

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: O'HARE TRUCK SERVICE, INCORPORATED, ET AL.,
Petitioners v. CITY OF NORTHLAKE, ET AL.

CASE NO: 95-191

PLACE: Washington, D.C.

DATE: Wednesday, March 20, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 O'HARE TRUCK SERVICE, :
4 INCORPORATED, ET AL., :
5 Petitioners :
6 v. : No. 95-191
7 CITY OF NORTHLAKE, ET AL. :
8 - - - - -X

9 Washington, D.C.

10 Wednesday, March 20, 1996

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:07 a.m.

14 APPEARANCES:

15 HARVEY GROSSMAN, ESQ., Chicago, Illinois; on behalf of
16 the Petitioners.

17 GARY M. FEIEREISEL, ESQ., Chicago, Illinois; on behalf of
18 the Respondents.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	HARVEY GROSSMAN, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	GARY M. FEIEREISEL, ESQ.	
7	On behalf of the Respondents	28
8	REBUTTAL ARGUMENT OF	
9	HARVEY GROSSMAN, ESQ.	
10	On behalf of the Petitioners	51
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-191, O'Hare Truck Service, Incorporated
5 v. The City of Northlake.

6 Mr. Grossman.

7 ORAL ARGUMENT OF HARVEY GROSSMAN

8 ON BEHALF OF THE PETITIONERS

9 MR. GROSSMAN: Mr. Chief Justice, and may it
10 please the Court:

11 This case is about whether the First Amendment
12 provides any level of protection whatsoever to a
13 businessman who's cut out from city business after 30
14 years of competent performance in retaliation for refusing
15 to contribute to the mayor's reelection campaign and
16 supporting the opposition.

17 This penalty on association invoked in this case
18 resulted in the substantial loss of income to
19 Mr. Gratziana, the petitioner here.

20 I wish to focus first on the aspect of forced
21 contribution involved in the conduct of the respondents in
22 this case. The precipitating event was Mr. Gratziana's
23 refusal to be coerced out of a substantial campaign
24 contribution. Making that contribution would have been
25 contrary to his own political beliefs.

1 This conduct by the respondent should be
2 condemned, not sanitized as patronage practice which
3 purports to serve the democratic process. This practice
4 corrupts rather than advances any meaningful interests of
5 government.

6 QUESTION: Well, I think that there are bribery
7 and corruption laws that would reach a situation of quid
8 pro quo, if you give me or you give my party \$200 I will
9 give you a contract.

10 MR. GROSSMAN: I think that is correct, Your
11 Honor, but what we seek here is a civil remedy when the
12 burden of reasonable doubt is not imposed on the
13 petitioner, where --

14 QUESTION: You don't need Elrod and subsequent
15 cases, and Rutan, in order to enforce that kind of
16 prohibition.

17 MR. GROSSMAN: I agree with you, Your Honor. I
18 do not believe that the petitioner's rights here are
19 dependent upon the public employment patronage cases
20 whatsoever. I believe there is independent doctrine that
21 we've cited in our briefs which prohibit penalties on
22 association, which prohibit forced contributions, and
23 which also allow people to express themselves politically
24 particularly in their private work place or on their
25 private property.

1 QUESTION: Well, I'm not saying that that --
2 that those statutes apply here. I'm just saying, where
3 there is a quid pro quo. I'm not sure that was
4 established as the factual situation here.

5 MR. GROSSMAN: No, I don't believe that within
6 the confines of the criminal law that a quid pro quo was
7 established here, but what we seek to do, and I want to
8 stress to Your Honor, is an opportunity to provide a court
9 with the proof of what did occur, and have a court
10 determine whether or not that violates the First
11 Amendment.

12 What's critical here is that the lower courts
13 have said that there is no First Amendment protection
14 whatsoever, so notwithstanding the ability of a litigant
15 even to prove the quid pro quo that you've suggested --

16 QUESTION: Bribery laws aren't dependent on the
17 First Amendment. I mean, you know, they apply whether
18 you're saying give me \$50 for my own coffer or give me \$50
19 for the party. I don't think those bribery and corruption
20 laws have any relationship to the First Amendment.

21 MR. GROSSMAN: I wasn't suggesting that they
22 did, Your Honor. I was suggesting that even if you place
23 that burden on the litigant here, that he nevertheless
24 should have an opportunity to go before a civil court and
25 prove that the violation of his First Amendment's, whether

1 it resulted from a quid pro quo, or the implicit
2 imposition of a penalty, as it did this case, violates the
3 First Amendment.

4 Because there are criminal laws that exist to
5 protect interests does not mean that we do not have
6 corollaries in the civil law which also under our
7 Constitution provide a means for redress. There are
8 numerous instances where that occurs, from instances of
9 policemen's conduct in illegal search and seizure,
10 straight through the panoply of constitutional --

11 QUESTION: Well, his corollary would be, I was
12 asked for a bribe, and I was -- my contract was terminated
13 because I refused to pay a bribe. The corollary would not
14 be, I have a cause of action because you violated my First
15 Amendment rights.

16 MR. GROSSMAN: No, the civil formulation -- I
17 respectfully disagree with Your Honor. I think the civil
18 formulation of that is that in fact his First Amendment
19 rights were violated as well, independent of the question
20 of whether the Government has chosen, responsibly, I
21 think, to create official misconduct laws or extortion
22 laws.

23 QUESTION: Then you are not relying on the
24 corruption statutes, you're relying on the Rutan-Elrod
25 line of cases.

1 MR. GROSSMAN: No, I'm not, Your Honor, although
2 I think that those cases can very well be instructive in
3 terms of analyzing the Government's interest that it might
4 assert in this case.

5 I don't say that they transfer in toto, because
6 I wish to stress that I did not represent a public
7 employee. The gentleman that appears before this Court
8 cannot conceivably be compared to a public employee.

9 He does not provide services in the Government
10 work place or at a Government work site. He does not work
11 shoulder-to-shoulder with other Government employees. He
12 has no Government supervisor. He is not in a chain of
13 command. His services are straightforward. They're
14 determined by the custom and practices within the industry
15 in which he works. He can't be said to speak for the city
16 or any official.

17 QUESTION: Well, Mr. Grossman, in protecting,
18 for example, the free speech rights of public employees,
19 the Court has employed some kind of a balancing test, the
20 so-called Pickering approach, and has recognized interests
21 of the employer as well as those of the employees. Do you
22 think that the independent contractor has rights greater
23 than that of an employee?

24 MR. GROSSMAN: I do. I think there's a
25 continuum on which independent contractors provide

1 services. I think that the closer that they look like
2 employees -- and I've just gone five or six factors
3 myself -- the closer that they look like employees, I
4 think more legitimately can they be regulated as public
5 employees. My client --

6 QUESTION: But you would propose to us, at
7 least, the employment of a stricter level of scrutiny for
8 the -- your client, the independent contractor, than would
9 be the case for an employee?

10 MR. GROSSMAN: Yes, I would, and I think that
11 it's important to note that in this Court's jurisprudence
12 regarding the regulation of public employees and their
13 First Amendment rights as recently as its decision in
14 Waters, it stressed that it really was not the operation
15 of Government per se, or Governmental efficiency, that
16 resulted in a freer hand in restricting the rights of
17 public employees, it was the nature of the employer-
18 employee relationship.

19 And this Court said that what was comparatively
20 a subordinate interest vis-a-vis the general public --
21 that is, operational efficiency -- becomes more pronounced
22 and weighty when you're talking about the interaction of
23 an employee in the workforce, understandably, just based
24 on every-day human relations, and I don't challenge
25 whatsoever that proposition, but when --

1 QUESTION: But there's a real concern, isn't
2 there, for opening up a great deal of litigation in the
3 Government contracting field if we find such a strong
4 interest on the part of the independent contractor?

5 MR. GROSSMAN: Well, first, if the question is,
6 should there be a cognizable claim at all, that doesn't
7 deal with the standard. If the question is, should
8 contractors be subjected to a reasonableness balancing
9 standard instead of strict scrutiny, at least we're half-
10 way there already, because all of the courts below have
11 said that there's no level of scrutiny that's to be
12 applied to this conduct.

13 Now, even if a reasonableness test was applied
14 here, I would maintain that whatever it is that the
15 respondents maintain they've done here -- we view it as a
16 simple act of political retaliation and forced
17 contribution. It's been siphoned through the screen of
18 patronage law, but whatever it is, we believe that it
19 would not withstand even a reasonable balancing test.

20 QUESTION: Well, what if a new administration in
21 Northlake comes to power, and they're trying to put
22 together a list of their own as to who's going to get the
23 tow truck business, is it in your view a violation of
24 First Amendment rights if they were to just put on that
25 list that they're compiling for the first time a list of

1 people who contributed to their campaign?

2 MR. GROSSMAN: No, I would not. Without more
3 facts, I do not believe that that would state a violation
4 of the First Amendment. I'm not exactly --

5 QUESTION: So you have to remove someone from a
6 list that already exists to come into your purview?

7 MR. GROSSMAN: Well, I think this Court need
8 only deal with this case as a termination of a benefit, a
9 penalty case. It need not decide what might be a more
10 perplexing question for some members of the Court as to
11 whether --

12 QUESTION: What more facts would you have needed
13 in the Chief Justice's hypothetical? What about the
14 additional fact that it is established that the reason
15 only these people were included was these were the only
16 people that gave money to the party?

17 MR. GROSSMAN: Well, I believe that if -- I'm
18 not sure I understand the hypothetical with clarity. If
19 it would result in the termination --

20 QUESTION: No termination. It's a new --

21 MR. GROSSMAN: I do not believe that that would
22 state a --

23 QUESTION: So it is only termination. Why do
24 you draw the line there? If you're going to draw the line
25 there, why not draw the line at independent contractors?

1 MR. GROSSMAN: No, I'm not sure that I
2 understand the precise distinction that you're making
3 between the termination --

4 QUESTION: Mr. Grossman --

5 QUESTION: I thought that your principle was,
6 look if there was actual harm that my client has suffered
7 by reason of his First Amendment beliefs. Now, one kind
8 of harm is being terminated from a contract. Another kind
9 of harm is not getting a contract that you would otherwise
10 get.

11 MR. GROSSMAN: It is --

12 QUESTION: Harm is harm.

13 MR. GROSSMAN: That's clearly the case, and I
14 think in the proper benefits case -- I'm not suggesting
15 that I don't think there are parallels in the law that
16 would support a claim that a denial of a contract also
17 would be actionable, but that's not the case before this
18 Court.

19 QUESTION: I understand it's not the case, but I
20 don't know why you don't gobble up that case. What about
21 a failure -- you know, when --

22 MR. GROSSMAN: I --

23 QUESTION: -- there are visiting dignitaries
24 that come to town, the White House has dinners for them,
25 and it is not uncommon for significant donors to the party

1 that occupies the White House to be invited to those
2 dinners and not donors to the other party. Now, what
3 about that? This -- I'm sure this comes out of public
4 funds from somewhere. Is there something wicked about
5 that? Is that unconstitutional?

6 MR. GROSSMAN: No, I don't believe that it is.
7 I believe --

8 QUESTION: Why not?

9 MR. GROSSMAN: Well, because --

10 QUESTION: I mean, that's shorting these people.
11 They would like to get to the White House as well.

12 MR. GROSSMAN: I believe that the person you've
13 described has a political identity. That is, the
14 President. I think he's free to exercise that role as
15 well as his role as executive administering the laws.

16 QUESTION: Well, why doesn't the mayor of
17 Northlake have the same identity?

18 MR. GROSSMAN: Because he has, in this precise
19 instance, chosen to terminate a business relationship. It
20 isn't a question of opening up access to other qualified
21 persons who happen to give him a contribution. It is,
22 instead, a direct penalty on belief because he has
23 terminated a 30-year-old benefit to an individual simply
24 on the grounds of refusal to contribute.

25 QUESTION: So if he brought new contributors in

1 and gave them benefits, that would not be bad under your
2 view.

3 MR. GROSSMAN: No, it would not.

4 QUESTION: What is -- where I'm having trouble,
5 and I'm simply asking for help, is, forget your case. If
6 your case were here alone and you could decide it
7 separately, I think you, in my view, might well win.

8 But what's bothering me about it is it's
9 connected to all kinds of other cases involving Government
10 contractors, and at this point I don't know how to draw a
11 line. That is, what's bothering me about the line, and I
12 really don't know, is, it is not the case -- I mean, there
13 are important Government interests in not getting the
14 courts too involved in this.

15 All 50 States have responsible bidding laws of
16 some kind. Illinois, the word responsible low bidder
17 appears 135 times in the statutes, so by and large they've
18 statutorily taken care of the problem except in certain
19 instances like yours, and also in defining the word
20 responsible.

21 And if every time a Democrat loses a contract,
22 or a Republican loses a contract, he can go into court,
23 then the administrators of the contracting system must
24 look for objective criteria so that they can prove they
25 weren't motivated by the political reason, and at that

1 point their ability to award contracts is severely
2 injured. They can't use subjective judgment.

3 That's the kind of thing that goes under the
4 title, efficiency of Government, and what I'm looking for
5 is some kind of line that you would propose that permits
6 that consideration called efficiency of Government to
7 still work while protecting, let's say, the egregious case
8 that you might have found, and I don't know how to draw
9 that line.

10 MR. GROSSMAN: Well, I think first, just as a
11 note, over \$200 million worth of no-bid contracts were
12 allocated by the State of Illinois in 1991 --

13 QUESTION: Yes, there are 135 times the words
14 responsible lowest bidder appears. Then there'll be a
15 category, I guess you'll say it's \$200 million worth --
16 that's not billions, but it's significant -- that fall
17 outside it, but that suggests to me that's what we're
18 dealing with.

19 And when we're talking about that kind of
20 animal, how do we preserve the ability of the Government
21 to work efficiently while stopping the egregious instance.
22 That's what I don't see. What's the standard?

23 MR. GROSSMAN: I think that what we do -- I
24 think that the Court has already answered that question,
25 and I think it has done it substantially by its

1 formulation of a burden of proof in Mt. Healthy v. Doyle.

2 Not only would the bidder have to show in fact
3 that there was political motivation, but he would also
4 ultimately have to show that there was no other
5 permissible reason on which he --

6 QUESTION: No, no, Mt. Healthy, he comes in, he
7 says, I am a human being who is a contractor. I am a
8 Republican. I did not get the contract. A Democrat got
9 the contract, and now, I am reasonably qualified, I got
10 into the final round, so we'll put the burden on the other
11 side to prove that it wasn't politically motivated. That
12 isn't too hard.

13 MR. GROSSMAN: That isn't very hard, except that
14 that hasn't been sufficient in the political discharge
15 cases to date. That is not how the proof has gone. I
16 think a good indication --

17 QUESTION: Mr. Grossman, earlier you said you
18 drew -- in response to Justice Scalia you said, this is a
19 termination case, and you seemed to exclude getting your
20 foot in the door in the first place, bidding, getting on
21 the list.

22 I thought you said, in answer to the Chief as
23 well, being thrown off the list that you've been on for 30
24 years is different from not being put on the list in the
25 first place. Now, are you abandoning that distinction in

1 your response to Justice Breyer?

2 MR. GROSSMAN: No, I don't believe I am. I
3 think that --

4 QUESTION: Then how do you justify the
5 distinction?

6 MR. GROSSMAN: I believe that if there's a
7 penalty case and you can look at injury to the individual,
8 he clearly has standing and he's clearly suffered a
9 constitutional wrong, in some instance the patronage cases
10 have looked to whether or not coercion takes place. That
11 is, is the benefit substantial enough, or the nature of
12 the relationship substantial enough, in order to really
13 make someone alter beliefs?

14 I don't believe that that dichotomy is
15 necessarily a valid one, but it nevertheless exists in the
16 law. To the extent that there are members of the Court
17 who believe that that is a more difficult question to
18 grapple with, I think it is not presented on the record
19 here and it need not be included.

20 QUESTION: But counsel, that simply doesn't help
21 us resolve this case. You're asking us to say that
22 independent contractors in some instances are included
23 within the protection of the First Amendment in these
24 patronage cases, and we are concerned about the principle
25 way to decide the case, and you just can give us no

1 explanation for why, in the Chief Justice's instance, the
2 same principle should not apply, and maybe it should --

3 MR. GROSSMAN: Well, I believe that it should.

4 QUESTION: -- but it's part of our function --
5 it's your function to argue the case and win. It's our
6 function to write an opinion.

7 MR. GROSSMAN: I understand that, Your Honor,
8 and I believe that this Court will have formulated -- let
9 me try to put it into the real world for a second.

10 Illinois has filed an amicus brief in this case. It has
11 shown that what it did was seek out professional
12 consultation through a professional management company
13 which has restructured its workforce and has provided the
14 very standards that Justice Breyer suggests exist that
15 reflect some objective merit-based hiring.

16 Since that has occurred, you can see from the
17 response in our reply brief, there are virtually no
18 employees who are winning political discharge cases, and
19 there are no employees winning promotion cases, because
20 the Mt. Healthy burden which I suggested to you allows
21 government to come in and show an independent, permissible
22 basis. It does not mean --

23 QUESTION: We don't know what the cost of that
24 is. I mean, what Justice Breyer is concerned about is
25 there is a place in government for subjective evaluation,

1 and perhaps especially in contracting, not just for who
2 has the lowest bid and all sorts of numerical and
3 objective criteria, but for factors that must be
4 subjectively evaluated. They have to be cast away if
5 there is this risk of litigation on the basis of awarding
6 it to somebody of the wrong party.

7 MR. GROSSMAN: No more than it had to be cast
8 away in the employment decisions. The same thing is true.
9 There is a subjective evaluation that is made between
10 equally competent and qualified employees. It happens all
11 the time in the workforce, and what the record is --

12 QUESTION: Well, but in the employment area, you
13 see, there was an exception written in to Elrod and
14 Branti, and that exception did cause a lot of litigation
15 in the First Circuit.

16 There were -- we had six -- there were 600
17 confidential employees fired when they changed government
18 in Puerto Rico in 1984, the political -- and 300 of them
19 brought lawsuits. That was very tough to work out.

20 What I'm looking for here is, is there a similar
21 kind of exception?

22 When you buy a pencil from the GSA, when the
23 Government orders a pencil, often to buy a pencil there
24 are all kinds of papers. It takes forever, and some of
25 the reason for that was because the GSA was worried about

1 being able to substantial 100 percent that there were no
2 subjective impermissible factors going into the Government
3 procurement process. That slows it down, stops it from
4 working.

5 So what is a standard whereby we can assure that
6 that kind of thing can work, at the same time protect your
7 client?

8 MR. GROSSMAN: Well, I believe that the record
9 shows that what happened in the First Circuit was fairly
10 unique.

11 What we see happening now in terms of the
12 administration of the Branti standard and the
13 administration of the patronage contracting case --
14 patronage employment cases is a routinization of the
15 application of the standard. Four circuits have agreed --

16 QUESTION: Yes, but you've already told me that
17 you would apply a stricter standard in the independent
18 contractor situation than for employees, so --

19 MR. GROSSMAN: A strict --

20 QUESTION: -- citing what's happened to
21 employees in promotion cases under a more balanced
22 standard seems to me doesn't answer the question of how we
23 would respond to Justice Breyer's line-drawing in your
24 situation.

25 MR. GROSSMAN: Well, I think that strict

1 scrutiny has been applied in the employee patronage cases,
2 but even under a reasonableness standard contract
3 patronage would not be -- would not withstand scrutiny.

4 This is not -- this is a viewpoint-based,
5 partisan-enforced practice that requires a contribution of
6 a precise amount, and which is a substantial tax on a
7 small businessman's ability to function whatsoever, so
8 whatever level of scrutiny this Court would choose, I
9 would maintain --

10 QUESTION: Well --

11 MR. GROSSMAN: -- that contract patronage cannot
12 withstand that.

13 QUESTION: Let me ask another question. Would
14 you have precisely the same case and the same standard if
15 it were speech-related?

16 Suppose that Mr. Grossman just put up the
17 sign -- excuse me, your client put up a sign supporting
18 the mayor's opponent, and we didn't have this element of
19 the refusal to contribute.

20 MR. GROSSMAN: Yes, I believe that that also
21 would be protected.

22 QUESTION: Well, that is this case. That's what
23 paragraph 12 of the complaint alleges.

24 MR. GROSSMAN: Excuse me?

25 QUESTION: That is this case.

1 MR. GROSSMAN: It unquestionably is --

2 QUESTION: Paragraph 12 of the complaint
3 specifically alleges that he was terminated because he
4 carried campaign posters.

5 MR. GROSSMAN: It is. It is precisely --

6 QUESTION: I don't understand why there should
7 be a distinction --

8 MR. GROSSMAN: I don't think there should be.

9 QUESTION: -- in this case.

10 MR. GROSSMAN: I think that strict scrutiny
11 applies to both. I think --

12 QUESTION: Mr. Grossman, victorious political
13 parties, especially at the municipal level, have been
14 awarding contracts to their political friends since God
15 made little apples, at least since He made them in this
16 country.

17 We have recently held that discrimination in
18 contracting on the basis of race is no good, even if you
19 do it for the best of motives. Don't you think that there
20 might be some cause for upset if minority groups that have
21 finally wrested control of various municipalities from
22 previous minority groups who had control, suddenly, as
23 soon as they get in, are confronted with a whole new
24 regime?

25 Now you can no longer give contracts to your

1 friends. Now everybody has to come in on an equal basis.

2 MR. GROSSMAN: I think it's --

3 QUESTION: And moreover, you can't discriminate
4 on the basis of race in the awarding of contracts,
5 although previously you could have discriminated on the
6 basis of political affiliation. Why should we change the
7 rule in the middle of the game like that?

8 MR. GROSSMAN: Well, I believe that it's no more
9 permissible to discriminate on the basis of political
10 affiliation than it is race or religion. And I think that
11 you change the rule because it conforms to the
12 Constitution, and I believe that it is --

13 QUESTION: Well, certainly some of our cases --
14 for instance, in the reapportionment cases we've held that
15 political gerrymanders are okay, but racial gerrymanders
16 are not, so we have not applied the same standard to
17 political considerations as we have to racial
18 considerations.

19 MR. GROSSMAN: I believe that's also correct in
20 that construct, but I believe where it is used as a
21 penalty directly against the exercise of rights, that this
22 Court's cases on viewpoint discrimination, and this
23 Court's case on forced contribution -- this isn't a matter
24 of the permutations of drawing district lines. This has
25 to do with a direct requirement that you conform your

1 political beliefs to a strict code, and that you pay on
2 the line in conformity with that.

3 QUESTION: What if the City of Northlake had
4 said, here, we want \$100 from each towing contractor. We
5 don't care whether you vote for the mayor or not. Your
6 political beliefs are your own, but just pay \$100 to the
7 mayor's campaign fund.

8 MR. GROSSMAN: I believe that that would be
9 forced contribution. It would run afoul of Abood, it
10 would run afoul of Keller --

11 QUESTION: But it certainly doesn't force anyone
12 to change their political beliefs.

13 MR. GROSSMAN: No. It is a -- in that
14 particular case, it is a forced contribution. It makes
15 them contribute contrary to their political beliefs. If
16 you do not want to support this mayor, but nevertheless
17 are required to do it, it's as great a sin to be taxed as
18 to be penalized against your will.

19 QUESTION: What about favoring contractors who
20 are environmentalists, who are active in environmental
21 causes? Would that be bad?

22 MR. GROSSMAN: I don't -- it would have to be
23 compared to another construct.

24 QUESTION: Well, I mean, this is a political
25 view. These people, they're greens. Can you favor greens

1 over, I don't know, whatever the other ones are, browns,
2 or blacks, I don't know.

3 MR. GROSSMAN: I would suppose that based on the
4 service that you sought to provide, and I want to stress
5 that there may very well be a compelling governmental
6 interest for some political loyalty, or there may be a
7 compelling governmental interest --

8 QUESTION: But I can't favor them just because I
9 want to give business to a company that I think has its
10 head on straight as far as what's good for the country is
11 concerned? I can't do that? Because that's sort of a
12 political view.

13 MR. GROSSMAN: Well, I think that it is
14 viewpoint discrimination and that it is ideologically
15 based. I think that it poses different governmental
16 interests than historically have been asserted by those
17 who believe that patronage serves the democratic process.

18 QUESTION: Mr. Grossman, on the subject of
19 lines, you never did say what would be a rational
20 distinction between not putting one on the list and taking
21 one off the list, that's one thing, and then you seemed to
22 say we should have a stricter standard when we're dealing
23 with, give money to the incumbent, don't support the
24 challenger, a stricter standard for that than someone who
25 goes around criticizing government policy.

1 Are those your positions, or are you saying all
2 of this gets together, and it's the same First Amendment
3 standard for all of them, whether it's expression about
4 government policy or patronage, whether it's getting on
5 the list or being taken off the list, the same standard
6 for all of these?

7 MR. GROSSMAN: I do believe it's the same
8 standard.

9 QUESTION: Then you're changing from the way you
10 started.

11 MR. GROSSMAN: I didn't intend to. What I
12 believe are that there are different government interests
13 implicated in those different hypotheticals, but that --

14 QUESTION: Well then, why shouldn't you be
15 talking about balancing, rather than the strictest
16 standard?

17 MR. GROSSMAN: Because unless you distinguished
18 yourself, unless as a contractor you start to move on a
19 continuum towards looking like an employee, you are a
20 member of the public at large, and there is no reason to
21 restrict your rights.

22 The person who happens to sell paper supplies to
23 the Court cannot remotely be likened to an employee.
24 There is no work place employer-employee relationship.
25 That has been the basis for restricting the rights of

1 public employees.

2 This Court reaffirmed that in Waters and defined
3 that quite clearly. It was not the efficiency of
4 operations, per se, that gives it a freer hand to regulate
5 employees. It is the nature of that relationship, every-
6 day functioning in the context of supervision, working
7 with other people every day in the work place.

8 Suppliers of office goods just don't look like
9 that. Nor do towing operators look like that, and there
10 is no reason to pull them out of the public and treat them
11 to a lesser standard for very, very basic rights of where
12 they put their campaign dollars.

13 QUESTION: Well, would you say that was true in
14 a speech situation with a public employee, if the person
15 who applied for public employment, but had not yet been
16 hired, had been engaging in speech which, had he been
17 hired would in some sense have been antithetical to the
18 accomplishment of his government job?

19 Would you say that that somehow could not be
20 considered, it couldn't be balanced because at the moment
21 of the speech he was simply a member of the general
22 public?

23 MR. GROSSMAN: No. It might very well be a
24 relevant consideration.

25 QUESTION: Then why isn't the same -- all right,

1 then why isn't the same --

2 MR. GROSSMAN: If it impacts on the performance
3 of the future job.

4 QUESTION: All right, then why isn't the same
5 kind of balancing going to be appropriate when you're
6 talking about a person who wants to be an independent
7 contractor but has not yet gotten a contract?

8 MR. GROSSMAN: It might be that if he is engaged
9 in speech which is related to the performance of a job --

10 QUESTION: So the difference is speech versus
11 association, is that it?

12 MR. GROSSMAN: I believe that association cannot
13 be related to the performance of the service. That is the
14 foundation of this argument. If you can prove that it is,
15 if political loyalty is, in fact, relevant, if someone who
16 hires a --

17 QUESTION: I just want to understand what you're
18 saying. I had thought that the reason the associational
19 applicant for a contract was, in fact, not going to be
20 subject to balancing in any sense was that he was simply a
21 member of the general public, but I think your reason, if
22 I understand you now is, there never can be a balancing on
23 an associational issue. That's purely for speech.

24 MR. GROSSMAN: I believe that that is true.

25 QUESTION: Okay.

1 MR. GROSSMAN: I would like to reserve my
2 remaining time for rebuttal.

3 QUESTION: Very well, Mr. Grossman.

4 Mr. Feiereisel, we'll hear from you.

5 ORAL ARGUMENT OF GARY M. FEIEREISEL

6 ON BEHALF OF THE RESPONDENTS

7 MR. FEIEREISEL: Mr. Chief Justice, and may it
8 please the Court:

9 This Court has made clear that First Amendment
10 rights are not absolute. There are encroachments or
11 restrictions on First Amendment rights permissible for
12 appropriate reasons, and when we're talking about an
13 independent contractor context, those appropriate reasons
14 exist.

15 To rule in favor of petitioners and send this
16 case back down to the district court, this Court must
17 extend the holdings in Elrod, Branti, and Rutan to the
18 independent contractor governmental context, and there are
19 several reasons why that should not be done.

20 First of all --

21 QUESTION: Can I ask, before you get into your
22 discussion of independent contractors, this fellow, of
23 course, wasn't a contractor with the city. He was just on
24 a towing list.

25 MR. FEIEREISEL: He didn't have a formal

1 contract with the City of Northlake, but essentially that
2 is why he was doing what he was doing, because the City of
3 Northlake had an agreement or had a towing rotation
4 list --

5 QUESTION: They had a list, but --

6 MR. FEIEREISEL: -- that wouldn't be there --

7 QUESTION: But he didn't have an agreement to
8 stay on the list, did he? He didn't have any contractual
9 right, did he?

10 MR. FEIEREISEL: No, he did not.

11 QUESTION: So he's not an independent
12 contractor. His contracts are with people who need towing
13 services, not with the city.

14 MR. FEIEREISEL: It's essentially the same thing
15 in this context because of his -- the reason why he's at
16 the scene performing his tow. He would not be there but
17 for the city calling him out to go there, and I think in
18 that context the analysis of an independent contractor is
19 the same, and my reading of the briefs is that the
20 petitioners have essentially admitted that this is an
21 independent contractor situation.

22 QUESTION: Well, would you agree that if he were
23 purely a member of the public, not a contractor at all,
24 who wanted to wear campaign buttons -- and it's alleged
25 here he displayed campaign posters for the opponent of the

1 city. If an independent, just a member of the public
2 displayed campaign posters for the opponent of the mayor,
3 could the city punish that person in any way?

4 MR. FEIEREISEL: No, it could not.

5 QUESTION: And what if they had facilities such
6 as a museum, could they deprive the members of the public
7 of entrance to the museum because they wore campaign
8 buttons?

9 MR. FEIEREISEL: No, they could not.

10 QUESTION: Now, why is it that --

11 QUESTION: Are you sure of that, that they
12 couldn't punish -- it depends on what you mean by punish.
13 Would the mayor have to invite this person to a dinner at
14 the mayor's mansion?

15 QUESTION: No, I'm not talking about what the
16 mayor does. Can they use city authority to deprive that
17 member of the public from services that other equally
18 qualified people would be eligible for?

19 MR. FEIEREISEL: Well, I guess in that context
20 it depends on what we're talking about, and if we're
21 talking about -- if we're talking about --

22 QUESTION: We're talking about the First
23 Amendment right --

24 MR. FEIEREISEL: No, I --

25 QUESTION: -- to display a campaign button

1 opposing the reelection of the incumbent in office.

2 MR. FEIEREISEL: And then if that individual, if
3 the incumbent is reelected and that individual then wants
4 to --

5 QUESTION: Wants to go into a public museum and
6 the mayor says, no, you were wearing a button against me
7 before, so you can't come in.

8 MR. FEIEREISEL: No, I would say that he could
9 not do that.

10 QUESTION: Now why, then, can he keep this
11 member of the public off the towing list if he's otherwise
12 qualified for it?

13 MR. FEIEREISEL: Because we get back to what I
14 believe --

15 QUESTION: If his only sin is displaying a
16 campaign poster, that's the only thing he's done, and
17 that's what's alleged in paragraph 12 of the complaint.

18 MR. FEIEREISEL: Well, we get back to what I
19 believe is the issue in the case, is that in an
20 independent contractor context, this individual wants
21 their name to be put on the towing rotation list, and the
22 administration in Northlake should be allowed to use or to
23 hire or to award contracts to people who it knows supports
24 its administration in order that it can make sure that it
25 delivers whatever those public services are to the people

1 that had elected them.

2 QUESTION: But they're not public services.
3 They're private towing services that they want to give to
4 motorists who are in distress. They're not providing any
5 service to the city.

6 MR. FEIEREISEL: They are providing a service to
7 the city. I respectfully disagree, Your Honor, because
8 one of the services they're providing to the city is, for
9 instance, you have an automobile accident on one of the --
10 on a busy thoroughfare through the City of Northlake.
11 Well, one of the things that has to happen, or that people
12 in Northlake should be entitled to, is free and safe flow
13 of traffic in their community.

14 If you have an automobile accident in that
15 community at a busy intersection and for some reason you
16 have a tow truck operator who is on your list and who you
17 call out to the scene to clear the intersection or clear
18 the problem, they --

19 QUESTION: What you're saying, I suppose, is if
20 there are 10 qualified towing truck operators, five of
21 whom voted against the mayor and five voted for him, the
22 public is benefitted by saying we'll only allow the five
23 who voted for the mayor on the list. That doesn't make
24 sense to me.

25 MR. FEIEREISEL: The public is entitled -- the

1 public is deserving of independent contractors who will
2 provide safe, efficient, and effective public services. I
3 think that --

4 QUESTION: Mr. Feiereisel, I had thought that
5 this case involved services provided to the city. That is
6 what is stated in the statement of the case both in the
7 petition and in the brief by the petitioner. It says
8 O'Hare provided the city with towing services. Both the
9 petition and the principal brief says that, and I thought
10 that's the assumption on which we're trying to decide this
11 case.

12 MR. FEIEREISEL: That was my thought as well,
13 Your Honor.

14 QUESTION: In any case, we --

15 QUESTION: Rather than what's alleged in the
16 complaint.

17 MR. FEIEREISEL: Well, it is what's alleged in
18 the complaint.

19 QUESTION: Well --

20 MR. FEIEREISEL: I again disagree with,
21 respectfully, Your Honor.

22 QUESTION: Would it be fair to say that there is
23 at least this agreement between the tower and the city:
24 the tower says, if you put me on the list, I promise to go
25 when I'm called. I will sort of guarantee that the

1 service, which benefits not only the auto -- automobile
2 owner but the city that wants its streets clean, is a
3 service that I promise to provide if called upon. Is that
4 the nature of the arrangement?

5 MR. FEIEREISEL: The nature of -- essentially I
6 believe that's the nature of the arrangement.

7 QUESTION: Yes. He says, if you put me on the
8 list, I'll go when you call me. Is that fair to say?

9 MR. FEIEREISEL: Correct.

10 QUESTION: Okay.

11 MR. FEIEREISEL: Assuming --

12 QUESTION: Who pays for it?

13 MR. FEIEREISEL: Assuming he has trucks
14 available.

15 QUESTION: Who pays for it?

16 MR. FEIEREISEL: Oh, I think typically the
17 motorist pays for it.

18 QUESTION: So the motorist doesn't pay -- I
19 mean, the city pays nothing.

20 MR. FEIEREISEL: The city pays nothing but --

21 QUESTION: Well, how are they selling something
22 to the city, then?

23 MR. FEIEREISEL: They're not selling anything to
24 the city, Your Honor. What they're doing is, they're
25 providing a public service that I think not only the

1 motorist benefits from but the city benefits from, and the
2 reason they're at -- the reason they're there is because
3 the city is -- has put them there.

4 QUESTION: Mr. Feiereisel --

5 MR. FEIEREISEL: Yes.

6 QUESTION: -- would your answer be different if,
7 instead of putting the company on the list, the question
8 were licensing companies to provide towing services and
9 the city allows only people who are licensed to perform
10 these services, whether called by the police or called by
11 a private person, and Mr. Gratziana can't get a license
12 for this year because he backed the wrong candidate?

13 MR. FEIEREISEL: Well, I think that in that
14 situation it may very well depend on what the
15 qualifications are, or what the --

16 QUESTION: Meets all -- you're not contending
17 here that there's any question about qualifications to do
18 the towing job?

19 MR. FEIEREISEL: Well, I don't know that,
20 because there's no -- the complaint doesn't --

21 QUESTION: Mustn't we assume for this purpose --

22 MR. FEIEREISEL: We must, but I don't think just
23 because we assume that because --

24 QUESTION: Oh, well, let's assume that this
25 mayor says, nobody gets a license to perform towing

1 service unless they supported me.

2 MR. FEIEREISEL: And --

3 QUESTION: And Gratziana didn't support the
4 mayor so he doesn't get a license, and he challenges that
5 and says that my First Amendment rights have been
6 infringed.

7 MR. FEIEREISEL: I don't see that that's a
8 different situation than this situation.

9 QUESTION: Well, certainly a difference is
10 that -- I gather from Justice Ginsburg's question that the
11 license might be necessary to perform towing services not
12 just for the city but for private individuals. Do you
13 think the city could say, you can't be in the business of
14 towing private individuals in Northlake if you didn't
15 contribute to the mayor's campaign?

16 MR. FEIEREISEL: No, I don't think they could
17 say that. I'm talking about -- I understood the question
18 to be a license to do the kind of work that is alleged in
19 the complaint here, which is to provide towing services to
20 the City of Northlake, and in that context I think that
21 there would be the same situation as we're talking about.

22 I don't believe that an administration, whether
23 it's newly elected or whether it's an incumbent
24 administration, should be forced to face the risk of using
25 independent contractors that it knows does not support it,

1 because when they're faced with that risk, they're faced
2 with --

3 QUESTION: But what's the interest? I mean, if
4 the interest of the city is to have qualified, prompt,
5 well-performing tow services available, and if it knows
6 that the service provided by O'Hare fits that category,
7 what further interest does it have in saying we're only
8 going to allow it for someone who contributed to the
9 mayor's campaign?

10 MR. FEIEREISEL: I don't know if once the --
11 once the petitioner in this case doesn't contribute or
12 doesn't support the administration that we know that any
13 more, because especially in local --

14 QUESTION: You mean, you think that the failure
15 to contribute somehow means that the service will not be
16 properly provided?

17 MR. FEIEREISEL: I don't know that. That's a
18 possibility. Local -- in local

19 QUESTION: Well, don't we take this case, as
20 we've already established, on the assumption that O'Hare
21 is qualified and has performed adequately in the past, and
22 would be expected to in the future?

23 MR. FEIEREISEL: That's --

24 QUESTION: I thought we took the case on that
25 assumption.

1 MR. FEIEREISEL: That is -- that is what's
2 alleged in the complaint and that's why --

3 QUESTION: Okay.

4 MR. FEIEREISEL: That's why we are here.

5 QUESTION: So let's get that out of the
6 hypothetical. What additional interest does the city have
7 in saying that only someone who contributes to the mayor
8 can be on that list?

9 MR. FEIEREISEL: The interest that I'm trying to
10 get at, Your Honor, is that I believe that regardless of
11 whether the petitioner or an independent contractor says
12 they will do whatever they are hired to do correctly,
13 properly, is not really the point, because when you are
14 forced to retain or hire independent contractors that you
15 know do not support you, your administration, your
16 policies, and your programs, then you are running the risk
17 of that specific, independent contractor potentially
18 undermining your administration in some way, and I think
19 that is especially true when we're talking about --

20 QUESTION: But Mr. Feiereisel --

21 QUESTION: But isn't --

22 QUESTION: -- the whole -- the vast business of
23 government is done on the basis of competitive bidding,
24 merit selection, and the government is trusting people all
25 the time if they put in the lowest bid, even if they're

1 from the opposite party, so your notion that this
2 doesn't --- this is unreliable, it's unreliable, doesn't
3 seem to hold up, since we're all agreed that for the most
4 part government contracts, government employment is given
5 out on the basis of merit or lowest bid.

6 MR. FEIEREISEL: Well, in those situations, Your
7 Honor, where there's -- where there are other statutes
8 applicable, then we wouldn't be talking about it.

9 QUESTION: But isn't there, in those cases --
10 you -- what you're saying, it's not workable. I can
11 understand your saying it doesn't have to be done, but
12 when you give the excuse that efficient government
13 operations are deterred, the scheme won't work, I think
14 that the experience is just contrary to that.

15 MR. FEIEREISEL: Well --

16 QUESTION: I thought it was the party system
17 that was your -- I thought you were coming here prepared
18 to defend the proposition that you ought to be able to
19 give contracts to your friends who helped getting you
20 elected, which --

21 MR. FEIEREISEL: I was getting --

22 QUESTION: Which has been done in this country
23 for 200 years --

24 MR. FEIEREISEL: I was --

25 QUESTION: -- and we haven't found it

1 unconstitutional for 200 years, but you're not prepared to
2 defend that proposition.

3 MR. FEIEREISEL: No, I was getting to that. I
4 was getting to that. I --

5 (Laughter.)

6 QUESTION: Well, would you agree that the thing
7 about inefficient, unworkable, that that won't fly?

8 MR. FEIEREISEL: Sure, I think -- no, I will
9 not, I will not agree with that, because I think that --

10 QUESTION: All right, would you explain to me
11 how the fact that the individual voted for a different
12 mayor undermines his capacity to provide a tow service? I
13 just don't get the connection.

14 MR. FEIEREISEL: Well, first of all, I -- we're
15 not -- this has nothing to do with who they vote for. I
16 don't -- we don't care who they vote for. We're not
17 trying to force them --

18 QUESTION: Contribute to, put signs up for,
19 however. How does that create a risk that he won't tow?
20 Doesn't he want to tow and charge for the towing?

21 MR. FEIEREISEL: I would assume that he doesn't,
22 Your Honor.

23 QUESTION: Okay, then why is there a risk that
24 he won't do the towing because he contributed to,
25 displayed signs for, voted for, a different candidate?

1 MR. FEIEREISEL: He may very well do the towing,
2 but he may do it in a -- he's out at the scene to do his
3 towing because Northlake sent him there, essentially, so
4 the people who he's towing for are basically seeing him as
5 somebody from the city. Now, whether he does the towing
6 correctly or doesn't do it correctly, if he -- if there is
7 some agenda, and obviously in this --

8 QUESTION: Do Republican towers tow differently
9 from Democratic towers?

10 (Laughter.)

11 MR. FEIEREISEL: I'm not saying that they do.

12 QUESTION: Do you claim that he's going to go
13 out there and say, and by the way, in the next election
14 vote the bums out.

15 (Laughter.)

16 QUESTION: Do you -- is that what they --

17 MR. FEIEREISEL: I don't know what he's going to
18 do. I don't know what he's going to do, Your Honor, but
19 what I'm saying is --

20 QUESTION: The courts rejected that argument
21 even for government employees, who are certainly more
22 closely associated with the party in power than an
23 independent contractor. We've said it doesn't matter.
24 We're not going to assume that a government employee is
25 going to mess up the system just because he comes from the

1 other party.

2 You have about 10 minutes left. You can argue
3 this point for the next 10 minutes, but there's nothing to
4 it.

5 (Laughter.)

6 QUESTION: I mean, really, the proposition
7 we're -- I thought we were going to argue is whether you
8 can favor your friends. That's what this issue involves.
9 If you can tell me this is a better tower, then there's no
10 problem.

11 QUESTION: Let me ask, why should you be able
12 to? I'm not saying you should or you shouldn't, but
13 suppose --

14 QUESTION: May I suggest, it's not favoring your
15 friends, it's penalizing your enemies that's alleged in
16 this case.

17 QUESTION: Yes, that, too. That, too.

18 (Laughter.)

19 QUESTION: For what they said. For what they
20 said in public. You're penalizing people for what they
21 say in public, and let's defend that proposition.

22 MR. FEIEREISEL: I think that what we have to do
23 when we're talking about a democratic process is, you are
24 entitled, as the administration in power to award
25 contracts to people who support you, and that may --

1 QUESTION: Winner take all.

2 MR. FEIEREISEL: Maybe. Maybe. That may --

3 QUESTION: Why? Because to award them to your
4 friends is -- whether every Senator, Congressman, State
5 legislator through 200 years has suggested if you have
6 breakfast with me or whatever, maybe that will help, or
7 maybe it won't, but to do that, to give contracts to your
8 friends is also to not give them to your enemies, and your
9 enemies, presumably, are those who voted for the opposite
10 side.

11 All right, so maybe that's gone on for 200
12 years, but the question that's being put by the other side
13 is, fine, what is the logical justification for penalizing
14 your enemies by helping your friends?

15 MR. FEIEREISEL: The logical justification is,
16 you should be able to reward your supporters because it's
17 the democratic process. You should be able to do that,
18 and you should not have to suffer the risk of facing a
19 First Amendment lawsuit every time someone is not awarded
20 a contract when they think they should have been awarded a
21 contract, especially if they have already established
22 themselves as a supporter of the opposition.

23 Then there's going to be a First Amendment
24 lawsuit filed every time that situation arises, and what
25 happens then is, there's going to be -- there's going to

1 be, even more so than in the employer-employee context, an
2 unbelievable amount of litigation that I think is going to
3 arise from that.

4 It was alluded to a little bit before, but I
5 think when you're talking about an independent contractor
6 situation, you have a lot more disappointed independent
7 contractors who don't get their bids accepted than you
8 have employees who don't get hired, or who don't get
9 promoted or transferred, or some other employment
10 decision.

11 So you're facing the prospect here of saying
12 that independent contractors have certain First Amendment
13 rights, and that's opening a potential floodgate of
14 litigation.

15 QUESTION: Do you accept the proposition,
16 Mr. Feiereisel, that if something is illogical it is
17 unconstitutional?

18 MR. FEIEREISEL: No, I don't accept that
19 proposition, Your Honor, and I think that another
20 consideration in this setting is once -- I get back to my
21 point before, that you shouldn't -- they admitted you
22 should not have to suffer the risk of running into an
23 independent contractor who has whatever agenda he may
24 have.

25 Clearly, based upon what is alleged in this

1 complaint, the petitioner does not support the mayor and
2 vigorously supports the opposition, so he -- the mayor
3 should not be penalized and Northlake should not be
4 penalized because he does not want to run the risk of this
5 particular independent contractor or any independent
6 contractor doing something to undermine his
7 administration. He should be allowed to --

8 QUESTION: Mr. Feiereisel, suppose my friends
9 and my enemies correspond with certain racial or religious
10 groups. Suppose one particular church campaigned, the
11 members of that church campaigned against the incumbent,
12 and so the people who are taken off the towing list are
13 all members of that religion, would that make any
14 difference?

15 MR. FEIEREISEL: Well, then I think you're
16 taking it out of a pure --

17 QUESTION: Taking it out of -- they happen to be
18 of one religion, but they also oppose the incumbent.

19 MR. FEIEREISEL: Well, I -- that may be a
20 different situation, but that's not what's alleged in this
21 case, Your Honor, and I don't know --

22 QUESTION: I just want to know if there's any
23 First Amendment -- any constitutional control here at all.

24 MR. FEIEREISEL: I --

25 QUESTION: Are you -- you seem at one point to

1 be taking the position that the government contracts just
2 like a private person contracts and there is no
3 constitutional limitation intruded into that, but you're
4 not taken that position.

5 MR. FEIEREISEL: I --

6 QUESTION: Just no First Amendment, is that --

7 MR. FEIEREISEL: I'm talking about the First
8 Amendment. I'm talking about -- in the context of this
9 case we're talking about political association, and in
10 that context, no, I believe that any --

11 QUESTION: But not the religion part of the
12 First Amendment, so if the --

13 MR. FEIEREISEL: That's -- no, that's not this
14 case.

15 QUESTION: Or race, or national origin.

16 MR. FEIEREISEL: That's not --

17 QUESTION: Those limits would apply to the
18 government.

19 MR. FEIEREISEL: I'm not saying they wouldn't.
20 That's -- I think that's a different case. We're not
21 talking about that here.

22 QUESTION: You're not entirely sure, though. I
23 mean, I thought you're just arguing for the spoils system,
24 the good old-fashioned spoils system, and not for racial
25 bigotry or religious bigotry --

1 MR. FEIEREISEL: I'm not. No, I'm not arguing
2 racial bigotry, I'm arguing for -- basically for --

3 QUESTION: You shouldn't say those issues are
4 not involved in this case. You should say that you're
5 argument would not approve of those things at all, because
6 that's not part of the spoils system.

7 MR. FEIEREISEL: Well, it's not part of this
8 case, either, and I agree with you.

9 I think that again, if you have a situation
10 where -- well, let me backtrack for a minute. I think
11 that the history of the Elrod, Branti, and Rutan decisions
12 as such, that it has proved to be unworkable in terms of
13 how it's applied in specific situations, and there are --

14

15 QUESTION: Well, let me ask you about -- are you
16 familiar with the Shockman decree in Chicago?

17 MR. FEIEREISEL: I'm familiar with it.

18 QUESTION: It's been in effect for about
19 20 years, I think. Has that been unworkable?

20 MR. FEIEREISEL: Well, I think that --

21 QUESTION: I mean, it's governed hiring in
22 Chicago, a very large community, for about 20 years, and
23 I'm not aware of the fact that we've been flooded with
24 cases arising out of the interpretation of that decree.
25 You're familiar with it, aren't you?

1 MR. FEIEREISEL: I'm familiar with it, Your
2 Honor --

3 QUESTION: Yes.

4 MR. FEIEREISEL: -- yes, and I'm not -- no, I'm
5 not aware of there being a flood of litigation arising out
6 of that decree.

7 QUESTION: And it survived in the change of
8 administration when a black mayor succeeded a white mayor,
9 it didn't cause insuperable problems or anything.

10 QUESTION: It was the same party, wasn't it?

11 (Laughter.)

12 QUESTION: Unless Chicago has a Republican mayor
13 these days --

14 MR. FEIEREISEL: No, it doesn't, Your Honor.

15 QUESTION: It didn't when I lived there, anyway.

16 MR. FEIEREISEL: It doesn't. There's no
17 Republican mayor in Chicago.

18 QUESTION: And I suppose there's no political
19 division within the Democratic Party, either.

20 (Laughter.)

21 MR. FEIEREISEL: Nonetheless, I think that the
22 potential is there not only -- I think it's obvious that
23 it's there in the employer-employee context.

24 It's clearly there in an independent contractor
25 context, and there were some -- there were questions

1 previously about line-drawing in an independent contractor
2 context. I don't think you can draw a line. I think that
3 it has to be everybody or nobody that this is going to
4 apply to, because --

5 QUESTION: Well, on the distinction between
6 hiring and firing, are you familiar with the Wygant case?

7 MR. FEIEREISEL: No.

8 QUESTION: It did draw just precisely that
9 distinction, and said it made a constitutional difference,
10 but perhaps you're not familiar --

11 MR. FEIEREISEL: Well, in this line of cases
12 with Elrod, Branti, and Rutan, that's all been basically
13 lumped together, I think. Hiring, firing, promotion,
14 transfer, whatever, you can't make any employment
15 decisions unless the individual involved, or who the
16 decision is being made against, falls within the exception
17 to those cases.

18 That scenario has created a lot of litigation.
19 It has created inconsistent results between different
20 courts, and I think that that will lead even more -- or it
21 will evidence itself even more strongly in a situation
22 like this, where you have innumerable more independent
23 contractor situations than you do employee situations.

24 You have a situation where the administration
25 that's in power should not have to run the risk of facing

1 lawsuits, having to spend money on lawsuits in this kind
2 of a context.

3 You have -- that's why there's so many qualified
4 immunity defenses that are being raised, because in those
5 situations the administration does not know, or the public
6 official involved, is being dismissed from cases because
7 they are not able to tell or were not able to tell from
8 past decisions whether the decision they're making is
9 constitutionally correct or incorrect, and I think that is
10 only going to get multiplied if you extend the same First
11 Amendment rights that have been extended to employees to
12 the independent contractors.

13 I've -- there are a couple of other arguments I
14 wanted to make. My time's running out so I'm not --
15 I'll -- they're in my brief.

16 I know that one of the things we raised is that
17 if the Court decides to -- or before the Court decides to
18 extend Rutan to this situation, I think that there --
19 there should be consideration given to overruling Rutan
20 because of the problems raised in our brief and the brief
21 of the State of Illinois, the officials.

22 In summary, it is our position that, when you're
23 in an independent contractor context, their First
24 Amendment rights in political association do not -- or can
25 be infringed because they are entitled -- the

1 administration, I am sorry, is entitled to rely on
2 independent contracts -- contractors, I'm sorry, that it
3 knows supports its position, its administration, its
4 program because that is the safest way, especially at the
5 local level, to promote efficient and effective
6 government.

7 Thank you.

8 QUESTION: Thank you, Mr. Feiereisel.

9 Mr. Grossman, you have a minute remaining.

10 REBUTTAL ARGUMENT OF HARVEY GROSSMAN

11 ON BEHALF OF THE RESPONDENT

12 QUESTION: Could you say just in 1 second who
13 pays? Does the municipality pay, or the customer? We
14 have different views. The court of appeals says one, the
15 petition the other.

16 MR. GROSSMAN: The -- it actually varies. There
17 are authorized tows where the -- Mr. Gratziana can only
18 be on the scene with the authorization of the
19 municipality. Those are abandoned vehicles. We've tried
20 to explain that by citing Illinois law in our complaint.

21 In those instances, the individual driver still
22 pays, but they could not -- it is similar to the licensing
23 that has been described by Justice Ginsburg. The tower
24 could not be on the scene without authorization from the
25 city.

1 There also are city tows where Mr. Gratziana
2 tows city vehicles and does that pursuant to the list as
3 well. In those instances the city does pay money. That's
4 simply the record, and I --

5 QUESTION: But he makes a commitment to the city
6 to go, not just to the individual. I mean, the deal is --

7 MR. GROSSMAN: That is correct.

8 QUESTION: -- the city gives him the
9 authorization, and he commits himself to go.

10 MR. GROSSMAN: That is correct.

11 In terms of the flood of litigation that was
12 predicted here, I'd like to stress that Abercrombie in the
13 Tenth Circuit has given these rights to public -- to
14 independent contractors since 1990, and there's been no
15 litigation.

16 Second, that I do think Mt. Healthy addresses
17 the question of the flood, but nevertheless I have also
18 attempted to carve out in our briefs an exception that
19 does parallel those considerations recognized in Elrod and
20 Branti, and that is that in those few instances where
21 independent contractors move down that line and do provide
22 services which, in terms of implementing policy --

23 CHIEF JUSTICE REHNQUIST: Thank you,
24 Mr. Grossman. Your time has expired.

25 The case is submitted.

1 (Whereupon, at 11:05 a.m., the case in the
2 above-entitled matter was submitted.)

3 Alderson Reporting Company

4 Attached pages represent an accurate and

5 sound recording of the oral argument before

6 The United States in the Matter of

7 SHARE TRUCK SERVICE, INCORPORATED

8 NORTHLAKE, ET AL.

9 CASE NO. 95-121

10 and that these attached pages constitute the

11 proceedings for the records of the case.

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

O'HARE TRUCK SERVICE, INCORPORATED, ET AL., Petitioners v. CITY OF NORTHLAKE, ET AL.

CASE NO: *95-191*

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

BY *Ann Marie Federico*

(REPORTER)