

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT
D. PARK Petitioners v. ARIZONA, ET AL.

CASE NO: No. 95-974

PLACE: Washington, D.C.

DATE: Wednesday, December 4, 1996

PAGES: 1-58

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IN THE SUPREME COURT OF THE UNITED STATES

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ARIZONANS FOR OFFICIAL ENGLISH :
AND ROBERT D. PARK, :
Petitioners :
v. : No. 95-974
ARIZONA, ET AL. :
- - - - -X

Washington, D.C.
Wednesday, December 4, 1996

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

APPEARANCES:

BARNABY W. ZALL, ESQ., Washington, D.C.; on behalf of
the Petitioners.

ROBERT J. POHLMAN, ESQ., Phoenix, Arizona; on behalf of
the Respondents.

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1 PROCEEDINGS

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-974, *Arizonans for Official English* and
5 *Robert D. Park v. Arizona*.

6 Mr. Zall, and let me request of you, Mr. Zall,
7 and also of your colleague that the Court is very
8 interested in hearing a full discussion of the issues
9 relating to standing, mootness, and jurisdiction, so we
10 hope you'll devote a substantial part of your arguments to
11 that.

12 MR. ZALL: Yes, Your Honor.

13 ORAL ARGUMENT OF BARNABY W. ZALL

14 ON BEHALF OF THE PETITIONERS

15 MR. ZALL: Mr. Chief Justice, and may it please
16 the Court:

17 This First Amendment facial overbreadth case
18 involves a Government employee who wanted to write her
19 official documents in a language her supervisor did not
20 understand.

21 Even if her choice of language on the job was
22 speech, which it was not, it was the Government's speech,
23 not hers. Under *Capital Square*, Government runs no risk
24 of a First Amendment violation when it restrains its own
25 speech. Official English statutes, which are simply

1 restraints on the Government's own speech, do not violate
2 the First Amendment. It's a political choice.

3 One point was not treated sufficiently in the
4 briefs. Last term in County Commissioners v. Umbehr, a
5 Government contractors case, the Court said that the
6 Government's interest in speech depends on the speaker's
7 proximity to Government. The closer to Government, the
8 greater the Government's interest.

9 Umbehr described a speech spectrum ranging from
10 private citizens, in whose speech the Government has
11 little interest, to Government employees, whose closeness
12 to Government means that the Government is very interested
13 in their speech.

14 Government contractors fell somewhere in between
15 Government employees, who had the closest relationship to
16 Government, and other speakers with less close
17 relationships, and though not said in Umbehr, since
18 Government is actually closest to itself, Government
19 speech, the Government speech cases would be -- would
20 place very high on the Umbehr speech spectrum, beyond --

21 QUESTION: Mr. Zall, this particular Government,
22 at least the Attorney General, long before this case was
23 decided by the district court said that the constitutional
24 provision in Arizona did not prohibit the use of a
25 language other than English where necessary to assure the

1 fairness and effectiveness of the delivery of services to
2 members of the public. Why didn't that end this
3 controversy?

4 The then plaintiff, the sole plaintiff in effect
5 got all the relief that she sought, which was the
6 assurance that she wouldn't be fired if she used a
7 language other than English where necessary to assure the
8 fair delivery of her service.

9 MR. ZALL: Your Honor, we agree with the
10 Attorney General's opinion as to its construction of
11 Article XXVIII on the First Amendment grounds. We also
12 agree that the Attorney General appropriately considered
13 equal protection matters. Our concern is that the
14 Attorney General's opinion relied on a case which,
15 subsequent to the opinion, this court vacated on mootness,
16 and that was an equal protection issue.

17 QUESTION: Did the Attorney General withdraw
18 that opinion as the official interpretation of the State's
19 executive?

20 MR. ZALL: It did not, Your Honor.

21 QUESTION: So that's the law as far as the
22 executive's -- as far as official Government in Arizona is
23 concerned, so my question is, why didn't this case end?
24 Wasn't it moot at that point?

25 MR. ZALL: Your Honor, I believe the plaintiffs

1 in the case said that the next Attorney General could
2 issue another opinion and the Attorney General's opinion
3 was not binding on the courts, therefore they felt that
4 they still had a viable case, and the district court
5 disagreed with the Attorney General's interpretation and
6 decided not to abide by it, as did the Ninth Circuit.

7 QUESTION: Well, is -- it's not a question of
8 what the district court independently might think the law
9 was. The question was, was the plaintiff at any risk of
10 losing her job when the official interpretation, the
11 State's interpretation, was that what she was doing was
12 all right?

13 MR. ZALL: I think the answer to that question
14 is she was at no risk of losing her job, Your Honor.

15 QUESTION: Well, didn't -- what controversy was
16 left, then, if she was at no risk of losing her job?

17 MR. ZALL: I believe, Your Honor, that although
18 that was -- that's the correct interpretation, she did not
19 agree with that and asked the court on a slightly
20 different ground, which is that she was not -- excuse me.

21 The district court handed down a decision on a
22 slightly different ground, which is that although she was
23 not at risk from losing her job, it decided this was a
24 facial overbreadth case and felt somehow there were some
25 risk to other Government employees who were not before the

1 court.

2 QUESTION: What basis would there have been for
3 that? I mean, the Attorney General's statement of State
4 law was not a statement which was peculiar to her.

5 MR. ZALL: I think that's correct, Your Honor.

6 QUESTION: So the district court was wrong,
7 wasn't it?

8 MR. ZALL: I believe the district court was
9 wrong, Your Honor. This never should have been a facial
10 overbreadth --

11 QUESTION: So at that point the case was
12 certainly moot, even if we make the assumption that there
13 was a case or controversy at some point.

14 QUESTION: And it probably became moot when
15 Ms. Yniguez left her State employment, I would have
16 thought, at the very least.

17 MR. ZALL: Your Honor, the central point of
18 mootness is whether this Court's decision can affect the
19 legal rights of the parties before it.

20 QUESTION: Well, who do you represent, exactly,
21 here? Is it that organization that helped put it on the
22 ballot --

23 MR. ZALL: Yes, Your Honor.

24 QUESTION: -- and a Mr. Park?

25 MR. ZALL: Yes, Your Honor.

1 QUESTION: And how is it that they have standing
2 in this case at this juncture?

3 MR. ZALL: Petitioners have standing because the
4 lower court decisions affected their legal rights. They
5 have legal rights created by the State.

6 QUESTION: What kind of rights does your
7 organization have, AOC, or whatever it is?

8 MR. ZALL: AOE --

9 QUESTION: You assume that it's some kind of
10 legislative standing for them? What is it you're arguing
11 for that would give them standing?

12 MR. ZALL: In footnote 17 of Diamond v. Charles
13 the Court noted that a State may create interest the
14 invasion of which would give standing in Federal court.
15 That's exactly what we have here. The State created an
16 interest in petition --

17 QUESTION: I would have thought Diamond v.
18 Charles would require us to say that the organization does
19 not have legislative standing.

20 MR. ZALL: Your Honor, Diamond v. Charles as I
21 read it is predicated on the ability to create and enact a
22 legally enforceable code, citing Snapp.

23 QUESTION: But how does that give the
24 organization here standing, Arizonans for Official
25 English?

1 MR. ZALL: Well, that goes back to the standing
2 question for organizations, Your Honor. There are two
3 ways that we have standing. One is the invasion of our
4 ability to go into State court.

5 QUESTION: Well, once the thing is adopted by
6 the voters, I don't see what standing that organization
7 has to litigate in Federal court.

8 QUESTION: Along that same line, how is your
9 organization any different from any citizen in the State
10 of Arizona?

11 MR. ZALL: Your Honor, the statute -- the
12 citizens' suit provision in Article XXVIII, section 4
13 permits any person or organization doing business in
14 Arizona to enforce Article XXVIII in State court. That
15 would not, in and of itself, give standing.

16 QUESTION: Well, why wouldn't that just be a
17 State law cause of action?

18 MR. ZALL: It is a State --

19 QUESTION: I mean, how do you get to Federal
20 court?

21 MR. ZALL: Because the Federal court decision
22 eliminated that State court right. It would be the
23 equivalent of our having any other State interest, State
24 granted interest which the Federal court's action then
25 eviscerated. We would have the right to come to Federal

1 court and say, we fought hard for that right.

2 QUESTION: Well, that part of your answer then
3 seems to me that you're agreeing that you're no different
4 than any other citizen of the State of Arizona.

5 MR. ZALL: I think that's not correct, Your
6 Honor. I think because we are the proponents and we
7 expect -- it was our court purpose to get that right
8 under --

9 QUESTION: Well, but you were just the mechanism
10 for putting something on the ballot. Unlike a
11 legislature, the voters didn't give any authority to you.
12 They voted for a measure.

13 MR. ZALL: That's true, Your Honor, but the
14 question --

15 QUESTION: Would a Senator who sponsors a bill
16 have standing to challenge a court's evisceration of the
17 bill after it's been adopted as a statute --

18 MR. ZALL: The Senator --

19 QUESTION: -- on the ground that he's -- you
20 know, it's my bill. It was my idea.

21 MR. ZALL: No, Your Honor, the Senator alone
22 probably not, but the legislative body itself would under
23 Chadha, and I think that that's a situation where --

24 QUESTION: Is that clear that where the courts
25 misinterpret a statute the Congress that passed the

1 statute has standing to challenge the court's
2 interpretation of it?

3 MR. ZALL: Not quite at that point, Your Honor.
4 What Chadha says is, where the executive branch and the
5 challenger both agree that the provision is
6 unconstitutional, Congress was the appropriate body to
7 defend the statute.

8 QUESTION: Well, but Congress is a standing
9 branch of the Government with ongoing duties and
10 responsibilities, and it was vitally interested in the
11 one-House veto from the standpoint of its institutional
12 capacity. All your organization did was put something on
13 the ballot.

14 MR. ZALL: Your Honor, the same situation
15 applies in Arizona, where the Arizona constitution,
16 Article IV, provides that the voters themselves have the
17 right to an initiative, and this is a matter in which this
18 would affect the voters' right of initiative.

19 QUESTION: Mr. --

20 QUESTION: Is your claim -- I'm sorry.

21 QUESTION: Go ahead. I had one.

22 QUESTION: Are you claiming that the Arizona
23 provision therefore creates Article III standing for any
24 Arizona citizen in a Federal court?

25 MR. ZALL: No, Your Honor. I'm suggesting that

1 in certain limited circumstances the invasion of the right
2 would give someone standing to complain about it, and the
3 difference is --

4 QUESTION: But what is the invasion of the right
5 which would be in any way different from an invasion which
6 any citizen simply as a citizen could claim?

7 MR. ZALL: Your Honor, the invasion of the right
8 is the elimination of the right. That goes to the injury
9 question, the prudential question.

10 QUESTION: Well, in -- then I think what you're
11 saying is that any citizen could have Article -- would
12 have Article III standing.

13 MR. ZALL: I don't believe so, Your Honor,
14 because the individual interest -- the individual injury
15 to each citizen is so small relative to everyone else that
16 there is no differentiation, but to the initiative
17 proponent, just as in this Court's decision in the Term
18 Limits case, where the State was present, just as the
19 State is present here, the initiative proponents were able
20 to come forward and make their best case.

21 QUESTION: Because the State was present making
22 the argument on the merits, but here we don't have that.
23 I think the State is telling us this case is moot, right?

24 MR. ZALL: Your Honor, that's the State's
25 position, but lower -- in the lower courts they were quite

1 clear on their position on the merits. It's only when
2 they came to this Court that they brought up once again
3 this issue.

4 QUESTION: Yes, but this Court is bound by a
5 case or controversy requirement, and the State is
6 acknowledging that that no longer exists.

7 You did say one thing, Mr. Zall, that puzzled
8 me, and perhaps I misunderstood you. You said that you
9 were now disabled because the Federal court had eliminated
10 your right, but it was not my understanding that a
11 district court or a court of appeals is a higher authority
12 on a question of Federal constitutional law than, say, the
13 supreme court of Arizona.

14 MR. ZALL: Your Honor, I'm sure that's true as
15 to the interpretation of State law, but not necessarily
16 the application of Federal law to State law, but leaving
17 that aside --

18 QUESTION: Do you think -- is the -- are the
19 Arizona State courts bound by what the Ninth Circuit
20 thinks Federal constitutional law is?

21 MR. ZALL: I think the courts are split on that,
22 Your Honor. I know the Arizona position is that they are
23 not bound, but there are cases --

24 QUESTION: So that's -- since that is the
25 position of the State courts in your State, then nothing

1 has been eliminated by anything that a district court or
2 the court of appeals said.

3 MR. ZALL: Well, Your Honor, as to us, and this
4 goes to our own unique situation and why we're different
5 from everyone else --

6 QUESTION: Unless the plaintiffs can sue in
7 Federal court. I mean, I assume what you're worried about
8 is that any State employee who doesn't want to abide by
9 this provision would simply bring a 1983 action in State
10 court -- in Federal court, and the Federal district court
11 at least would be bound by the determination of the court
12 of appeals here and would apply the opinion that you don't
13 agree with.

14 MR. ZALL: That's our concern, Your Honor
15 under --

16 QUESTION: If we were to find that your
17 organization does not have standing here, I guess -- and
18 for that reason dismiss the case, I guess the consequence
19 would be that the court of appeals judgment would stand,
20 because you just came in at this last stage, right?

21 MR. ZALL: No, Your Honor. We attempted to
22 intervene.

23 QUESTION: You attempted to intervene, but you
24 were not a party in the court of appeals.

25 MR. ZALL: We were a party in the court of

1 appeals Your Honor. In the 939 Fed. 2d opinion, Yniguez
2 won. We were permitted --

3 QUESTION: But there were other parties on your
4 side of the case in the court of appeals.

5 MR. ZALL: Well, because of a fairly bizarre
6 application of 2403(b), we were the only group that the
7 court designated as a party.

8 QUESTION: You were not a party in the district
9 court. The district court denied your motion to -- your
10 post judgment motion to intervene, is that right?

11 MR. ZALL: That's correct.

12 QUESTION: And you didn't seek to enter the
13 litigation before the judgment in the district court.

14 MR. ZALL: That's correct.

15 QUESTION: And was the reason that you didn't
16 because you thought that the State was going to defend the
17 provisions?

18 MR. ZALL: Yes, Your Honor. That's what the
19 Ninth Circuit found also, and we did receive those
20 assurances.

21 QUESTION: What about after the Attorney General
22 took a position with which I gather you disagreed about
23 the narrowness of the provision?

24 MR. ZALL: Your Honor, in the district court the
25 State's position was completely -- was the same as ours.

1 They argued the constitutionality. They argued one
2 additional factor, which was the Eleventh Amendment, and
3 ultimately the court, the district court accepted their
4 Eleventh Amendment argument but rejected their
5 constitutional argument.

6 QUESTION: Get back to the point I'm concerned
7 about. If you don't have standing here, the decision, at
8 least of the district court, remains in effect, isn't that
9 right, because you -- your standing has nothing to do with
10 the district court judgment.

11 MR. ZALL: Unless this Court vacates it, or --

12 QUESTION: Why would we vacate? They were
13 proper parties. If we take the ground that you're not a
14 proper party here, nor were in the court of appeals, the
15 district court judgment would still stand.

16 MR. ZALL: Your Honor, if --

17 QUESTION: I assume.

18 MR. ZALL: I'm sorry. If -- since the State
19 attempted to intervene in the district court level under
20 2403(b) and was reversed, I believe that the appeal, at
21 least of that order, is still properly before this Court,
22 and I think that --

23 QUESTION: I thought the Governor was a party in
24 the district court, wasn't he?

25 MR. ZALL: The Governor was, Your Honor. She --

1 and --

2 QUESTION: And the Governor thought the
3 constitutional provision was invalid, I understand,
4 Governor Mofford.

5 MR. ZALL: She did, Your Honor.

6 QUESTION: And the Attorney General said it's
7 not enforceable in the circumstances that Yniguez said it
8 was, so it seems to me that there's no controversy before
9 the Court if you have no standing.

10 MR. ZALL: Your Honor, if we have no standing,
11 and the argument is that the district court's opinion
12 stands, then you will have in essence private
13 constitutional review.

14 QUESTION: Well, under our Bankcorp decision it
15 seems to me that even though we were to conclude you have
16 no standing, that does not mean we would simply dismiss
17 the petition for certiorari if we find that there was a
18 defect further below, that there was -- either controversy
19 either had become moot, or there was no case or
20 controversy in the first place.

21 This Court would then have the authority to
22 vacate the opinions below, I believe.

23 MR. ZALL: I believe that's also the position of
24 the States in its briefs, Your Honor.

25 QUESTION: Why would we vacate the opinion

1 below? That is to say, I can see if you were the only
2 party before the Ninth Circuit and you don't have
3 standing, then we'd vacate that, I guess. There was no
4 controversy because they weren't parties.

5 But in the district court, prior to Ms. Yniguez
6 leaving her job, the district court reached its decision
7 and then the other party to the case, the Governor,
8 decided not to appeal, so there was no appeal, and
9 therefore the district court decision stays in place.

10 QUESTION: I suppose --

11 QUESTION: So why --

12 QUESTION: Yes. I suppose there is a question,
13 though, which I had already asked you, about whether there
14 was even --

15 QUESTION: That's right. That's right.

16 QUESTION: -- a controversy at the district
17 court.

18 QUESTION: That's right. That --

19 QUESTION: -- because the Governor took the same
20 position as Ms. Yniguez.

21 QUESTION: That's right. Exactly. Exactly.

22 QUESTION: Whether there was ever a controversy.

23 MR. ZALL: Your Honor, I think there's also a
24 question --

25 QUESTION: So could you go back -- I mean, I'm

1 quite interested in your response to Justice O'Connor's
2 question.

3 MR. ZALL: As to whether there was ever a
4 controversy in the district court, Your Honor?

5 QUESTION: Yes, because that would seem to be
6 determinative, wouldn't it, about whether or not we
7 vacated, assuming you lose all the other points, the
8 district court decision or just vacated the court of
9 appeals decision, so I think your response would be
10 important on that.

11 And of course if you left that in place you
12 could review the matter in some other case. I mean,
13 you're not deprived of constitutional review.

14 QUESTION: Was there ever a point when the
15 Governor was adverse to the plaintiff in this case, and
16 there was one statement that the Governor said that she
17 would comply with the constitutional amendment, and she
18 expected every other State official to do the same.

19 Now, was there ever any adversary contest in the
20 district court, or did we have a friendly lawsuit
21 throughout? Was there ever any point where the Governor
22 took the position before the district court, I am
23 defending the constitutionality of this State
24 constitutional provision?

25 MR. ZALL: I believe that was the position of

1 the State throughout the district court --

2 QUESTION: State meaning government, because
3 it's hard to tell who is the State in this case.

4 MR. ZALL: I'm sorry. The State was a party
5 until December 21, 1988, when it was dismissed on Eleventh
6 Amendment grounds, and then the complaint was refiled
7 without the State.

8 QUESTION: But would -- and then the Governor,
9 as the chief executive officer of the State, did she ever
10 take a position in opposition to the plaintiff --

11 MR. ZALL: I believe --

12 QUESTION: -- in the litigation?

13 MR. ZALL: Yes. I believe the answer is yes.
14 In the litigation the Governor's position, as articulated
15 by the Attorney General, who was representing all the
16 parties in that --

17 QUESTION: Including the Governor.

18 MR. ZALL: Including the Governor.

19 QUESTION: Well, but --

20 MR. ZALL: But before --

21 QUESTION: -- I had thought that they had
22 conflicting positions. I had thought that the Governor
23 indicated that she agreed with the district court that
24 it's unconstitutional, but that the Attorney General said
25 that it would not be enforced against Yniguez, but even if

1 we take those two combined, it seems to me that there's no
2 controversy.

3 MR. ZALL: Your Honor --

4 QUESTION: There's no -- at least there's no
5 threat. There's no threat to the employee.

6 MR. ZALL: The Attorney General's position was,
7 both prior to the opinion in the litigation, that there
8 was no threat to the employee, and at the point of the
9 opinion said, in essence, there's no --

10 QUESTION: So at that point where was the
11 controversy?

12 MR. ZALL: Since this is a First Amendment case,
13 Your Honor, what's concerning me is that the Court is very
14 solicitous towards concerns of chilling First Amendment
15 speech, and because the --

16 QUESTION: You're chilled if there's a threat.
17 You're not chilled if there's no threat. I mean,
18 that's -- don't you need a threat to be chilled?

19 MR. ZALL: I think Your Honor's question is
20 whether you would need a realistic threat to be chilled.
21 I think a perceived threat which chills speech might be --

22 QUESTION: You have an unrealistic threat --

23 MR. ZALL: Well --

24 QUESTION: -- that chills you? Wouldn't an
25 unrealistic threat produce an unrealistic chill?

1 (Laughter.)

2 MR. ZALL: I think it would, Your Honor.

3 QUESTION: May I ask another question about the
4 status of the case? I take it the defendants never filed
5 an answer, or did they?

6 MR. ZALL: Defendants did file an answer, Your
7 Honor.

8 QUESTION: Including the defendant Catherine
9 Eden?

10 MR. ZALL: I'm sorry, Your Honor, I think I
11 misspoke. I believe the defendants did not file an answer
12 in the --

13 QUESTION: Was --

14 MR. ZALL: They filed a motion to dismiss.

15 QUESTION: One of the defendants was Catherine
16 Eden, the director of the Department and so forth and so
17 on. Was her position ever made known formally of record?

18 MR. ZALL: Other than the Attorney General's
19 representation, her own personal position, Your Honor? I
20 don't think so.

21 QUESTION: Can you tell me, is the director of
22 this employee's Department bound by the Attorney General's
23 interpretation of the act?

24 MR. ZALL: Although the Attorney General's
25 opinion is not binding on the courts --

1 QUESTION: Is it binding on this agency?

2 MR. ZALL: The director of the Department of
3 Administration? I don't know the answer to that, Your
4 Honor.

5 QUESTION: Not much use being an Attorney
6 General, I would guess, if your opinions on the law are
7 not binding on the other executive officers. You might as
8 well not have one.

9 MR. ZALL: Well, Your Honor, I believe the
10 Attorney General's opinion power as under ARS 41-193(A) is
11 in the statute, but the courts have decided that they're
12 not binding on --

13 QUESTION: Oh, they're not binding on the
14 courts, I've no doubt about -- let me ask about damages.
15 Did the district court award nominal damages?

16 MR. ZALL: Yes, Your Honor, following the Ninth
17 Circuit en banc opinion.

18 QUESTION: Following the Ninth Circuit en banc
19 opinion --

20 MR. ZALL: Yes.

21 QUESTION: -- but not originally?

22 MR. ZALL: Correct, Your Honor.

23 QUESTION: And the Ninth Circuit used as the
24 basis for its jurisdiction once Yniguez was no longer
25 employed and the case would otherwise be moot the fact

1 that -- what? Although the district court had not --
2 although she -- had she asked for nominal damages?

3 MR. ZALL: Not specifically, but she had asked
4 for all other relief.

5 QUESTION: All other relief.

6 MR. ZALL: Which is what the Ninth Circuit --

7 QUESTION: And the Ninth Circuit en banc sent it
8 back saying that you could have awarded nominal damages,
9 even though the court had not awarded nominal damages.

10 MR. ZALL: That's correct, Your Honor. It also
11 said that Ms. Yniguez --

12 QUESTION: But since it hadn't awarded nominal
13 damages, why wasn't the case moot once she left
14 employment?

15 MR. ZALL: The Ninth Circuit felt that she
16 had --

17 QUESTION: It could --

18 MR. ZALL: -- the right to ask for nominal
19 damages, and that was enough.

20 QUESTION: Well, that's -- so retroactively the
21 Ninth Circuit said go back and get nominal damages and
22 that will retroactively keep the case alive. Is that what
23 the Ninth Circuit did?

24 MR. ZALL: I think what they're asking is that
25 she could ask for it. It was the request and the

1 expectation rather than the --

2 QUESTION: But the case was over below. She had
3 gotten her relief. The relief did not include nominal
4 damages. The only relief it got was injunction against
5 enforcing this against her in the future. Then she leaves
6 the State employ. There's nothing left to the case,
7 right?

8 MR. ZALL: Actually, there was no injunction
9 issued, either.

10 QUESTION: Well -- just a declaratory judgment.

11 MR. ZALL: Just a declaratory judgment.

12 QUESTION: So that she would know that she
13 wouldn't be threatened, or chilled, unrealistically or
14 realistically, whatever.

15 (Laughter.)

16 QUESTION: Right?

17 MR. ZALL: The court felt that --

18 QUESTION: And the Ninth Circuit said, however,
19 although there's nothing here that -- once you've left
20 employment there's really nothing at issue any more, there
21 could be something at issue if the district court had
22 granted you nominal damages, and we will remand to the
23 district court to have the district court, if it wishes,
24 grant you nominal damages, whereupon, retroactively, our
25 jurisdiction on the appeal will be valid. Is that what

1 the district court of appeals did?

2 QUESTION: You can object to the question as
3 leading.

4 (Laughter.)

5 QUESTION: Chief Justice, I'm leading him where
6 he doesn't want to go. I think --

7 (Laughter.)

8 QUESTION: -- he wants to have the case here,
9 but I don't see how it's here.

10 QUESTION: That's characteristic of all leading
11 questions.

12 (Laughter.)

13 MR. ZALL: I think, given the context, my proper
14 answer should be yes, but I think my answer's actually no,
15 Your Honor, because I think what it was suggesting was
16 that in the peculiar circumstances before the court at the
17 time there were still legal rights between the parties
18 before the court, which it had made parties, which could
19 be determined by the court on the facts in front of it.

20 QUESTION: Yes, but there was no legal right to
21 damages, was there?

22 I mean, the Ninth Circuit -- apart from
23 everything else that Justice Scalia recited, the Ninth
24 Circuit was also wrong in suggesting that she would have a
25 right to nominal damages, wasn't it?

1 MR. ZALL: I think under the Eleventh Amendment
2 that's correct, Your Honor.

3 QUESTION: May I ask you what -- in your
4 judgment what we should do with the case?

5 (Laughter.)

6 MR. ZALL: If --

7 QUESTION: You must have a position.

8 MR. ZALL: Yes, Your Honor.

9 QUESTION: You represent a client before us.

10 (Laughter.)

11 QUESTION: And I'm curious to know what your
12 position, independent of all the questions that have been
13 asked of you --

14 QUESTION: Perhaps we could have it printed in a
15 casebook on jurisdiction.

16 (Laughter.)

17 MR. ZALL: Obviously, our preference is to have
18 the Court decide the merits, since we believe that the
19 rights of petitioners and respondents would be determined
20 at that point, but if the Court finds that this case was
21 moot, either from the start there was no subject matter
22 jurisdiction, then clearly we would ask the Court to
23 vacate all the way down.

24 If there are no other questions, I'd like to
25 reserve --

1 QUESTION: Very well, Mr. Zall.

2 Mr. Pohlman, we'll hear from you.

3 ORAL ARGUMENT OF ROBERT J. POHLMAN

4 ON BEHALF OF THE RESPONDENTS

5 MR. POHLMAN: Mr. Chief Justice, and may it
6 please the Court:

7 When the State of Arizona determined in its
8 exercise of its sovereign judgment that it would not join
9 in the petition for certiorari in this case and that it
10 would not appeal the final judgment in Ms. Yniguez' favor
11 for nominal damages in the district court, this case
12 became one without an Article III case for controversy and
13 should have concluded.

14 We would ask that this Court dismiss the
15 petition because the petitioners lack standing to maintain
16 this action in this Court.

17 QUESTION: I certainly agree with that, but why
18 didn't it suddenly become nonexistent as soon as the
19 district court entered a judgment that didn't include
20 nominal damages and the petitioner later, and before the
21 appeal, resigned from her State employment? Why didn't it
22 become moot then?

23 MR. POHLMAN: It wasn't moot for a number of
24 reasons, Justice Scalia, one of which is that there was a
25 final unappealed judgment in favor of the -- Ms. Yniguez

1 against Governor Mofford, so that judgment was binding and
2 final long before she left State employment.

3 QUESTION: Well, why was there a case or
4 controversy in the district court, please?

5 MR. POHLMAN: In the district court there was a
6 case or controversy initially because, as a factual
7 matter, the district court found that Ms. Yniguez had
8 suffered an injury in fact in that she -- her First
9 Amendment rights had been chilled.

10 QUESTION: Well, the Government -- the Governor
11 agreed that the proposition was invalid.

12 MR. POHLMAN: The Governor agreed after the
13 judgment, Your Honor, Justice O'Connor, that it was
14 invalid.

15 QUESTION: Well, there was never -- there was
16 never an answer on the merits, was there? There was just
17 a motion to dismiss by Arizona.

18 MR. POHLMAN: There -- I don't recall, Justice
19 O'Connor, whether there was an answer.

20 QUESTION: Isn't that right? Isn't that all
21 there was?

22 MR. POHLMAN: I don't recall if there was or
23 not. I tend to believe there was an answer because the
24 case went on for so long below, and actually went to
25 trial.

1 QUESTION: But at any point in the litigation
2 did either the Governor or the Attorney General indicate
3 that your client would be disciplined for using Spanish?

4 MR. POHLMAN: There was -- Justice Kennedy,
5 there was no specific indication. However, there was a
6 finding that Governor Mofford intended to enforce the
7 article, that she expected Government employees to enforce
8 the article and to comply with the article, and that
9 therefore Ms. Yniguez had a chilling effect on her First
10 Amendment rights that was caused by Governor Mofford, and
11 that's found in the appendix to the petition for
12 certiorari at pages 102 and 103.

13 QUESTION: What was the basis for that finding?

14 MR. POHLMAN: It was Governor Mofford's
15 outspoken indication that she intended to enforce Article
16 XXVIII, and that she expected Government employees to
17 comply.

18 QUESTION: But in view of the Attorney General's
19 opinion, enforcement of it does not seem to have a
20 realistic prospect of any effect on Ms. Yniguez.

21 MR. POHLMAN: First, Mr. Chief Justice, Ms.
22 Yniguez did not have the benefit of that particular
23 Attorney General's opinion until some 3-1/2 months after
24 this litigation was commenced, so for that 3-1/2 month
25 period of time, her rights were obviously chilled.

1 QUESTION: Well, but if they were chilled for 3-
2 1/2 months and then all of a sudden unchilled, the lawsuit
3 doesn't go ahead on the basis of what was the case
4 earlier, does it?

5 MR. POHLMAN: It doesn't, Mr. Chief Justice.
6 However, in the case of the Attorney General's opinion
7 below, that opinion was found to be nonbinding. The
8 district court judge recognized that the -- a different
9 Attorney General may well have a different opinion.

10 QUESTION: Nonbinding on whom?

11 MR. POHLMAN: The -- it was not binding on any
12 court.

13 QUESTION: Ah.

14 MR. POHLMAN: It was binding --

15 QUESTION: But the court wasn't -- but the claim
16 wasn't that the court was going to prosecute her. The
17 claim was that someone representing the State, the
18 Governor, the Attorney General, or her supervisor was
19 going to bring some action against her, and the opinion, I
20 presume, was binding on those people, possibly with the
21 exception of the Governor, but it was binding on the
22 others, wasn't it?

23 MR. POHLMAN: My understanding, Justice Souter,
24 is that it would be binding on those lower administrative
25 employees, including Catherine Eden, who was one of the

1 defendants who was --

2 QUESTION: So that leaves the Governor, and
3 isn't it also the case that prior to the district court
4 judgment, in any even prior certainly to the expiration of
5 the appeal period, the Governor herself had gone on record
6 in her own right as saying that she thought it was proper
7 to use English if necessary to discharge one's duties in a
8 reasonable way. Isn't that correct?

9 MR. POHLMAN: In the record, Justice Souter, the
10 Governor always said that she would enforce the article
11 until such time as the judgment was entered by the
12 district court. At that time, she indicated she did not
13 intend to appeal, but she also thought it was --

14 QUESTION: No, but didn't she at some point, and
15 I'm not positive of what this moment was, didn't she also
16 indicate, quite apart from her general position that the
17 amendment should be enforced, that she believed it was
18 proper for a State employee to use some non-English
19 language if that was reasonable in the discharge of the
20 employee's duties? Didn't she say that?

21 MR. POHLMAN: That's not my understanding,
22 Justice Souter. That language was included in the
23 Attorney General's opinion, which was in January, of
24 course, after the lawsuit had been initiated, and --

25 QUESTION: But well before judgment was reached

1 in the district court.

2 MR. POHLMAN: Yes, Your Honor, before judgment
3 was reached and before trial, and at the trial the
4 district court judge determined that, notwithstanding that
5 Attorney General's opinion, given what Governor Mofford
6 had said in public, and given the immediacy of the
7 chilling effect on Ms. Yniguez' rights, that there was, in
8 fact, an injury in fact to her, notwithstanding that
9 opinion, and that is why he entered the declaratory
10 relief --

11 QUESTION: Is your view that there should be no
12 vacation of any decision, not the Ninth Circuit's, and if
13 that is your view, how can, at least with respect to the
14 Ninth Circuit when the plaintiff was no longer in the
15 State's employ and before the Ninth Circuit reached its
16 judgment, how can you defend keeping that judgment on the
17 books?

18 MR. POHLMAN: Justice Ginsburg, I think what we
19 do is, we look at the Bonner Mall Partnership case, and we
20 find that vacatur is an equitable doctrine.

21 If we look at the equities as to what occurred
22 first in the district court, there was no appeal by the
23 Governor. It was a final unappealed judgment long before
24 Ms. Yniguez left Government service. Therefore, that
25 judgment, in our view, cannot be vacated under Bonner Mall

1 Partnership.

2 But if you look at the equities with respect to
3 the Ninth Circuit, at the time that that judgment was
4 entered, Mr. Zall's group and the Attorney General sought
5 to intervene for purposes of taking an appeal of the
6 judgment at that time.

7 Ms. Yniguez had no reason at that juncture to
8 appeal her claim for nominal damages because the district
9 court said we will not allow this judgment to be appealed.
10 No one has an interest to appeal it. It is going to stop
11 right here. And so all that was on appeal --

12 QUESTION: Well, how can a district court
13 prevent someone from appealing? I can see how the court
14 of appeals could say there is no interest, but what did
15 the district -- did the district court enter some sort of
16 an order that they couldn't appeal?

17 MR. POHLMAN: No, Your Honor. What the district
18 court did was to deny the motions of Mr. Zall's group,
19 Arizonans for Official English, and the Attorney General,
20 to intervene for the purpose of taking an appeal.

21 QUESTION: What you're saying is no one who
22 was then in the lawsuit was interested in appealing. We
23 had the plaintiff and the Governor, and that's it, right?

24 MR. POHLMAN: Exactly.

25 QUESTION: And it was only after final judgment

1 was entered with respect to those two parties that
2 additional people asked to come in, one AOE and the other
3 the Attorney General.

4 MR. POHLMAN: That's correct, Your Honor.

5 QUESTION: And the district court said no, I
6 deny your motion, your post judgment motion to intervene.

7 MR. POHLMAN: That is exactly --

8 QUESTION: And the first thing that the court of
9 appeals did was to reverse that denial as to AOE, right?

10 MR. POHLMAN: That is correct.

11 QUESTION: And then what the district -- what
12 the court of appeals did concerning the Attorney General
13 I'm not altogether clear. Was the Attorney General, in
14 your view, a party in the case at the appellate level?

15 MR. POHLMAN: I -- yes and no, and the reason I
16 answer it that way, Justice Ginsburg, is because they were
17 permitted to intervene under -- and I would share Mr.
18 Zall's view that it's kind of a bizarre application of 28
19 U.S.C. 2403(b), but the Attorney General is permitted to
20 intervene for the purpose of arguing the constitutionality
21 of the amendment.

22 That statute provides that the Attorney General
23 may do so or the State may do so and has all the rights
24 and obligations of a party, but they're not exactly a
25 party, although they have all rights and obligations,

1 including the right to petition for certiorari to this
2 Court.

3 QUESTION: But the State's position, as I
4 understand it, is that the case became moot when the
5 plaintiff left the State's employ, and that happened
6 before the Ninth Circuit's judgment.

7 MR. POHLMAN: Justice Ginsburg, that's the
8 State's position of the day, although their position has
9 never been consistent throughout this litigation.

10 QUESTION: Whose has? Yes, that's for sure.

11 (Laughter.)

12 QUESTION: Mr. Pohlman, I don't understand why
13 you said it was okay for your client not to appeal the
14 denial of nominal damages.

15 MR. POHLMAN: Justice --

16 QUESTION: She was the plaintiff. The Governor
17 was the defendant. The district court denied her nominal
18 damages against the Governor.

19 Now, to be sure, the Governor then said, I don't
20 want to appeal, but why couldn't your client have said,
21 but I do? I have been denied nominal damages. I think I
22 was entitled to them, and I want an appeal.

23 MR. POHLMAN: Justice Scalia, she could have
24 appealed at that juncture.

25 QUESTION: Well, I thought Yniguez never even

1 asked for nominal damages in the district court.

2 MR. POHLMAN: We did not ask for --

3 QUESTION: For such other relief.

4 MR. POHLMAN: We did not ask for nominal damages
5 in the district court at the initial phase. We asked for
6 all -- anything that might be just and equitable in
7 premises in a traditional addendum clause.

8 In the Ninth Circuit, that is --

9 QUESTION: Well, actually, you put in zero zero
10 on dollar amounts, did you not?

11 MR. POHLMAN: With respect to damages?

12 QUESTION: Yes.

13 MR. POHLMAN: I don't recall that being in the
14 judgment.

15 QUESTION: Even if such other relief as may seem
16 just and proper -- are they still using that language in
17 Arizona complaints? -- that's good enough to keep -- to
18 leave the question open for the district court, but when
19 the district court at the end of the case does not grant
20 nominal damages, then it seems to me you've got a much
21 different question. For the Ninth Circuit to send the
22 thing back and say you could have asked for nominal
23 damages seems extraordinary.

24 MR. POHLMAN: Mr. Chief Justice, they are still
25 using that language in Arizona, and what occurred, really,

1 is the Ninth Circuit said, because we had requested at the
2 time that if it goes back, and if there ever is an appeal
3 from the judgment on the merits, which there had not been
4 previously, there had only been an appeal that -- a
5 procedural question of whether or not Mr. Zall and his
6 group and the Attorney General could intervene, because up
7 to that point in time Ms. Yniguez had a declaratory
8 judgment in her favor. She had no reason, as long as the
9 actual judgment was not in jeopardy, to go and ask the
10 district court to spend the time to get \$1 in nominal
11 damages.

12 QUESTION: When she did ultimately cross-
13 appeal -- she did ultimately cross-appeal after the Ninth
14 Circuit reversed the district court's intervention order,
15 correct?

16 MR. POHLMAN: That's correct.

17 QUESTION: Now, what was the basis for her
18 cross-appeal. What was she asking on the cross-appeal?

19 MR. POHLMAN: She was asking for a judgment of
20 nominal damages in her favor based upon the rights that
21 she had -- had been found to have been violated in the
22 district --

23 QUESTION: On the cross-appeal, but since she
24 had made that claim only on cross-appeal, if AOE's appeal
25 was improper because it's an improper party, then her

1 cross-appeal fails because her cross-appeal was only
2 derivative of the main appeal, isn't that correct?

3 MR. POHLMAN: We don't believe so, Justice
4 Kennedy, and the reason is this. The State at that point
5 in time was still in the case as an intervenor under
6 2403(b). In fact, the State actively opposed the nominal
7 damages cross-appeal, filed its own appeal with respect to
8 procedural aspects of the case, and later, after the Ninth
9 Circuit remanded for the purpose of award of nominal
10 damages, or at least entered its decision, the State
11 expressly waived its right, or its immunity under the
12 Eleventh Amendment.

13 QUESTION: When did the nominal damages cross-
14 appeal occur? I'm not clear on that. When did that
15 occur?

16 MR. POHLMAN: Within 30 days of the first appeal
17 on the merits, by either of the --

18 QUESTION: Could we go back just one step? We
19 have -- was this a 1983 action in the district courts --

20 MR. POHLMAN: Yes --

21 QUESTION: Section 1983?

22 MR. POHLMAN: Yes, Justice O'Connor.

23 QUESTION: And have we not held in cases like
24 Will v. Michigan that States and State officials like the
25 Governor are not persons under 1983?

1 MR. POHLMAN: For purposes of damages?

2 QUESTION: Yes.

3 MR. POHLMAN: I think --

4 QUESTION: So how could the district court ever,
5 under a 1983 suit, assess even nominal damages against the
6 State?

7 MR. POHLMAN: It's my understanding that under
8 the Ex parte Young doctrine there can be an award of
9 nominal damages, and I don't have the case before me. I
10 would be happy to submit a letter brief, Justice O'Connor,
11 if that would assist the Court, but in any event what
12 occurred was the nominal damages were awarded in the face
13 of an express waiver of immunity by the State of Arizona.

14 QUESTION: Where do we find that express waiver
15 in the record?

16 MR. POHLMAN: That would be on page 32 of our
17 appendix in Ms. Yniguez' brief, which is the letter from
18 the Attorney General, at that point in time Grant Woods.

19 QUESTION: In your brief on the merits here?

20 MR. POHLMAN: Yes. Our appendix in the brief on
21 the merits, Justice O'Connor.

22 And it's for that reason that we believe that we
23 properly have damages awarded for \$1 and proper damages
24 were awarded. The judgment in fact was entered in
25 November of last year, and that can be found at page 211

1 of the joint appendix.

2 QUESTION: Mr. Pohlman, I take it you are
3 recognizing that the Attorney General was a proper party
4 adverse to you in the court of appeals. I gather that
5 from footnote 10 on page 23 of your brief. You seem to
6 say there that while you have consistently argued that AOE
7 has no standing, that doesn't require vacating the Ninth
8 Circuit's opinion because the State has standing.

9 MR. POHLMAN: That's quite accurate.

10 QUESTION: Now, if that's so, the State's
11 position here is that the case is moot, at least when the
12 plaintiff left the employ of the State of Arizona.

13 When mootness occurs in between the district
14 court and the court of appeals, isn't Munsingwear the rule
15 that we follow? The State is an appellant. It says, we
16 have no responsibility for the plaintiff leaving the
17 employ. We didn't get a chance to get appellate review,
18 so the district court decision has to be vacated.

19 If the State is legitimately a party, as you
20 seem to concede on appeal, doesn't that follow?

21 MR. POHLMAN: Justice Ginsburg, that would
22 follow normally under Munsingwear if, in fact, there had
23 been no judgment for nominal damages, that had not been
24 appealed and had actually been expressly waived, that
25 judgment by the State, and they had opposed that all the

1 way through the Ninth Circuit and then decided after that
2 judgment was entered to eschew a judicial review of that.

3 QUESTION: So you're hanging everything on that
4 \$1 of nominal damages.

5 MR. POHLMAN: No, Justice Ginsburg, I would not
6 say that. I would say that that is one of the aspects of
7 this case upon which we hang our hat for purposes of case
8 or controversy.

9 QUESTION: Well, what else is there? Let's
10 leave out the \$1 nominal damages. We have a case that's a
11 perfectly good final judgment. We have an appellant that
12 you concede is a proper appellant, the State. The case
13 becomes moot through no -- nothing that the appellant has
14 done between the district court and the court of appeals.
15 Isn't our normal practice in that situation to vacate the
16 district court's decision?

17 MR. POHLMAN: Absent the nominal damages under
18 normal circumstance, Justice Ginsburg, I think that would
19 be the case.

20 However, here we have a First Amendment
21 overbreadth case, and to add to some of the procedural
22 dilemma below at the time the suggestion of mootness was
23 made by the Solicitor General who replaced the original
24 Solicitor General in the case, we had at that time pending
25 an appeal by State Senator Jaime Gutierrez, whose appeal

1 unfortunately got lost in the docketing system of the
2 Ninth Circuit, and it was agreed --

3 (Laughter.)

4 MR. POHLMAN: It was agreed between the parties,
5 and we can find this in the joint appendix, but it was
6 agreed between the parties at that point in time, that
7 being the State and Ms. Yniguez and AOE, that if the
8 matter were to be remanded for consideration on the
9 merits, then the appeal of Senator Gutierrez would also be
10 joined with it.

11 That never occurred for reasons which are --

12 QUESTION: And what was his standing?

13 MR. POHLMAN: Senator Gutierrez was a State
14 legislator at the time.

15 QUESTION: He had the same standing as the
16 petitioner does here, in other words.

17 MR. POHLMAN: I would say he had much greater
18 standing in the sense that --

19 QUESTION: He voted for this measure?

20 (Laughter.)

21 MR. POHLMAN: Senator Gutierrez would not have
22 voted for this, Justice Stevens. He's bilingual and a
23 State legislature who often communicated with his
24 constituents --

25 QUESTION: In other words, he voted against it.

1 MR. POHLMAN: I would expect he voted against
2 it.

3 QUESTION: So what -- again, what is his
4 standing?

5 MR. POHLMAN: A State legislator whose conduct
6 was threatened by Article XXVIII in that he routinely, as
7 many State legislatures -- legislators do, communicated
8 with his constituents during the performance of Government
9 business in languages other than English.

10 QUESTION: Your position, Mr. Pohlman, is that
11 AOE has no standing here, I take it.

12 MR. POHLMAN: Yes.

13 QUESTION: And where does that leave people who
14 vote and perhaps organize to get a referendum passed.
15 Typically the Arizona constitutional convention, one of
16 the reasons for referendum was that you couldn't get
17 something through the legislature because of special
18 interests, so let the people do it.

19 The referendum passes, and the Governor and the
20 Attorney General hypothetically say, you know, we don't
21 like this thing, we're not going to defend it. Who then
22 defends the action?

23 MR. POHLMAN: Once it gets to that point in
24 time, Mr. Chief Justice, I don't think anyone defends the
25 action. I think it is the obligation of the State to

1 defend that action and indeed, they did in this case.

2 QUESTION: What if they don't, though? I mean,
3 they say we don't like the bill. We're just going to let
4 it go.

5 MR. POHLMAN: In that event I would suggest to
6 Mr. Chief Justice that the voters who passed the
7 initiative would probably change the administration when
8 they next went to the polls.

9 QUESTION: But there's no way for anybody to
10 come in and defend the initiative if the Governor and the
11 Attorney General won't do it.

12 MR. POHLMAN: In our view, that would be the
13 case.

14 QUESTION: Well, there is a citizens suit
15 provision, and the citizens can sue in State court to
16 enforce something that's been validly passed under the
17 very terms of the provision that was passed, is that not
18 so?

19 MR. POHLMAN: There is, indeed, an enforcement
20 provision in the --

21 QUESTION: Anybody who claims to be adversely
22 affected.

23 MR. POHLMAN: Anyone who desires, I believe,
24 Your Honor, to enforce the provisions.

25 QUESTION: So there is a citizens suit

1 provision. Somebody can come into court and raise it.

2 MR. POHLMAN: Your Honor, I'm not so sure that a
3 citizens suit provision in an initiative like this would
4 give any citizen of the State of Arizona then carte
5 blanche under Article III to challenge a declaration by
6 the --

7 QUESTION: I guess we don't worry about Article
8 III in State court actions.

9 MR. POHLMAN: You're right, in State court they
10 could challenge it, and that challenge would still be
11 viable today.

12 QUESTION: Exactly.

13 QUESTION: Well, but where the question is based
14 on the Chief Justice's inquiry, followed by Justice
15 O'Connor, is we're assuming the State officials do not
16 enforce the act, and Justice O'Connor points out that the
17 initiative does have a citizens suit provision allowing a
18 citizen to enforce the act.

19 MR. POHLMAN: That's accurate, Justice Kennedy.

20 QUESTION: But the citizens suit provision may
21 come up against a barrier if there's previously been an
22 action in the Federal court where the Governor and the
23 Attorney General are enjoined from enforcing it, which
24 went by default, so the Attorney General and the Governor
25 would then have a perfectly good defense to the citizens

1 suit provision of res judicata as a result of the Federal
2 action.

3 MR. POHLMAN: Mr. Chief Justice, I think that
4 may be true with respect to the Attorney General and the
5 Governor. My understanding of the enforcement provision
6 is it was directed at administrative employees or anyone
7 that -- a citizen or person doing business in the State --

8
9 QUESTION: And I guess there was no injunction
10 here. A declaratory judgment, right?

11 MR. POHLMAN: It was simply a declaratory
12 judgment. There was no injunction, injunctive relief
13 granted, Justice --

14 QUESTION: Mr. Pohlman, may I go back to Justice
15 Ginsburg's question going to the issue of whether we
16 should vacate the district court judgment?

17 Would this be a position that you would espouse,
18 that at the conclusion of the district court action,
19 neither of the parties before the district court appealed.
20 It is quite true that there was then an intervention, and
21 ultimately in the Ninth Circuit the State came in. The
22 Attorney General came in under the statute for the
23 purposes of defending the constitutionality of the State
24 act.

25 But the Attorney General at that point was in

1 there only on a kind of conditional basis. He was only in
2 there saying, if we're going to have an appeal, then I'm
3 here under the statute representing, in effect, the State
4 to uphold the constitutionality of the act if I can, but
5 I'm not an independent appealing party, and the State and
6 the Governor are not independent appealing parties.

7 Given that interpretation, would it, even on our
8 normal equitable vacatur rules, be appropriate not to
9 vacate the district court judgment, because the parties
10 who could have appealed in fact did not. The parties who
11 presumably would suffer from leaving the judgment on the
12 books did not, in fact, appeal. Would that be a -- would
13 you espouse that argument for opposing vacating the
14 district court order?

15 MR. POHLMAN: I would espouse that argument to
16 oppose vacating the district court order, exactly.

17 Justice, Souter, I believe that the Attorney
18 General, though, had a slightly different position insofar
19 as the Ninth Circuit is concerned. The Attorney General
20 actively sought to reinsert himself as a party for the
21 purposes of pursuing the appeal with or without AOE when
22 they were in the district court.

23 QUESTION: But that was -- wasn't that after the
24 appeal period had run?

25 MR. POHLMAN: No, Your Honor, it was not. They

1 appealed within the time frame that was necessary in order
2 to -- had they been granted leave to intervene.

3 QUESTION: Oh, so --

4 QUESTION: That was the position that you took
5 in this footnote that I read. You recognized the standing
6 of the Attorney General as a proper party.

7 MR. POHLMAN: Exactly.

8 QUESTION: Well, if that's the case, then, then
9 the Attorney General was not in only on the limited basis
10 that my suggestion gave him, so I suppose if you accept
11 his standing as a party at that point, and you take the
12 position that he should have been allowed in, period, then
13 I guess the argument for vacating is a valid argument.

14 MR. POHLMAN: Justice Souter, we would disagree
15 with that for some of the reasons that have been said
16 before, but in fact, and this goes back again to the
17 ruling by the Ninth Circuit with regard to 2403(b), in
18 fact you're entitled to intervene as the State, not as a
19 party, but with all the rights and obligations of a party
20 at that point in time, and the district court recognized
21 there is no right to intervene at that point, or at least
22 felt that way.

23 The Ninth Circuit gave them a right which is not
24 contemplated by the statute, which was a defendant
25 standing under 2403(b), and I -- and for purposes of your

1 question I'm not so sure that was legally correct, but
2 that was the understanding the State had, that they were
3 in there with defendants --

4 QUESTION: Mm-hmm.

5 MR. POHLMAN: And that was the position -- they
6 never appealed that particular ruling, and that was the
7 way that --

8 QUESTION: Ah, so that's why they're stuck.
9 Yes, okay.

10 QUESTION: Could -- I have two questions briefly
11 that I'd like to hear your answer to. The most important
12 is, I'd like to hear clearly what your answer was to
13 Justice O'Connor's initial question.

14 I take it in the district court there was a
15 person, the plaintiff, and a defendant, the Governor, who
16 had an argument. The plaintiff won, and the Governor
17 didn't appeal. All right, but the question was, was there
18 ever a controversy between them, and the answer to that
19 depends upon whether there was a reasonable threat of
20 prosecution, isn't that right? That's the case they cited
21 in support of that.

22 MR. POHLMAN: I --

23 QUESTION: Now, you pointed to a place in the
24 district court's opinion which says I, the district judge,
25 think there was a reasonable threat of prosecution. Where

1 in the record do I find the material upon which that
2 conclusion rests?

3 MR. POHLMAN: You will find the testimony in our
4 appendix attached to our brief on the merits at pages 14
5 and 15, which is the testimony of Ms. Yniguez concerning
6 her fear that she may be prosecuted, or that there may be
7 a citizens suit based upon the test of Article XXVIII.

8 You will find the judge's conclusion on page
9 102a of the appendix to the petition for certiorari, where
10 he finds that in fact Ms. Yniguez has suffered an injury
11 in fact due to the threat of potential disciplinary action
12 by virtue of --

13 QUESTION: Was Ms. Yniguez -- excuse me.

14 QUESTION: Where do I find what the Governor
15 said, because what he's saying is it's the Governor's
16 statement that leads me to think that the Governor might
17 prosecute her.

18 MR. POHLMAN: That is in the stipulated facts
19 that are in the joint appendix, I believe. If not, they
20 may be in our appendix beginning at pages 5 and 6. I
21 don't have that right in front of me, but I can find that
22 for you, Justice Breyer.

23 QUESTION: Mr. Pohlman, I hate to come back to
24 this, but I'm still not clear on it. After the State came
25 in on the appeal, when did the cross-appeal for the denial

1 of nominal damages occur?

2 MR. POHLMAN: The cross-appeal for the denial of
3 nominal damages occurred shortly after the first appeal on
4 the merits was ever filed by any intervenor, and that was
5 after the case had been remanded, following the decision
6 on the suggestion of --

7 QUESTION: Okay.

8 MR. POHLMAN: It was the first --

9 QUESTION: After remand, though. It's after
10 remand. The original appeal to the Ninth Circuit went up
11 and back down without any claim of nominal damages
12 involved.

13 MR. POHLMAN: The original appeal was not on the
14 merits, Justice Scalia.

15 QUESTION: I understand.

16 MR. POHLMAN: That's why the cross-appeal we are
17 not entitled to unless there are -- we don't need to
18 cross-appeal on the judgment unless there is actually an
19 appeal on the judgment. There was none until it was
20 remanded. That's the first time a notice of appeal on the
21 judgment itself was ever filed under Pellegrino v. Nesbit.

22 QUESTION: Did the stipulation you -- as to the
23 facts covering the Governor's position, I thought that
24 stipulation said nothing about the Governor intending to
25 take enforcement actions, just that the Governor intended

1 to comply. Well, if the Governor intends to comply by
2 herself speaking English, I suppose that wouldn't affect
3 this at all.

4 Is there anything in the stipulation that says
5 the Governor intends to take enforcement actions against
6 people like Yniguez?

7 MR. POHLMAN: Justice O'Connor, I don't believe
8 there's anything that says that per se.

9 QUESTION: No, I didn't think so.

10 MR. POHLMAN: In our appendix at page 8 to our
11 brief on the merits some of the stipulations appear.

12 QUESTION: In your red brief?

13 MR. POHLMAN: Pardon me?

14 QUESTION: This is in your red brief?

15 MR. POHLMAN: Yes, Mr. Chief Justice, in the red
16 brief.

17 QUESTION: Page 8?

18 MR. POHLMAN: Page 8 of our appendix shows some
19 of the stipulations pertaining to what occurs in the
20 disciplinary process.

21 The testimony below was Ms. Yniguez had seen
22 people disciplined before, that she understood that she
23 was expected to comply --

24 QUESTION: Disciplined under this statute?

25 MR. POHLMAN: Not under this statute, no.

1 People were disciplined for failing to follow the laws of
2 the State or the constitution of the State --

3 QUESTION: Well, that's scarcely surprising.

4 (Laughter.)

5 MR. POHLMAN: That they would be disciplined for
6 that, and that's what we agreed, Mr. Chief Justice. It is
7 scarcely surprising. That's why she was in fear of her
8 job.

9 QUESTION: Well, but the question is, did the
10 enactment of this law put her in fear of her job.

11 MR. POHLMAN: Yes, it did, and that is precisely
12 what the district court found, that she had a reasonable
13 belief that she may be disciplined if she in fact spoke
14 something other than English on the job.

15 QUESTION: Thank you, Mr. Pohlman.

16 Mr. Zall, you have 5 minutes remaining.

17 REBUTTAL ARGUMENT OF BARNABY W. ZALL

18 ON BEHALF OF THE PETITIONERS

19 MR. ZALL: I'd like to point the Court's
20 attention to the rulings of the two lower courts on this
21 case.

22 In the petition appendix, page 112, 113a, the
23 order of the district court says, it is further ordered
24 that Article XXVIII of the constitution of the State of
25 Arizona is hereby declared to be void as being invalid on

1 its face in violation of the First Amendment of the
2 Constitution of the United States.

3 And on page 60a of the same appendix, the Ninth
4 Circuit en banc decision says, we affirm the district
5 court's judgment that Article XXVIII of the Arizona
6 constitution is facially overbroad and violates the First
7 Amendment, and that the article is unconstitutional in its
8 entirety.

9 I think that is the heart of the matter here,
10 Your Honors.

11 Petitioners are bound by the lower court
12 judgment because they intervened as a party. If Article
13 XXVIII is void in its entirety, then petitioners do not
14 have the enforcement rights that the court suggests that
15 they do.

16 In addition, on the question of who defends the
17 actions, I think in this case the Attorney General
18 attempted to defend, and because of the application of
19 2403(b) in this case the Attorney General and the State's
20 rights under the Eleventh Amendment were implicated
21 because --

22 QUESTION: Well, the Attorney General's position
23 is, wisdom has come a little late, but now the Attorney
24 General is enlightened and understands that long before
25 any judgment was entered in the Ninth Circuit the case was

1 moot, so if we accept that, that wipes out the Ninth
2 Circuit's decision, because the Ninth Circuit has no
3 authority to issue a judgment in a moot case.

4 MR. ZALL: It would also wipe out the district
5 court opinion.

6 QUESTION: Not necessarily, because if the
7 mootness occurred on appeal, you don't ordinarily wipe out
8 a final judgment from which no party to that judgment has
9 appealed.

10 If we had a lawsuit with two parties at the end
11 of the road, neither pursued an appeal in the district
12 court, and then we have quite different lawsuit in the
13 Ninth Circuit and the State is telling us as to that
14 lawsuit mootness occurred before the judgment, how do you
15 reach back and say, but the mootness also affects the
16 original suit and that original judgment between the
17 plaintiff and the Governor?

18 MR. ZALL: Your Honor, the problem with the
19 hypothetical is that this is not a standard contract case
20 or an employment problem case. This is a facial
21 overbreadth First Amendment attack on a State constitution
22 which was held to be void in its entirety. This is not
23 just Ms. Yniguez and the Governor.

24 The Court has held that judgments have a value
25 in and of themselves. People rely on them. We cannot go

1 into State court --

2 QUESTION: But you can't rely on a judgment
3 that's vacated, and the Federal court has no authority to
4 deal with anything that isn't a genuine controversy at the
5 time judgment was entered.

6 MR. ZALL: But, Your Honor, the problem is, if
7 we go into State court and say, sue anyone in the State,
8 the defense by everyone is, the district court for Arizona
9 has held this statute -- this constitutional provision
10 unconstitutional in its entirety.

11 QUESTION: It was my understanding that a
12 district court's judgment doesn't necessarily bind even
13 another district judge in the same district.

14 MR. ZALL: But it does --

15 QUESTION: So how does it bind a State court?

16 MR. ZALL: It doesn't bind it in the sense that
17 it's automatically controlling, but in a number of
18 cases -- FDIC v. Jennings, I think in the Tenth
19 Amendment --

20 QUESTION: It's like a law review article, isn't
21 it?

22 MR. ZALL: It's the prospect of an unfavorable
23 precedent looming over the case to the extent that a State
24 court judge is going to say, this is a question of Federal
25 law. Am I going to apply Federal law to this question

1 differently than the district court of Arizona? I would
2 find that a prospect that would be daunting for a
3 litigant.

4 QUESTION: I've known some State judges who
5 would do that.

6 (Laughter.)

7 QUESTION: How many district -- how many Federal
8 district judges sit in Arizona? Do you have any idea?
9 Three hundred?

10 (Laughter.)

11 MR. ZALL: No. No, Your Honor. I think there's
12 only -- I think there's four.

13 QUESTION: There's six in Phoenix and three in
14 Tucson.

15 (Laughter.)

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Zall.
17 The case is submitted.

18 (Whereupon, at 11:01 a.m., the case in the
19 above-entitled matter was submitted.)
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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:

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,
Petitioners v. ARIZONA, ET AL.

CASE NO. 95-974

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

BY Ann Marie Federico

(REPORTER)