84:6 sanctioned 11:8 18:25 sanctions 3:13 23:25 35:7,15 40:12,13 41:21 42:2,5,7,17,22 45:3 54:21 56:9 60:15,15 satisfied 29:23 satisfies 78:6 saying 6:4 8:9,13				

<p>13:1 22:1 24:13 53:11 66:1 77:13 79:12 81:1,17 82:24 83:6 says 4:3 12:14,16 17:14 19:8,20 23:15,19 40:21 42:10 43:18 46:21,24 48:11 50:12 51:19,24 69:23 72:3 75:14,16,21 77:18 78:5,9 79:3 84:19 Scalia 5:8,15,23 11:11,15,16 12:10,20 19:3 19:23 26:2,4,10 26:13,20 28:20 53:20,22 54:9 54:12 62:13,22 62:25 63:3,16 64:6,8 65:14 66:16,22 67:21 67:24 68:2,8,12 78:23 79:1,8,18 79:22 80:1,11 87:4,7 scorched-earth 74:3 score 88:7 seated 43:14 second 15:2 35:12 40:15 61:12,21 section 43:4 53:23 80:17 see 9:24 17:13 30:6 31:7 49:10 51:2 seek 4:18 35:17 seeking 33:21 38:17 selected 15:2 sense 8:7 48:15</p>	<p>52:12 54:10 71:1 80:2 sentence 19:15 19:22 50:21 separate 9:16 55:8 66:14 73:11 75:9 September 48:13 sequence 51:17 series 59:21 set 42:14 55:7 65:5 sets 48:1 seven 58:18,18 seventh 54:20 share 81:14 shareholders 73:8 sheds 44:21 shelf 22:7 short 74:16 shortfall 69:18 shorthand 45:19 show 31:5 38:24 46:13 showed 68:17 shows 7:6 30:20 41:22 65:21 shut 88:8 shutting 24:8 side 22:2 25:25 64:7 71:9 sight 70:10 sign 57:5 signed 25:22,23 significance 48:24 significant 6:22 47:7 69:18 similar 21:6 simple 44:19 71:7 simply 3:22 5:1 12:16 14:14 19:16 71:14 74:25</p>	<p>single 45:20 sink 28:22 sister 13:25 71:11 74:2 76:3 sit 9:24 31:17 site 26:25 47:14 56:2 61:14,18 69:12 78:21 80:23 sites 15:17 22:7 situated 55:18 situation 17:22 18:5 72:19 86:16 situations 72:18 six 13:11 52:19 87:6,7,20 slippery 73:5 sole 23:17 51:8 52:14 solely 37:1 77:14 Solicitor 1:17 solve 59:15 somebody 68:2 83:22 sorry 7:15 15:22 37:16 78:25 sort 31:17 39:21 40:15 86:15 Sotomayor 6:6,8 6:14,21 7:5,11 7:15,18,22 8:1 8:6,13 16:23 17:2,5,9,16,24 18:14,19 28:14 28:17 29:2,5,14 29:25 30:3,11 32:6,13,16,19 32:22 33:1,6,15 33:18 35:23 36:18 46:5,8,18 47:1 64:5 70:14 70:21,23 78:4 84:10,16,20,24 85:4,17,19,22 88:9</p>	<p>sounds 12:10 67:9 source 47:14 48:21 64:23 South 11:18,21 11:24 48:19,20 48:23,25 49:2 57:14,24 58:5 58:23 59:3,11 62:1 63:13,14 64:16 75:5 80:20,22 81:2 82:3 83:13 86:17 87:10,13 87:17 Southeast 3:11 11:20 25:1 sovereign 30:1 32:23 33:2 38:11 45:4 60:20 72:4,5,7 72:22,25 special 3:19 4:3 6:8 30:4,17 31:23 32:3 33:24 35:1,3 37:6 53:10 55:8 65:22 77:19 82:8 specific 4:2 21:22 23:22 24:4 56:3 80:10 84:8 specifically 24:12 37:24 41:21 86:25 speculation 56:4 speed 47:11 spend 18:5,6 65:11 70:13 spending 63:5 spent 13:6 55:12 56:18 63:6 66:19 67:6,14 68:17,18 70:15 70:16 86:14</p>	<p>squandering 64:2 stage 35:1 38:3 85:10 stakes 87:14 standard 86:2 standards 85:15 standing 37:18 72:15 stands 76:13 start 13:20 starts 43:18 state 6:17 12:14 12:21 13:19,21 14:13 15:1,2,4 15:7 16:16,18 19:13 20:14 21:17,18,18,20 23:8 37:19 39:13,16 40:5 41:5 42:4,19 44:3 45:6,17 47:8,15 49:17 49:22,22,23 51:9,18,25,25 53:6,14 56:18 56:24 57:2,10 58:2 59:4,23 61:4,8,22 71:12 71:14,17,25 72:8,21,21,21 72:23 73:4,16 73:25 74:2,4,7 74:9,24,25 75:23 76:1,1,4 78:9 79:5,24 80:23 statement 4:7 45:17 statements 3:15 states 1:1,13,19 5:12 8:17 11:19 12:6 13:25 14:24 19:5 23:6 25:2 26:24 30:8 30:20 32:1,9,13</p>
--	--	--	--	--

33:10,19 34:2	65:16 68:24	suggestion 60:9	49:25 50:8 56:5	31:20,22 62:8
34:11,11,19,24	69:12 70:8,9,12	66:11	59:13,24 64:3	66:11 68:14
35:16,21 36:13	Stevens 14:2	suggests 5:18	65:7,16,24 66:1	70:10,23,24,25
36:16,19 37:2	16:20 39:20	26:15 67:11	69:11,11 81:13	73:2,8 74:19
37:10 38:4,5,19	80:16 81:1,5	suit 39:2,5 71:10	86:18 87:17,20	75:3 79:11
38:20 39:3,5,9	stop 87:14	72:1,2,23 74:14	taken 14:11 17:6	80:10 81:22
39:24 41:7,10	stopped 17:12	74:24	70:8	82:2,17
41:12,15 43:8,9	24:5	suits 75:22	talk 12:15	thing 9:5,17
43:25 44:25	storage 13:16	sums 38:17	talked 50:24	17:18 23:11
45:1,8,17,22	60:5	63:25	80:17	40:13 88:1
46:6,21 47:7	store 59:17	sunk 17:7 26:24	talking 26:23	things 9:7 39:1
48:8 49:11,14	straight-up 75:7	55:20	27:17	40:22,23,25
50:22 51:19,20	stream 58:7	supplemental	talks 50:21	67:7,7 73:23
51:22 52:2,9	strikes 18:11,13	57:20 84:5	tax 39:3,6	88:12
53:7 54:2 58:21	86:15	SUPPORT	taxpayers 4:12	think 5:15 6:21
59:21 60:1,4,12	strong 26:11	34:21	39:14 64:3 70:6	7:8 8:10 9:14
60:16 61:23	structure 35:5	supported 27:23	technical 85:15	13:4,8 14:10,15
62:4 71:7,10,11	42:1	supporting 1:20	tell 32:2 33:1	14:17 16:4
73:7,9,10,13,14	studies 55:11	suppose 21:1	tells 79:13,18	17:21,22 18:21
73:19,21 74:12	88:11,11,13	74:6,6,10	temptation 26:10	19:1 22:21 24:1
75:12,19,22	subject 28:24	supposed 20:18	tender-hearted	24:25 25:3
76:8,19,23	38:7 42:5 55:3	41:9,10 50:5	26:5	27:14,19,20
77:13,16,22	62:18 71:10	Supreme 1:1,12	terminated 9:8	28:4,6,25 29:13
78:1,1,5,12,14	76:22	surcharge 82:8	terminates 87:5	30:15,16,17
78:18 79:2,4,10	subjecting 75:23	surcharges 69:6	terminating 69:4	31:11 33:21,23
79:14,19,20,23	76:1	77:19 78:10,11	termination	34:12 36:11,17
80:6,14 81:13	submit 58:17	81:10	42:12 55:1	37:11,25 38:13
81:20 83:2,4	submitted 88:20	sure 7:20 8:20	terms 11:1 28:19	38:21,23 39:15
84:1,12 85:1	88:22	14:4 18:8 36:7	29:9 31:3 39:23	39:17 40:1,2,5
State's 38:10	submitting 74:1	40:23 57:1	40:3 46:19	40:8 41:3,4,6
59:24 87:18	substantial	86:17	82:14 88:15	41:25 42:8,21
status 72:5	10:17 47:18	surely 39:8 50:16	terrorist 13:15	43:6,14 44:5,8
statute 22:1	69:23 71:5	72:5	Texas 13:20 16:4	44:9,19,21
stay 58:22 59:8	substantially	surprising 47:6	thank 3:9 34:15	50:16 51:13
59:13	22:11 58:1	47:16	44:12 77:1,2,7	53:9 56:4,21
staying 63:12	substantive 36:2	survive 76:14	88:18,19	63:12 64:21
81:23	subtle 29:13	suspension 42:5	that's 13:21	65:1 71:4,25
step 48:11 50:3,3	sue 37:19 71:17	<hr/>	23:24 35:16	72:10,13,20,21
50:7,18 65:17	71:24 72:11,20	T	38:13 54:7 57:4	72:22,24 74:1,7
66:3,3	74:9	T 2:1,1	71:25 73:7 74:4	75:9 76:4,6,12
steps 4:5,8,23,25	sued 45:4	take 4:5,23 9:1	80:16,18	76:16,17,24
20:12,12,18,20	suggest 26:13	11:19 15:4	theories 76:2	79:8,11,17,18
22:18,19 28:11	suggested 36:12	17:10 18:7	theory 84:12,14	81:15 85:6,7,12
29:16,18 46:12	63:11	20:12,17,18	84:23,25	86:10 88:15
62:20,21,25	suggesting 29:6	22:18 28:11,19	there's 16:14,25	thinking 49:13
63:1,18,20 64:3	32:16	29:15,18 46:12	17:23 20:6	thinks 50:10

third 47:15	trouble 12:17	8:24 9:19 12:24	68:8,8,8 78:23	we're 85:10,10
thought 8:1 25:6	truck 82:3,21	14:18	waive 45:3	87:17
50:17 65:14	true 15:17,18	unique 86:3	waiver 60:20	we've 26:25 27:1
69:20 72:2	trustee 76:9	United 1:1,12,19	walked 88:4	27:22
thousand 10:22	truth 79:7	23:6 33:9 34:19	walking 18:24	We'll 9:24 49:18
27:18	try 8:7 14:7 33:25	34:24 36:13	46:7	whatsoever
three 13:5 41:19	85:13	38:4 60:4 71:11	WALTER 1:21	10:10 50:11
51:20	trying 41:14	76:8	2:7 44:15	55:13 61:16
throwing 4:11	58:25 74:13	unjust 18:3 56:8	wand 79:3	white 34:5
thrust 44:10	85:21 88:5	56:11 70:18	want 15:15 16:14	who's 43:13
Till 65:10	turn 25:10 49:23	unlimited 15:14	18:12 25:11	willing 63:22
time 4:23 6:24	71:3	unrelated 86:6	28:22 41:11,15	65:11 70:1
12:14 16:2	turned 16:21	unwilling 70:3	53:17 56:23,25	willingness
26:21 28:21	24:20 25:14	up-front 9:22	60:24 76:7	63:23
32:23 35:11,11	turns 18:8,19,22	use 8:22 56:1	81:14	win 20:1,2 23:2,2
42:25 45:9	twice 24:13 76:5	58:15	wanted 41:24	23:3
51:14 61:12	two 26:17 35:8	useful 56:22	84:3	wind 75:11,15
62:4 65:22,25	39:1 72:18	60:10	wants 59:20	withdraw 10:14
67:6 86:14	73:15	users 55:6	washed 70:16	11:6,25 12:14
88:17	typical 82:13	Utah 15:18	Washington 1:8	19:14 20:9
times 7:23		utterly 18:12	1:15,18,21	26:14,15,21
title 42:9	U		15:18 87:16	45:6 47:8 48:19
today 13:12,22	ultimate 5:13	V	wasn't 16:11	49:12 53:12
29:19 35:8	28:5	v 1:5 3:5 31:13	50:6 62:3 72:10	58:3 60:14
88:14	ultimately 8:22	33:9 36:13 38:2	72:11	61:12,22 62:1,4
told 9:21 59:22	78:2 79:21	39:2,19 76:14	waste 4:6 11:3,13	62:12,14,15,16
tomorrow 13:15	80:22 84:1	85:20 86:3	11:18 13:17	63:3 87:4
total 22:10 78:11	unable 70:3	valid 71:12 88:14	46:1,3 57:9	withdrawal 9:15
82:9,11	unbondable 62:8	value 22:11,14	59:18 60:5 64:1	10:15 12:15,16
totally 9:22 20:10	underlying 22:4	70:18,22,25	80:8 82:4 87:18	12:19 20:15
73:7	understand 6:4	vehicle 34:13	87:22	22:18 42:11
tougher 14:11	14:3 15:24 18:1	vehicles 58:9	wasteful 64:19	45:2 47:5 54:25
toughest 19:15	21:11 46:19	viable 32:8	70:13	57:24 58:12,24
transmit 53:7	78:24 84:10	view 4:17 27:22	wastes 11:19	61:17 62:3
transmittal 69:4	understanding	violated 36:25	13:17 87:2	64:15
treasury 6:11	24:24 44:22	violation 24:14	waves 79:2	withdrawing
77:15	46:14 59:20	37:6	way 6:23 7:2 13:8	17:12,13 61:19
treat 41:10 51:9	77:23	Virginia 59:5	16:15 29:10,23	withdrawn
treated 71:17,18	undertake 49:18	virtually 15:14	31:16 39:18	28:21 47:19
treating 73:4	undisputed 3:18	76:11	80:3 83:7 85:14	48:25 70:11
treaty 21:1,3,9	4:7	vote 73:16 80:5	86:9 88:15	withdraws 12:24
tribes 31:10 38:8	undoubtedly	voted 43:14	went 39:4 45:24	withdrew 19:17
38:12,14 76:9	36:17,20 72:7	73:18,21	55:6 56:14 62:7	29:17 48:19,20
76:10	unfortunate 15:1		62:16 66:13	57:15
tribunals 75:24	16:12	W	67:3	word 40:12,12,24
trigger 27:8	unilaterally 8:17	wait 15:5 24:10	weren't 86:7	words 27:7 54:2

67:2 69:10 work 27:11 33:16 82:1,2 working 6:15 15:9 world 57:17 worth 12:17 14:8 worthless 70:5 wouldn't 8:15 9:8 40:20 72:24 76:12 79:7 86:7 86:22 87:12 writes 57:22 wrote 24:13	\$200 15:3 \$21 25:1 69:15 \$25,000 45:22 57:3 74:13 \$3 64:11 \$34 25:4 56:20 57:8 \$4 67:3 \$6 68:14 \$7 64:13 65:23 65:25 67:6 \$75 7:10 59:1 \$80 7:2 12:22 13:11,23 14:4 26:24 27:1 30:8 45:11,15,16,18 46:6 49:25 55:5 55:15 59:25 77:12,20 81:22 85:5 \$80,000 55:20	1995 12:1 48:19 87:25 1996 3:22 47:10 57:20 1997 3:22 4:9 8:23 12:2 20:8 23:5 24:17 28:10 29:18 65:15 69:3 87:24 1998 66:9 67:14 1999 4:9 20:8 23:5 28:10 70:16 87:25	7 7 42:1,9,12 44:10 54:24 55:1 66:4 7(C) 23:20 43:4 43:15 44:9 51:11,12,15,17 53:22 7(F) 35:15 42:2 42:20 7(H) 61:20 77 2:11
<hr/> X x 1:2,7 25:17	13:11,23 14:4 26:24 27:1 30:8 45:11,15,16,18 46:6 49:25 55:5 55:15 59:25 77:12,20 81:22 85:5 \$80,000 55:20	<hr/> 2 2 9:3 10:23 28:8 62:16 63:5,17 67:12 2-year 23:22 20 8:2 15:10 56:4 2010 1:9 223 59:2 26 41:18 27 41:18	<hr/> 8 8 63:25 70:2 80 14:9,11 15:6 17:6 18:22 29:8 50:4,8,18 51:5 57:12 88 48:12 89 48:12
<hr/> Y year 10:13 29:20 63:6 64:11 66:20 67:4 years 9:3 10:23 15:6,10 19:8 22:17 49:22 55:22 56:4 59:25 62:17 63:17,25 70:3 88:12,14,16 yielded 16:2 you're 81:1 you've 18:2	<hr/> 1 1 74:23 10 4:3 55:21 77:4 10:06 1:13 3:2 100 15:6 11 1:9 11a 42:16,18 11:37 88:21 12 55:21 88:14 88:16 12A 77:17 120 17:10 13 65:5 131 72:1 132 1:4 3:4 143 57:21 15 56:3 17a 42:10 19 63:19 66:21 68:19 19a 42:3 19th 68:24 70:11 1981 59:6 1992 49:3	<hr/> 3 3 2:4 30 8:2 61:21 31 49:3 323 84:7 34 2:6 7:13 57:13 34,000 7:12	<hr/> 9 92 48:13,13 96 65:5 97 9:15 10:3 62:16 67:2,5 98 65:15 67:2,5 84:5 99 84:7
<hr/> Z zero 63:1	<hr/> 1 1 74:23 10 4:3 55:21 77:4 10:06 1:13 3:2 100 15:6 11 1:9 11a 42:16,18 11:37 88:21 12 55:21 88:14 88:16 12A 77:17 120 17:10 13 65:5 131 72:1 132 1:4 3:4 143 57:21 15 56:3 17a 42:10 19 63:19 66:21 68:19 19a 42:3 19th 68:24 70:11 1981 59:6 1992 49:3	<hr/> 4 4 42:14 49:22 4(E)(11) 42:16 4(H)(2)(b) 77:17 400 24:2 400-odd 10:22 412 84:8 44 2:8 460 68:22	
<hr/> \$ \$1 27:21,25 \$1,000 82:18 \$10 30:8 \$10,000 82:18,22 82:25 \$100 7:16 \$13 25:3 \$134 13:23 \$2 67:14 \$20 27:3	<hr/> 1 1 74:23 10 4:3 55:21 77:4 10:06 1:13 3:2 100 15:6 11 1:9 11a 42:16,18 11:37 88:21 12 55:21 88:14 88:16 12A 77:17 120 17:10 13 65:5 131 72:1 132 1:4 3:4 143 57:21 15 56:3 17a 42:10 19 63:19 66:21 68:19 19a 42:3 19th 68:24 70:11 1981 59:6 1992 49:3	<hr/> 5 55 84:6	