OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BARBARA LANDGRAF, Petitioner v. USI FILM PRODUCTS, ET AL.; and MAURICE RIVERS AND ROBERT C. DAVISON, Petitioners v. ROADWAY EXPRESS, INC.

CASE NO: No. 92-757 and No. 92-938

PLACE: Washington, D.C.

DATE: Wednesday, October 13, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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BARBARA LANDGRAF, :

Petitioner :

v. : No. 92-757

USI FILM PRODUCTS, ET AL.; :

and :

MAURICE RIVERS AND ROBERT C. :

DAVISON, :

Petitioners :

v. : No. 92-938

ROADWAY EXPRESS, INC. :

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Washington, D.C.

Wednesday, October 13, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

ERIC SCHNAPPER, ESQ., New York, NY; on behalf of the Petitioners.

GENERAL DREW S. DAYS, III, ESQ., Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting the Petitioners.

GLEN D. NAGER, ESQ., Washington, D.C., on behalf of the

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SUITE 400
WASHINGTON, D.C. 20005
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Respondents.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 92-757, Barbara Landgraf v. USI Film Products, and 92-938, Maurice Rivers and Robert Davison v. Roadway Express.

Mr. Schnapper.

ORAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONERS

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

The question here is whether sections 101 and 102 of the 1991 Civil Rights Act apply to the claims in these cases, both of which arose prior to November 21st, 1991, the effective date of the Civil Rights Act.

With regard to Rivers, the practical question is whether in the future this and other section 1981 cases which arose before -- prior to November 1991 will be governed by section 101 of the '91 act or by this Court's 1989 decision in Patterson, which the Civil Rights Act overturned.

With regard to Landgraf, the practical question --

QUESTION: I don't think that the Civil Rights overturned our decision. It simply recognized that

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Congress had passed a statute which was broken and that it ought to be fixed.

MR. SCHNAPPER: I --

QUESTION: It's a very fundamental distinction.

MR. SCHNAPPER: Well, I'll accept your characterization of it.

With regard to Landgraf, the practical question is whether plaintiffs who are injured by intentional acts of discrimination occurring prior to November, 1991 can obtain the additional remedies provided by section 102. If section 102 is not available, then petitioner Landgraf, who has established that she was the victim of intentional discrimination, will have no remedy whatsoever.

There are two distinct reasons why we maintain that section 101 and 102 --

QUESTION: In one of the two cases, Mr. Schnapper, the right to jury trial is involved, isn't it?

MR. SCHNAPPER: If section 102 applies, then either party could request a jury trial, that's right. And so that's raised in the Landgraf case.

QUESTION: In Landgraf, right.

QUESTION: That right to jury trial is inseparable from the substantive right to damages.

MR. SCHNAPPER: That's right, that's right. It's only if there's a right to damages that the right to

jury trial is available to either side. There are two distinct --

QUESTION: And on that point, if the plaintiff prevailed there would have to be an entire new trial, because the defendant also would have a right to jury trial. Is that not so?

MR. SCHNAPPER: We don't believe so, Your Honor. The bench trial that was conducted prior to the adoption of the Civil Rights Act established liability, and we believe that under the reasoning of this Court's decision in Park Lane Hosiery, that estoppel by judgment precludes either side --

QUESTION: How could there be estoppel when the defendant succeeded -- won the judgment. You can't appeal from an adverse portion of an opinion if the judgment is in your favor. Defendant, in that case, not being in a position to appeal the judgment in defendant's favor, then in fairness, must be able to have a whole new trial.

MR. SCHNAPPER: Your Honor, in the Landgraf case the judgment was in the plaintiff's favor. The district judge found that there had -- that there was a pattern of sexual harassment and the defendant could have cross appealed on that issue.

QUESTION: That was not the -- what was the ultimate judgment in the district court? I do not think

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there was a judgment entered for the plaintiff, was there?

MR. SCHNAPPER: There wasn't -- there wasn't judgment entered for the plaintiff. The court found there had been a violation of the law and --

QUESTION: Yeah, and one appeals from a judgment, not from an opinion and not from a finding. You can't appeal -- if you win the judgment, as far as I understand it, you can't appeal from an adverse finding made along the way. The judgment winner can't appeal even though there was a finding -- an intermediate finding against the judgment winner, isn't that correct? You appeal from a judgment, not from an opinion and not from a finding.

MR. SCHNAPPER: I believe, Your Honor, that -- that when we were in the court of appeals arguing that even prior to the Civil Rights Act we were entitled to greater relief, the defendants could have argued that we were not entitled to any relief because the decision as to liability was incorrect. And, in any event, that issue could be addressed on remand.

QUESTION: There is the further point --

QUESTION: It's a fairly important issue. It seems to me you wouldn't have to come down with an all or nothing answer here that the act -- based on when the wrongs, alleged wrongs occurred. But at least to the jury

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trial and damages remedy, if the trial had already taken place that would be a more appropriate place to divide the effectiveness.

MR. SCHNAPPER: We view the matter differently, Mr. Chief Justice. Our view is that as long as the question of what the remedy should be was in dispute, which it was at the time the act was adopted, that the plaintiff ought to be able to invoke the statute.

QUESTION: Well, what if Congress had done just the opposite of what it did here? Supposing before the most recent act there had been a right to jury trial and afterwards the Congress says no, there's no longer a jury trial, and the plaintiff had already had a jury trial in which she'd been awarded damages, would you say then that under -- the new act would apply and the jury trial would be cancelled out?

MR. SCHNAPPER: No. No, our view is that so long as the right manner of trial -- the manner of trial was correct under the law as it stood at the time of the trial, that that isn't -- that that method of trying a case doesn't -- isn't reopened. I mean, it -- this cuts both ways. In the Landgraf case the petitioner lost on some issues and won on others. We're not here claiming that we're entitled to go back and retry the issues we lost.

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QUESTION: But you are claiming you should go back and be able to have a jury trial?

MR. SCHNAPPER: Oh, we're claiming we have a right to go back and seek additional relief in the form of damages. If we are allowed to do that, either party could then ask for a jury trial. But it would all -- the hearing --

QUESTION: Which they wouldn't have done before the act was amended.

MR. SCHNAPPER: Right. But the issue to be tried on remand is not going to be liability, it's going to be damages, which is an issue that was not tried at all the first time around.

QUESTION: And you don't recognize the defend -- that a defendant would have an argument, well, I'm entitled to a jury trial too. And it isn't often that you would bifurcate liability and damages, because the two are -- often intertwine.

MR. SCHNAPPER: Well, it has, however, happened. This is, in effect, what happened in Park Lane Hosiery where there was one proceeding properly before a judge in which liability was established and then subsequent proceedings invoked that judgment.

QUESTION: Yeah. Well, there was no judgment. There was never a judgment for the plaintiff in this case.

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The court of appeals affirmed a district court judgment for the defendant, and that's quite different from what was involved in Park Lane.

MR. SCHNAPPER: Well, we view the matter differently.

QUESTION: Do you have any authority for a -- an appeal from a favorable decision, where a party is allowed to appeal from a favorable decision?

MR. SCHNAPPER: Now, I'm not sure whether this precise circumstance has arisen. It --

QUESTION: But I don't want to sidetrack you on that anymore. But I'm not aware of any such authority.

MR. SCHNAPPER: Well, let me also say that it's not necessary at -- in this case and in this present posture, for this Court to address that collateral judgment by estoppel issue. We think that could be dealt with on remand. The broader question here is whether the statute can be invoked at all. I think that's the issue which requires resolution here.

The linchpin of our argument regarding the structure and language of the statute is the fact that there are two expressly prospective provisions in the act. Section 109(c), with regard to extraterritoriality, provides that that section will not apply to conduct occurring prior to the effective date of the statute. If

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petitioner Landgraf had worked for USI in Mexico she could not invoke the statute. Section 109(c) would apply. But in this instance respondent USI can't invoke section 109(c) because the petitioner worked in a plant in Texas.

Similarly, there is a second expressly prospective position -- provision in the statute, section 402(b), which expressly exempts from any application of the act any preexisting case that meets three requirements: that it was filed before 1975; that the first decision in the case happened after March of 1983; and that it's a disparate impact case.

QUESTION: Do you agree that that applies to -- so far as you know, to only one possible party?

MR. SCHNAPPER: That was the understanding of Congress and that's our understanding.

In this -- in this case, Rivers' and Landgraf's case meet the second requirement of section 402(b) but don't meet the first or the third requirement.

Because neither of the expressly prospective provisions are available to respondents, this case is governed by section 402(a). It's our contention that section 109(c) and 402(b) are dispositive of the meaning of section 402(a). There are a number of different, well established rules of construction which we think apply here.

QUESTION: Well, section 402(a) doesn't -- is not clear, is it, in telling us whether it can be retroactively applied? I mean theoretically the statute --

MR. SCHNAPPER: Well --

QUESTION: -- could become effective on the date of its passage but not be retroactive under that language.

MR. SCHNAPPER: Well, our -- if all we had here was the language take effect upon enactment, we would not have a strong argument.

QUESTION: Yeah.

MR. SCHNAPPER: But we have other provisions in the statute, and here, as in --

QUESTION: Well you rely on these two, 109(c) and 402(b), exceptions --

MR. SCHNAPPER: Well, we also --

QUESTION: -- for the meaning of the 402(a).

MR. SCHNAPPER: Yes. But we also rely on the language of section 402(a) which begins: "Except as otherwise specifically provided." The only plausible reference of that clause, we think, is section 402(b) and 109(c). Now, if that's the reference, the word, the ordinary meaning of the phrase "except as otherwise provided" is that 402(a) is different than those exceptions. So we do rely in part on the language of

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section 402(a).

As I was saying, there are a number of well established rules of construction which we contend apply here. The rule that expressio unius est exclusio alterius, the rule in Russello, that where a provision such as 109(c) is in one section of a statute but not another, that that decision was deliberate.

We've noted in our arguments that if the view of respondent were accepted that 402(a) means that the statute is applicable to any preexisting claim, then section 402(b) would be entirely redundant, as would section 109(c). The construction which we advance has the effect of giving independent significance and force to all provisions of the statute.

QUESTION: There is some redundancy in this -- in this act. 110(b) says exactly the same thing as 402(a), so it isn't the most carefully drafted piece of legislation. There's no reason to have this -- the same sentence in 110(b) as there is in 402(a), is there?

MR. SCHNAPPER: We agree, Your Honor, that -- the maxim is where it's possible to avoid redundancy, the court should interpret the act to do so. It's not possible with regard to section 110. It is -- it reads exactly the same as 402(a). But it is possible to construe 402(a) in a manner which doesn't render 402(b)

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and 109(c) redundant.

QUESTION: Mr. Schnapper, there -- now, there are a lot of maxims of construction and it's not unusual for the maxims to cut against one another, and in those cases I guess you have to decide which one is stronger. Now, I had thought that we have a very strong rule -- I'm not even sure it's -- it's at as low a level as a maxim of construction, but a rule that retroactivity is disfavored. I mean, we have some State constitutions that specifically prohibit retroactive legislation. It's a long tradition of the common law.

Why shouldn't we say, well, in an ordinary case these minor indications of meaning would suffice, but they don't suffice to overcome the strong presumption against retroactive legislation, you have to say it clearly?

MR. SCHNAPPER: Well --

QUESTION: You wouldn't say this is clear, would you?

MR. SCHNAPPER: Well, I wouldn't -- well, I would, Your Honor. This is as -- this structural argument we advance here is the same as the argument the Court accepted in Pennsylvania v. Union Gas, that -- where there were exceptions in that case specifically providing that States were liable for certain things, the Court concluded that that was -- that meant the extraordinarily stringent

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requirement of the 11th Amendment. So I think without resolving the apparent tension between Bowen and Bradley, it would be possible to resolve this case.

But I'd like to turn to the Bowen and Bradley issue, if I might. The -- as the Court is undoubtedly aware, there -- and as you rightly pointed out, there are a number of seemingly contradictory presumptions out there, the Bowen line of cases and the Bradley line of cases.

The -- it's our contention that those lines of decisions can be reconciled and, indeed, they are complementary. We believe that these are two sides of the same coin because these rules have traditionally been applied to different categories of statutes. And so understood, the Bowen and Bradley rules can be reconciled.

The -- and I refer here now not only to decisions of this Court, but to the decisions of the courts in the States, to which you refer, which have constitutional prohibitions against retroactivity.

QUESTION: Before you get into it, you say that have traditionally been applied. Where was the Bradley rule traditionally applied before Bradley?

MR. SCHNAPPER: Well --

QUESTION: Express -- was it ever expressed before Bradley? Do you have a case that expresses Bradley

before Bradley?

MR. SCHNAPPER: Well, we listed a number of cases. The one I think that would -- particularly apt here is Sturges, Your Honor, in which the -- in which the Court was called upon to apply one of those very constitutional prohibitions against retroactive legislation and concluded that it didn't apply to legislation with regard to remedies and procedures.

Your Honor, if I might, I think I'd best reserve the balance of my time.

QUESTION: Very well, Mr. Schnapper.

General Days, we'll hear from you.

ORAL ARGUMENT OF DREW S. DAYS, III

ON BEHALF OF THE PETITIONERS

GENERAL DAYS: Mr. Chief Justice and may it please the Court:

I'd like to begin my argument by responding to the point that Justice Ginsburg made with respect to the right to a jury trial. As we've set out at note 14 of our brief on pages 24 and 25, we think that in a situation where there has not been a finding of liability for a plaintiff, the application of this new rule would require a remand and an entire trial -- jury trial on that issue, not merely on the question of damages.

QUESTION: My discussion with Mr. Schnapper was

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over whether there was a finding -- there was no judgment for the plaintiff.

GENERAL DAYS: That is correct.

QUESTION: And the court of appeals affirmed a judgment for the defendant.

GENERAL DAYS: That is correct.

QUESTION: And my understanding is that winners can't appeal from a favorable judgment.

GENERAL DAYS: That's correct. And what we've offered in our brief is a variety of alternatives that the Court might consider in terms of how a trial on remand might be handled by the lower court.

I wanted to pick up on my colleague, Mr. Schnapper's argument about the Bradley, Bennett, Bowen rules, that he began to discuss. As he indicated, we have argued in our brief that the language structure analysis that he provided to the Court provides a reasonable inference that Congress intended for the act, with the exception of 402(b) and 109(c), to apply to pending cases.

But to the extent that the Court finds difficulty with that, we think that there is one inference that certainly can be drawn from that language and structure analysis, and that is that Congress intended that at least some of the provisions of the 1991 act would have applicability to pending cases. In other words, the

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language points in the direction of some applicability to pending cases.

What that directive provides is an invitation for courts to evaluate the remaining provisions of the act against a backdrop of jurisprudence having to do with default rules in those instances where it is not clear whether certain provisions should be applied to pending cases or not to pending cases. So we think that the language structure argument and the default rule analysis are mutually reinforcing.

QUESTION: How would you apply that rule, Mr. Days, in the hypothetical case, not this statute, where the jury trial provisions are not linked to the damages? Suppose you have a trial in which the damages are assessed by the court and then, pending appeal, the jury trial provision is enacted? How would you apply your rule in that case? Would the plaintiff be entitled to reversal for a new trial before a jury?

GENERAL DAYS: We would regard the right to a jury trial as a procedural right, and under normal circumstances that would require a jury trial. But we would also suggest, as we said in our brief, that where a trial has occurred and it is an error-free trial even without a jury, there would be no requirement for a trial before a jury to the extent that the new rule applied.

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QUESTION: Well, why do you have to make that exception? Isn't it a more sensible way to simply ask the question that once you've decided that you have a general principle against retroactivity, you still have to ask yourself what is the -- what is the baseline for retroactivity? What is the event that determines whether it's being retroactive or not?

And its not being retroactive with respect to most procedural rules simply because the event is the trial, and therefore any trial that occurs after the legislation uses the new procedure. That's not -- that's not rendering it retroactive at all. Whereas most substantive rules, including -- including the amount of damages, the base line, the point of reference is not the trial but rather the action which is being punished by or compensated by that damages.

GENERAL DAYS: Justice Scalia, that's certainly one way of approaching it, but I don't believe that that provides any greater certainty than the rule that we're suggesting, namely that the Court approach the issue by looking at substantive changes on the one hand, and procedural or remedial on the other.

QUESTION: Well, I wouldn't have to make an arbitrary exception to that principle, as you have had to make it for your substantive procedural distinction. You

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make a substantive procedural distinction but then you say well, of course, where the trial has already occurred. Well, why make that exception?

QUESTION: Mr. Days.

GENERAL DAYS: Yes.

QUESTION: Maybe we should be looking to the kinds of principles that govern the Erie Doctrine or the rules enabling it, to see what types of things could be immediately applied and what couldn't. Does that make some sense?

GENERAL DAYS: Yes, it does. Certainly, the approach that we suggest, namely the substantive on the one hand, and procedural, remedial on the other, is a dichotomy that's very familiar to the courts across the face of --

QUESTION: But, Mr. Days --

GENERAL DAYS: -- of Law.

QUESTION: -- In that connection, on the substance/procedure divide, whether it's in the Erie context or the choice of law context, whether it's vertical or horizontal, damages, as far as I know, are always put on the substantive side of the line, mode of trial on the procedural side.

But you are saying that these two travel together, so that the right to damages for the first time,

for money other than back pay, you are classifying as remedial, nonsubstantive, and yet in the choice of law context it's -- classically, damages are substantive.

GENERAL DAYS: Our position is that that is remedial, that what the statute --

QUESTION: Including punitives?

GENERAL DAYS: I think the situation is more problematic with respect to punitives.

QUESTION: Do you have any authority even for compensatory damages being something that one would class as not substantive?

GENERAL DAYS: Yes, there are decisions in the lower court that have allowed double damages in situations where there was a change in the law, even though that was not the rule prior to the change in law. I don't have that specific citation, but there is a second circuit case in which that was done in a securities matter.

QUESTION: Why is that any different from increasing the criminal penalty for an action that's already criminal? Would you say that that's retroactive?

GENERAL DAYS: The ex post facto law would come into effect when we're talking about criminal penalties.

QUESTION: Well, why, because it's retroactive? Because it's retroactive, but you say it somehow is not retroactive in civil cases even though it obviously is in

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criminal.

GENERAL DAYS: Well, Justice Scalia, I think we disagree as to what the rule is. You're asserting that the rule is against retroactivity.

QUESTION: Well, that's what ex post facto -- that's what the ex post facto law is directed to.

GENERAL DAYS: But I'm talking about in the civil context, and I think that we've shown in our briefs and the briefs of petitioner that the rule has really been one that makes that distinction between substance, on the one hand, and procedure and remedy on the other.

QUESTION: Mr. Days, I haven't seen any case, at least in this Court, where an augmentation of the penalty -- of the damages, I withdraw the word penalty, but where an increase in available damages has been applied retroactively. And you told me there is a Second Circuit case in a securities matter, but is there any case in this Court where a statute augmenting a monetary toll was applied retroactively to preenactment conduct?

GENERAL DAYS: No, Your Honor. No, Justice Ginsburg --

QUESTION: So, it is --

GENERAL DAYS: I'm not aware of a case in this Court. But I think that there are a number of cases that make the distinction between ousting someone of vested

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rights or imposing new obligations without notice or an opportunity to be heard, but they have not focused on damages as such. Where new remedies are provided for old wrongs, we -- we read the law as saying that that is not a substantive change.

QUESTION: And why is it -- why are punitive damages not a new remedy for an old wrong?

GENERAL DAYS: We think that punitive damages are more difficult because this Court has pointed out in TXO, for example, in Justice Stevens' opinion, that there are requirements of notice that ought to be provided to a person before that person is subjected to punitive damages. We don't think that the same requirement is necessary under these circumstances, that is with respect to compensatory damages.

The -- thank you.

QUESTION: Thank you, General Days.

Mr. Nager, we'll hear from you.

ORAL ARGUMENT OF GLENN D. NAGER

ON BEHALF OF THE RESPONDENTS

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

This case would no doubt be easier if in the 1991 Civil Rights Act Congress had directly and specifically addressed the question of whether or not

sections 101 and 102 of the Civil Rights Act were to be applied retroactively to conduct that occurred 5 years before the enactment of the statute.

QUESTION: I think it slipped their mind.

(Laughter.)

MR. NAGER: It was a heavily debated issue, no doubt, and -- but they didn't specifically address it, and the question for this Court is what rule of construction applies in a case where Congress has not specifically addressed --

QUESTION: Well, Mr. Nager --

QUESTION: Well, the --

QUESTION: -- According to the Ninth Circuit in its opinion in -- is it Reynolds v. Martin?

MR. NAGER: Yes.

QUESTION: The panel there took the position that Congress had not only addressed it but the language is clear, and when you look at the provisions relied upon by Mr. Schnapper that it becomes a plain language case.

MR. NAGER: That is what the court in Reynolds held, and, of course, it was wrong. And the reason it was wrong is because it started in the wrong place. This Court has made clear for over 200 years that the starting point in a case involving a question of retroactivity is a presumption. It's a presumption that courts should --

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QUESTION: Well, do we -- do we get to presumptions before we get beyond the question of plain language? And --

MR. NAGER: Yes, Justice Souter, I think we do. Ever since Schooner Peggy the Court has instructed the court should struggle hard to avoid retroactive interpretations of the law, that the presumption of prospectivity protects fundamental values of justice and limited Government through checks and balances that are fundamental to this Nation's legal tradition and to its constitutional structure. It --

QUESTION: Well, in our struggle how do we read out the negative implication of 109(c)?

MR. NAGER: I don't think it's a question of reading it out, Justice Souter. There's no doubt that there is a plausible inference from those sections that one plausible construction of 402(a) is that Congress intended it to apply some of the provisions of the Civil Rights Act retroactively, but it's not the only conceivable inference.

And the important question that the Court has to ask is what standard of clarity does Congress have to meet in order to compel the courts to do what this Court has historically instructed the courts to not do, to not apply a statute retroactively. And this isn't the only

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presumption that this Court has at that time.

QUESTION: Well, let me -- in your response would you make a -- maybe you don't want to make this distinction; if you don't, you tell me. But it seems to me that it's plausible for you to make a distinction between the implication of 402(b), which was apparently, it is agreed, intended to have application only to one possible party in one case -- which is a -- you know, I suppose can easily be characterized as just an insurance policy, it's a pretty bizarre example -- and on the other hand, 109(c) which doesn't have that -- that narrow compass and does not seem to be a bizarre example.

MR. NAGER: I think the Justice is correct in that the two provisions are different. 402(b) is different because it prohibits both a retroactive application of the statute and a prospective application of the statute. 402(b) says no provision of this act will apply to that case. So, for example, section 1113 of the statute, which provides -- creates the right for expert fees in civil rights cases, that provision, absent the way 402(b) was written, could have applied to the Wards Cove case on remand with respect to future proceedings.

QUESTION: Uh-hum.

MR. NAGER: And the -- so essentially 402(b) is a grandfathering provision.

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Now, I -- again, 109(c) is different. It just talks about conduct occurring after the date of enactment. That's what section 109(c) becomes applicable to. But we can't ignore either the presumption that I've discussed or the language of 402(a) itself. That language is ambiguous and it elicits --

QUESTION: Well, I would grant you that in the absence of (c) it certainly would be ambiguous, but it is also very clear, as your brother pointed out, that it begins by referring to an exception so that it seems to have been drafted with just such an exception as 109(c) in mind, which seems to me, if anything, to underline the implication of (c). It seems to me a strong implication.

MR. NAGER: Well, in -- the Justice has agreed with me that section 402(b) prohibits both retroactive and prospective effects, so to the extent that 402(a) starts with except -- with a qualification on its language, it easily picks up 402(b) without making any reference one way or the other as to whether or not 402(a) is only a prospectivity provision or a retroactivity provision as well as a prospectivity provision.

The important point here is twofold. One is that the language of 402(a) is language that Congress has used before. And that language has been routinely construed by the lower courts as allowing only prospective

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effect for a statute.

QUESTION: Well, language that includes "except as otherwise provided" and then an exception, in what cases here do you -- do you think support your view that even the natural inference of the statute will be ignored in favor of nonretroactivity?

MR. NAGER: Congress, in the 1978 amendments to title VII and the Pregnancy Discrimination Act which changed the rule of law that this Court had announced in Gilbert v. General Electric. in section A of the 1978 effective date sections said: "Except as provided in subsection (b), this act shall take effect on the date of enactment;" and in subsection (b) said that the 1978 amendments would not become effective as to benefit plans in existence on the date on enactment until after 180 days had passed.

So -- and the Second Circuit and one other court of appeals which is slipping my mind at this point but is cited in our brief, construed the 1978 amendments to only allow prospective application of the statute in all respects; prospective delayed for 6 months for benefit plans in existence, prospective for conduct occurring after the date of enactment for everything else.

QUESTION: And are there cases from this Court that express such a view?

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MR. NAGER: Well, there are cases from this Court dealing, quite frankly, with much more complicated and difficult cases. For example, Schwab v. Doyle is a case in which Congress had passed a transfer tax under the estate tax laws saying that in any transaction whatsoever that a transfer tax would be placed on that transaction, so that a person before their death couldn't reduce the size of their estate.

And this Court said that while certainly it was one plausible construction of that statute to say that it applied to any transaction that an individual had entered into before their death to reduce the size of their estate -- this Court said it is possible to read the statute to only apply to transactions occurring after the date of enactment and before an individual's death, and that the transfer tax would only apply to those reductions -- transactions which reduced the size of an individual's estate.

Again, the point here is that this Court has historically said the courts should avoid retroactive applications of the law. There is a historic bias --

QUESTION: Why don't we --

MR. NAGER: Against retroactive applications of the law.

QUESTION: -- Mr. Nager, stick closer to home.

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In the context of title VII, I think your answer was that the Pregnancy Discrimination Act cases did not come to this Court. It's the court of appeals ruling that --

MR. NAGER: That is correct, Justice Ginsburg.

QUESTION: How about the Civil Rights Restoration Act of '87? Is -- what is the language there and what is the -- what views have been expressed by the courts on the retroactivity of that act that, let me see, made the law different from what it was when Grove City was decided?

MR. NAGER: I have to concede to the Justice that I haven't read the language of the Civil Rights Act -- Civil Rights Restoration Act of '87. I do know the courts of appeals have split on whether or not that statute could be applied to cases that were pending or concerning conduct that arose before the date of the enactment of that statute.

QUESTION: That would be the closest, I think, wouldn't it, to the Patterson situation?

MR. NAGER: No. I think, in fact, the closest to the Patterson situation is the Pregnancy Discrimination Act. The Pregnancy Discrimination Act rejected the rule of law, the interpretation of the preexisting title VII scheme announced by this Court in General Electric v. Gilbert.

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And General Electric v. Gilbert, as the dissent pointed out, rejected the unanimous views of six court of appeals and the EEOC's position on whether or not discrimination on the basis of pregnancy constituted discrimination on the basis of disability. And Congress rejected this Court's interpretation as of what the law should be, enacted a new rule of law that provided for a effective date using general language identical to the general effective date language in this statute.

And the courts of appeals, applying different methodologies, to be sure, than methodologies that other courts have applied -- because there is some confusion -- a considerable amount of confusion in the courts of appeals as to what methodology to apply given the tension that exists in this Court's cases, as Justice Scalia has pointed out in his concurring opinion in the Majerno case. But they have all come to the same conclusion, that statutes containing general effective date language, as this statute contains, should be construed to have only prospective effect.

QUESTION: But, Mr. Nager --

QUESTION: How about --

QUESTION: Mr. Nager, aren't there two differences between the problem we have in this case -- and I'm not sure of the answer -- and the problem in the

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pregnancy discrimination case. First of all, that statute didn't have a comparable -- anything comparable to 402(b) in it. And secondly, that is -- was a one-shot provision. It just had one particular change. Here there are a host of changes.

And I think -- and you've suggested that one might read this statute as contemplating retroactivity for some of the changes, such as the expert witness fee provision and such as the attack on consent decrees.

MR. NAGER: I'm -- apologies if I have been unclear, Justice Stevens. I did not mean to suggest that the Civil Rights Act can in any way properly be construed as having retroactive applications --

QUESTION: So your position is there is no retroactivity, even, for example, on the consent decree provision, that applies only to future consent decrees, not to future attacks on previously entered consent decrees.

MR. NAGER: It applies -- that provision, just like the expert witness fees provision, would apply to any event occurring after the date of enactment. So that if -- we'd have to go through the specific provisions of section 108, which is a section dealing with consent decrees. It deals with rights of intervention, it deals with notice issues with respect to consent decrees. And

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the expert witness fee example --

QUESTION: Well, what is your view on whether it would attack -- whether it would apply to a future lawsuit challenging the validity of a prior dissent decree on the ground that the litigant didn't have adequate notice?

MR. NAGER: The question is with respect to the applicability of section 108?

QUESTION: Yeah.

MR. NAGER: With respect to that future lawsuit, the law -- if the lawsuit was challenging the validity of the consent decree, it would have to meet the requirements of section 108 in order to be properly filed, because section 108 sets forth the terms upon which such a lawsuit can be filed.

QUESTION: And the ground of the lawsuit is that he -- at the time the consent decree was entered the plaintiff had not had adequate notice. That depends on whether the retroactivity is a -- applies to conduct or applies to --

MR. NAGER: And you've picked a tough example and I'm hesitating not because I don't know the right methodology to apply, but because I can't -- I don't have -- I'm not looking at each provision of the statute.

QUESTION: All I'm suggesting is that the retroactivity problem is complicated because there are a

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variety of provisions in here with respect to which one could at least argue that there is some kind of retroactivity.

MR. NAGER: The point is easily conceded by me that this is not an easy question even if one knows what the right starting point is.

QUESTION: Of course, the distinction between substance and procedure is not a very clear one either, is it?

MR. NAGER: That is true, Justice Scalia, and I appreciate that help.

(Laughter.)

QUESTION: Before we get into that, can -- would you tell me, what is the analogue in the Pregnancy Discrimination Act that you're -- you're arguing from to section 109(c)?

MR. NAGER: To my knowledge, there is no analogue and --

QUESTION: Well, doesn't -- isn't that the end of the argument, then?

MR. NAGER: No, I don't think so. Because one still has to ask -- there's still the language of 402(a) and there's still the presumption of prospectivity. And my first point to you, Justice Souter, would be that negative inferences are not enough. This Court in -- with

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regard to both this presumption and a number of --

QUESTION: Why not? I mean you say that. Why not? It's a -- it seems pretty clear negative inference.

MR. NAGER: Because this Court's decisions have stated over and over and over again, it has to be a clear and unequivocal command for retroactivity that Congress has set forth.

Let me use an example using --

QUESTION: But, well, is the rule that you think we should follow or, indeed, that perhaps we have followed, is that a negative inference will never suffice?

MR. NAGER: Yes, that is what we would suggest to the Court, that Congress has to either expressly --

QUESTION: It would certainly get you where you want to go.

(Laughter.)

MR. NAGER: That's part of my objective, if not my entire objective.

But let me give an analogy. This Court in the ARAMCO decision, a decision which 109 -- section 109 of the Civil Rights Act changes the rule for whether or not title VII applies overseas. In that case there were negative inferences. There was an alien exemption in the statute, and from that one side in that case argued well, there wouldn't have been any need to put an alien

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exemption in the statute if the statute didn't apply to U.S. citizens overseas, because the alien exemption says Title VII doesn't apply to aliens who are working overseas.

But as the Court -- as Chief Justice Rehnquist pointed out in his opinion for the Court, and as Justice Scalia pointed out in his concurring opinion, that wasn't enough to overcome the presumption for the extra application against application of U.S. laws overseas. If that presumption isn't overcome by negative inferences, it would certainly seem that this presumption, which certainly forms the most essential starting point for statutory constructions -- this Court over and over again has said it is the first principle of statutory construction -- that negative inferences from 109(c) would not be enough, and it shouldn't be enough.

QUESTION: But, Mr. Nager, apparently Congress thought we'd misapplied the presumptions.

MR. NAGER: And Congress has the right to change the rules, as it clearly has. This Court's job, of course, is not to try to figure out what the current Congress would like the law to be. This job -- this Court is presented with questions of statutory interpretation enacted by prior Congresses.

And when this -- a subsequent Congress enacts a

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new law, as it clearly has the right to do, it also has the right to specify, if it feels that strongly about it, that it should make the effective date retroactive. But it has to say so and Congress did not here.

QUESTION: Mr. Nager, may I ask you if you think there's any -- you were asked about the Civil Rights Restoration Act of 1987, the Grove City -- sequel to Grove City. The preamble of that statute says that Congress wanted to restore prior executive interpretation, that the courts had relied on restoration. Is there any sense of restoration involved here?

MR. NAGER: I think not. In fact, there were -- the preliminary bills for the Civil Rights Act of 1991 used identical language to that: to respond to Supreme Court decisions rendered under title VII and to restore the law to what it was.

And if one reads the legislative history, for whatever it's worth, it does account for some history, and here there was a bitter struggle between the Bush administration and the Democratic leaders in the Senate and in the House over whether or not changes in the law to which they agreed should be characterized as restorative or not.

But the other point I'd make to you, Justice Stevens, is it's really not a determinative factor what a

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law is characterized as. The question should be whether or not Congress has commanded that even a restorative law be applied retroactively or not.

It may be that restorative laws are those kinds of laws in which Congress is going to be more likely on occasion to make those -- to meet this Court's test. But there's no reason to lower the standard just because Congress may on those occasions rise up and say notwithstanding the fundamental principles of justice that underlie the traditional presumption, notwithstanding our historic suspicion of legislatures enacting retroactive rules, that these are occasions on which other values, values that our society has now come to agreement upon, should override the presumption in those particular circumstances.

QUESTION: In the case of the 1987 act, the returns in the lower court are divided. You conceded that.

MR. NAGER: Yes, Justice Ginsburg.

QUESTION: On the retro -- and so would you agree that the answer should be the same in this case as it is in that, at least with respect to Patterson and Grove City? The statute itself in '87 said legislative action is necessary to restore the prior consistent long understanding of what the law was. So in that respect the

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two are alike and should logically go the same way.

MR. NAGER: Well, this statute doesn't say that, though. This statute, in fact, does not say it's going to restore the law. It says in responding to Supreme Court decisions, Congress is going to expand the law. So to the extent we are looking, in fact, at the findings and purposes provisions of the two statutes, they're different.

We should also --

QUESTION: Are you saying there's a stronger argument for the retroactivity of the '87 act than of the 1991 act?

MR. NAGER: Yes, although I'd reiterate the point that I made to Justice Stevens, that Congress' purpose in restoring the law, while it may provide a suggestion of an intention for retroactivity, is not sufficient to create a retroactive effective date. Congress has to say so clearly.

And this was the point of the Tenth Circuit, which is the circuit that I do remember, under the '87 statute, which rejected the call for retroactivity of that statute even though it had the benefit of the Second Circuit's views and the Fifth Circuit's views on holding that statute retroactive.

The point, again, is that we -- the starting

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point for the analysis is we will struggle hard, in the words of the Schooner Peggy Court, to avoid a retroactive application of the law. That's possible here and with -- if the Justice will allow me, I'll let someone else argue the conflict in the circuits under the '87 statute, but my reading of those cases would be that I would be taking the same position if I were arguing that statute, except I can't remember the effective date provisions of that statute well enough.

QUESTION: That presumption that you're referring to, Mr. Nager, I gather is not just an interpretative presumption. It's -- unlike many presumptions which are just, you know, given no other indication, the normal interpretation is thus and so, this is something of a substantive presumption.

MR. NAGER: I think so, although I'm hesitant to -- in this particular case, to make distinctions between substantive presumptions and interpretative presumptions.

(Laughter.)

QUESTION: What is -- what is the underlying -- what is the underlying value that makes this presumption so important? Isn't it the concept of fair notice?

MR. NAGER: It in -- part of it is the concept of fair notice.

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QUESTION: And what else is it?

MR. NAGER: It is the notion that in this country, with our separation of powers between the legislative branch and the judicial branch and the executive branch, that the power to look backwards to interpret preexisting law and apply preexisting law lies with the courts, and that the presumption with respect to the legislative branch is that it looks forward, not backwards.

QUESTION: Yes, but there's no question here that if Congress had made it's intent clear, it would have had the power to make the statute retroactive.

MR. NAGER: That is true. But I have to put a slight qualification on that that I -- we find the punitive-damages provision troubling. This Court in Turner Elkhorn said that it would have a hard time, under the due process clause, sustaining a law whose purpose was retroactively to blame -- be based on blameworthiness principles or deterrence principles. And, of course, this statute talks about deterrence, but you can't deter something that's already happened.

So --

QUESTION: Mr. Nager, you're not arguing, are you, that there would be a separation of powers problem in any application short of attacking a final judgment of the

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Court?

MR. NAGER: No. No, I'm not. I'm trying to answer the question of where does the substance come from that -- that has led the courts to create this presumption, whether one calls it a substantive canon as opposed to an interpretative canon. And as I have read the historical materials, as I have read this Court's cases, it's -- it has essentially based it on two fundamental parts of the American legal tradition.

The one, as the Justice Stevens pointed out, people are entitled to fair notice of the law, they're entitled to fair notice of its sanctions, and that we will struggle hard to avoid the application to them of any law, of any sanction that they haven't had fair notice of.

The second substantive background value that has informed the presumption and given it weight -- and, Justice Stevens, you refer to this yourself in your concurring opinion in the Croson case -- is that we have a suspicion in this country that legislatures can be vindictive. They can act for noble purposes, they can act for vindictive purposes, but when they're acting looking backwards we need to be especially concerned and especially suspicious. And it's that --

QUESTION: I also made the same point in my dissent in Daubert against Florida.

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MR. NAGER: That is --

QUESTION: Which kind of cuts against you a little bit.

(Laughter.)

MR. NAGER: That is true, but the -- of course, that was a dissenting opinion and it was not about what informs this presumption.

(Laughter.)

QUESTION: Mr. Nager, as far as knowing what the law is, I mean the law has been, throughout this period, thou shalt not discriminate. So the precise -- the conduct-regulating rule -- maybe with some exceptions in the 1981 situation, but certainly in the Landgraf case the rule was there all along, thou shalt not discriminate.

And it's not like a traffic ticket, with all apologies to the Seventh Circuit judge who said it's like taking a traffic ticket and putting you in prison for life. The rule was very strong since the day title VII came in, thou shalt not discriminate on the basis of -- , and all that has been done is to make the price tag higher.

But you're not really suggesting that a defendant would make the calculation that it's okay to discriminate because the only thing I might be liable for is back pay and injunctive relief?

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MR. NAGER: I'm not making that argument because I don't think that we need to. I have three points to say to you, Justice Ginsburg.

To the extent that it was illegal to discriminate, either on the basis of race in the Roadway case or to have unlawful sexual harassment in the workplace, the Roadway defendants were vindicated repeatedly in the district court as to not have discriminated on the basis of race. As the Justices pointed out, the judgment entered in the Landgraf case was a take-nothing judgment against the plaintiff.

QUESTION: But there was a finding that the employer's conduct was in violation of the act.

MR. NAGER: The finding was that there was sexual harassment occurring in the workplace, but there was also another finding that the employer, USI Film Products, had redressed that situation. So that, in fact, the remedy that the 1964 Congress wanted happened.

The 1964 Congress, in contrast to the 1991 Congress, wanted to encourage employers to fix the situations themselves. And this employer did that. Maybe not as fast as we would have liked, and maybe the next time it'll do it better.

And one of the -- no doubt one of the effects of the 1991 statute -- because I now have clients calling me

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asking me to put on sexual harassment training seminars that weren't -- we didn't use to put on for our clients, is for them to increase their training efforts, increase their monitoring efforts, increase their education efforts so that they can train their employees both not to discriminate on the basis of race or sex, not to have sexually harassment work forces, to respond effectively to employee complaints.

But please do remember that the employers in this case, A, have not been adjudicated of violating any law, discriminating unlawfully. And, in fact, it's always -- not always, but in these two cases, as it is in many cases, these are cases in which the employers are simply being held vicariously liable.

And there is no doubt that the 1964 Congress understood and the 1991 Congress understood that the level of the sanctions that are attached to the law informed the judgments made by American employers as to how much money to put into the investment to ensure that other people don't discriminate. Discrimination is wrong. It's illegal.

When it's found to have occurred -- as it has not been, there's no judgment finding any discrimination in either of these cases. There are factual findings in the Landgraf case. I concede that sexual harassment

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existed in the workplace. But there's also a finding in the district court opinion, affirmed by the court of appeals, that the human resources manager responded to that situation and fixed it.

I'd like -- one final point to make to the Court. This was a political compromise, as Justice Scalia pointed out. This was not an issue that slipped through. This was vigorously debated. And there wouldn't have been a Civil Rights Act but for the fact that Senator Danforth and Senator Rudman and Senator Domenici and six other moderate Republicans said if we're going to have a civil rights bill, people are going to have to make some compromises.

And they forged a compromise and they ended up with ambiguous statutory language. And they ended up stitching together a few bills that, as Justice Ginsburg has pointed out, contain redundancies that we can't get out of the statute any way we read it, no matter what presumptions we apply. And we had a lot of self-serving floor statements.

If Congress -- what Congress needs from this Court is clear direction. What is the rule that the Court is going to apply when Congress doesn't say whether or not it intends a retroactive effect of the law? Congress needs a rule that it can understand, that's simple to

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apply, and so do the lower courts. They're in terrible confusion. And if respect for the compromise that was struck in 1991 --

QUESTION: Mr. Nager, it is perfectly clear, isn't it, that if they had made their intent perfectly clear we would have followed it? So they have a clear rule already.

MR. NAGER: That's true. But there's also --

QUESTION: If we'd said it in different language, do you think they still might have just compromised this way?

MR. NAGER: Justice Stevens, there are clearly floor statements from people on both sides citing different decisions coming out of this Court to try to -- to create, essentially, a manipulated record for the lower courts to apply.

QUESTION: But each side well knew that if they put in language as they had in the 1990 statute, there wouldn't have been much of a problem.

MR. NAGER: That's true.

QUESTION: Well, I guess it's clear that if they make it clear we will follow it.

(Laughter.)

QUESTION: But it isn't clear that if they don't make it clear, we won't follow it.

(Laughter.)

MR. NAGER: That's true too.

QUESTION: And that's what the -- what the one-upsmanship was about.

MR. NAGER: That's correct, Justice Scalia.

Unless the Court has further questions, I have nothing further.

QUESTION: Thank you, Mr. Nager.

Mr. Schnapper, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONERS

MR. SCHNAPPER: May it please the Court:

I'd like to first just clarify one question about the record in Landgraf. Mr. Nager was correct when he stated that the district court found that the plaintiff's personnel manager had corrected -- had addressed the problem.

However, the record also demonstrates, and the Court found, that that happened only after more than a year of particularly egregious harassment, during which time the victim repeatedly went to her supervisor who responded to her that she was a tattletale. And she was thereafter threatened on a number of occasions for having complained. So this is not a situation which was properly and happily resolved.

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Secondly, with regard to Justice Stevens' question about whether Congress understood that it was restoring the law to where the lower courts, at least, had understood it was, in Appendix F to our reply brief we list 85 statements by Members of Congress, both Republicans and Democrats, using the word restore, or similar language, to describe what the statute did.

QUESTION: Does that -- does that go for all the decisions? This one concentrates on Patterson, but what about Shaw against Library of Congress? Is that showing --

MR. SCHNAPPER: In general, those cases -- those remarks don't distinguish among -- some are specifically about Patterson or other cases, but generally they're about -- they're referring to the whole statute.

QUESTION: So you would be making the same argument if the -- this particular problem before us today was the Shaw --

MR. SCHNAPPER: Yes.

QUESTION: -- Problem, even though that involves the -- another -- yet another maxim, that sovereign immunity and waivers strictly construed.

MR. SCHNAPPER: Yes, yes. I would --

QUESTION: So you -- the Solicitor General, I believe, had a caveat about -- about that.

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MR. SCHNAPPER: He did.

QUESTION: You don't share that.

MR. SCHNAPPER: We do not.

The -- I'd remind the Court in this -- I'd add to the list of battling presumptions here, another one in this Court's recent decision in Frankly v. Gwinnett County. And it's one of those clear statement rules that crop up repeatedly.

We presume the availability of all -- presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. Well, here we are. We're seeking the remedy of damages. It seems to me that is -- that's a presumption that applies here as well.

We disagree with respondent about what the -- the reach and the rationale of the presumption referred to by Justice Scalia is. Our view is the same advanced by Mr. Justice Stevens, that it's to protect good faith reliance interests.

The respondents at page 4 of -- excuse me, respondents in Roadway, in page 4 of their brief, referring to the monetary relief that might be available, say that citizens have a right to have not only warning of what the law prohibits, but also its sanctions, so that they can avoid those sanctions if they wish. As Justice Ginsburg pointed out, compliance with title VII was not

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optional. This isn't a licensing fee that says you can violate if you're willing to pay the cost.

QUESTION: Well, but especially when you're dealing with a statute that imposes vicarious liability -- that is to say, we're not talking about employers who personally discriminate. But the issue is how much effort must they expend to be sure that none of their employees is guilty of such discrimination.

Obviously, how much effort the republic excepts from them depends to some extent upon the sanctions that the republic -- the republic is imposing for their failure to shape up. Don't you think that there's -- there's a -- that it's an intelligent decision for a businessman to make?

MR. SCHNAPPER: With all deference, Your Honor, we don't believe that that is what ordinarily goes on in the business community. Most employers -- most businessmen, with regard to any statutes, take those statutes very seriously and comply with them, and don't make calculations about whether it's going to be a $20,000 verdict or a $30,000 verdict. The defense in this --

QUESTION: Do you go -- do you go the whole hog with your argument and say that also applies to the new punitive damage provisions?

MR. SCHNAPPER: We do. I -- we remind the Court

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that the punitive damages are capped, and capped in such a way that if there's a large compensatory reward, there won't be --

QUESTION: What was it, $300,000?

MR. SCHNAPPER: It depends on the size of the employer.

QUESTION: Oh.

MR. SCHNAPPER: On punitive damages I would, you know, raise somewhat different questions. But --

QUESTION: But you'd come to the same conclusion.

MR. SCHNAPPER: Yes. Because we don't -- we don't think employers make those kinds of distinctions. And the defense in this case was to have --

QUESTION: Well, then it would follow -- then it would follow that punitive damages are -- serve no purpose.

MR. SCHNAPPER: No, Your Honor. One of the purposes of punitive damages referred in the legislative history was to -- was the concept noted in this Court's decision in Newman v. Piggy Park, to provide encouragement for private parties to enforce the law by maintaining these lawsuits. That purpose obviously is served here.

QUESTION: Do you think -- never mind.

MR. SCHNAPPER: Thank you.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Schnapper.

The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.)

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1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)