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Supreme Court of Texas.
Nestle USA, Inc., Switchplace, LLC, and NSBMA, LP
v.
Susan Combs, Texas Comptroller of Public Accounts and Greg Abbot, Texas Attorney General.
No. 11-0855.

January 12, 2012.

Appearances:

Peter A. Nolan of Winstead PC, for Plaintiff.

Richard B. Farrer of Yetter Coleman, LLP, for Amicus Curiae.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS
ORAL ARGUMENT OF PETER A. NOLAN ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF RICHARD B. FARRER ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF PETER A. NOLAN ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear arguments in 11- 0855, Nestle USA v. Susan Combs.

MARSHAL: May it please the Court, Mr. Nolan will present argument for the plaintiff and Mr. Farrer will present argument for the Amicus. The plaintiff has reserved ten minutes for rebuttal. Mr. Nolan will open with the first 15 minutes and will present the rebuttal.

ORAL ARGUMENT OF PETER A. NOLAN ON BEHALF OF THE PETITIONER

ATTORNEY PETER A. NOLAN: Good morning. May it please the Court, with the Court's permission, the Amicus is going to address the jurisdiction. If there are questions about jurisdictions, which are not answered, if I may, I'd like to address those in the 10 minutes I've reserved for rebuttal. The current Texas franchise tax creates scores of different classifications of tax treatment. It uses different standards for total revenue, different standards for cost of goods sold, different standards for compensation and different standards for ability to use the deduction. As a result, franchise tax as a percentage of Texas profits differs between industry groups by almost 3000%. The average effective tax rate for the five least-taxed industries is less than one-fourth the average effective tax rate of the five most taxed industries. The question before this Court today is whether the Legislature may impose a tax, a franchise tax, which places such an unequal and disparate burden on Texas taxpayers when the franchise tax should be commensurate with the value of the privilege of doing business in Texas.

JUSTICE DEBRA H. LEHRMANN: Why didn't you pay your taxes in protest?

ATTORNEY PETER A. NOLAN: We didn't pay our taxes in protest because under Section 24, there's no requirement to pay those taxes in protest in order to come to this Court and challenge the constitutionality.

JUSTICE DEBRA H. LEHRMANN: Do you understand it's generally required, right?

ATTORNEY PETER A. NOLAN: It's generally required and our point on this is the, Section 24 doesn't say anything about a particular procedure you most go for. Mandamus generally requires you ask a state official to do something, they turn you down and then you ask for a mandamus. It is not required when that would be a futile act and in this case, that would be a futile act. The Comptroller had been enforcing this franchise tax for years. Allcat had come to you and challenged the franchise tax on the very grounds upon which we challenge them today--the equal protection and the commerce clause and the due process. The Comptroller did not say, oh, I'm sorry, you're right, and stop enforcing the act, the Comptroller at the AG, and they fought against that. A month later, only a month later, we bring our action in this Court. It would have been futile. It would have been a waste of time to go to the Comptroller and say we know that you are currently defending against these in the Allcat case, but we've come to ask you to declare that this statute is unconstitutional upon the very grounds that you're fighting in a Supreme Court, so under those circumstances the case law is relatively clear that if it's a futile act, you don't need to do that and so that's why we did not ask the Comptroller to declare this unconstitutional in any manner before we came to this Court.

JUSTICE DEBRA H. LEHRMANN: Or not just to ask for it to declare it unconstitutional, but ask for it to refund.

ATTORNEY PETER A. NOLAN: Refund, yes, Your Honor, and the refund is sort of peculiar to the Section 112 procedure so under that procedure we did not ask for the refund. So the question is, if a tax should be commensurate with the value of the privilege of doing business is what the Legislature has done, is that constitutional? And the State points out and we agree that mathematical precision is not required in determining the value of the privilege, but you at least have to try to determine the value of the privilege. The Austin Court of Appeals in the Bullock v. Sage case explains why. They don't really break any new ground, but they explained why a franchise tax, which is commensurate with the value of this privilege must logically and constitutionally value this privilege by the same standard. The Sage case reiterates the franchise tax is one imposed on the value of the privilege to transact business in Texas. That's the standard by which we will measure this. It's the value of the privilege. The Court starts with Article 8, Section 1 of the Texas Constitution, which says taxation shall be equal and uniform and then the Court recites the logic of the Lively case. That's a property tax case and the Lively v. Missouri case says the standard of uniformity described by the constitution being the value of the property, taxation cannot be uniform unless the value of all property is ascertained by the same standard. That's just logic. It's not law. It's just logic. Using this logic what the Austin Court of Appeals says is, the standard of uniformity for a franchise tax being the value of the privilege taxation, this franchise tax cannot be uniform unless the value of the privilege is ascertained by the same standard. They simply applied the logic from the property tax case to the franchise tax case and precisely because both of them must be commensurate with the value of that, which is being taxed. That's all the Sage court did. We maintain that Sage properly applied the Lively standards of uniformity of the franchise taxes because the franchise tax should at least reasonably attempt to be commensurate with the value of this privilege. The State, by the way, does not contend that the classifications in the franchise tax are related to the value of the privilege, but instead argues that the myriad of classifications which are used, which caused admittedly unequal treatment of taxpayers are nonetheless rational because there's some other legitimate public policy, not tied to the value of the privilege, but some other policy and that policy could be as simple as a desire to encourage a particular occupation or encourage a particular industry.

JUSTICE EVA M. GUZMAN: And does it always have to be tied to the value or their privilege?

ATTORNEY PETER A. NOLAN: In a franchise tax and in a property tax, yes, or else it doesn't make any

sense. If you have a tax, which is commensurate, and I looked up the word commensurate in the dictionary and it means proportionate, so if you have a tax, which is proportionate to the value of that privilege, then you must measure that value the same for everybody or how can you have a proportionate?

JUSTICE EVA M. GUZMAN: And theoretically, could the other legitimate public policy be tied to the value or privilege and you just contend that it's not?

ATTORNEY PETER A. NOLAN: Yes. We just contend that it's not and what's important is the State doesn't even pretend to contend that it is. It's simply not.

JUSTICE DAVID M. MEDINA: And wouldn't that value just fluctuate over time and over economic conditions?

ATTORNEY PETER A. NOLAN: Yes, Your Honor.

JUSTICE DAVID M. MEDINA: It would.

ATTORNEY PETER A. NOLAN: The word I'd really like to use is economic conditions. The value does depend on economic conditions. These myriad distinctions don't. They're unrelated to economic conditions. They're unrelated to the value of the privilege and that, we think, is the fatal flaw.

JUSTICE DAVID M. MEDINA: So how is that corrected? Do you have to get, hire a bunch of actuaries to come in and determine what that privilege is for each?

ATTORNEY PETER A. NOLAN: No. It's really relatively easy and the State of Texas did it the easy way for 100 years or however long there's been a franchise tax. What they did was they took something, which was a proxy for that value. They might use income as a proxy for the value of the privilege. They might use the wealth, the assets of the corporation or the industry as a proxy for that value and then what they did was they taxed based, the tax base was either the income of the corporation or the property of the corporation or some combination of those two so what the State did for decades and decades and decades was try to figure out the value of the privilege. They took some proxy for it. It doesn't have to be mathematically exact, but they just have to try. It has to the point of it and for decades what the State did was they took some reasonable proxy for the value of this privilege and then they taxed that value. Here they haven't attempted to do that at all. That was what we say is the fatal flaw. They're not taxing the value. They're taxing something which is unrelated and that's the fatal flaw. The Enron Corp case is instructive in our analysis. We both cite the case, both cite this case, and Enron was a property tax case questioning whether it was a violation of the equal and uniform tax clause to allow taxpayers to value petroleum preserves on different dates. I think one was September 1st of the previous tax year and one was January 1st of the current tax year and so the court, like other courts that have looked at this, started the analysis by examining the constitution. Article VIII, Section 1(a)provides that taxation shall be equal and uniform. Article VIII, Section 1(b) provides that all real property and tangible personal property shall be taxed in proportion with its value. The Enron court also relied, just as Sage did, upon the reasoning in Lively v. Missouri for the proposition that what is now Section 1(b), providing that property is in proportion to its value, actually secured, and this is important, it secured the uniform and equal tax treatment of Article VIII, Section 1(a). (b), which is the proportionality secures the equal and uniform requirements of Section 1(a). As we said before, the Enron court quoted this from Lively, the standard of uniformity prescribed by the Constitution in 1(b), I'm sorry in 1(a), being the value of the property, taxation can't be in the same proportion to the value of that property unless all the property is ascertained by the same standard. It can't be. The logic of this is unassailable. When you tax the value of something and that tax must be commensurate with the value of that something, it cannot be, it's a mathematical impossibility that the tax be equal and uniform unless the value of the property is uniformally ascertained. Enron does provide that the Legislature may constitutionally draw distinctions or classifications in the manner in which the value of the property is determined, but only so long as those classifications are rationally related to determining the value. For instance, in Enron, it was permissible to have differ-

ent dates for the evaluation of these petroleum reserves precisely because either date was rationally related to determining the property value of those reserves. What the court said was it might even be a better way of doing these reserves if you did sort of an average of every month, but certainly is rational to pick either September 1st of the preceding year or January of the tax year because these petroleum reserves differ in value and so either date was designed to get to an accurate value. Therefore, either date could be used and classifications, which are designed are to get accurate values can be used. Classifications which are not designed to get to accurate value, but are designed for other purposes, perhaps you want to favor dentists over doctors, those in an occupation tax, fine. In a franchise tax or a property tax, not fine. You could not tax the home or you should not tax the home of a dentist differently than you tax the home of a doctor. You ought to figure the value of their home the same. Most of the cases, not all of them, but most of the cases cited by the AG's office are federal cases and so I read those federal cases and under equal protection, we should still prevail and this is why, in the case of Allegheny Pittsburgh Coal Company v. County Commissioners, it's 488 U.S. 336, it's cited in the Nordlinger case, which the State cites. The question before the United States Supreme Court concerned a West Virginia evaluation of property. West Virginia constitution and laws had what we have, taxation shall be equal and uniform, all property shall be taxed in proportion to its value. In the West Virginia case, a county assessor basically did what they did in California and said, look, instead of doing that, I'm going to assess these based upon the value at which you bought the property. Therefore, you had different evaluations depending upon when you bought the property. The Supreme --

JUSTICE DAVID M. MEDINA: Which impact, if we declare this unconstitutional, what's the impact on the State?

ATTORNEY PETER A. NOLAN: The impact on the State is they'll go back and they'll have a tax, which is constitutional. It doesn't stop any of the good parts that this tax has. It doesn't stop broadening the tax base. What it does stop is an unequal and non-uniform tax. The State is working on that right now. I bet they'd love to have guidance. It's probably why they put Section 24 in there; look, tell us what our guidance is so we can get a tax. This is important.

JUSTICE DAVID M. MEDINA: And what happens to all the taxes that have been paid under this plan?

ATTORNEY PETER A. NOLAN: There are two, we're asking for a refund, but as this Court has done in other cases, it can say look no refund, we're going forward from here or State you've got X-number of time to fix this.

JUSTICE DON R. WILLETT: Going back to Justice Lehrmann's original question, you never, you didn't pay the taxes under protest.

ATTORNEY PETER A. NOLAN: Yes.

JUSTICE DON R. WILLETT: Correct?

ATTORNEY PETER A. NOLAN: That's correct.

JUSTICE DON R. WILLETT: You never asked a Comptroller to refund tax. You say it would have been futile so what's the point because of their arguments [inaudible] and Allcat.

ATTORNEY PETER A. NOLAN: Yes, Your Honor.

JUSTICE DON R. WILLETT: But you're asking us to issue a Writ of Mandamus.

ATTORNEY PETER A. NOLAN: Yes, Your Honor.

JUSTICE DON R. WILLETT: And I'm wondering, you haven't asked the Comptroller to honor your alleged

rights and the Comptroller hasn't turned you down because you haven't asked her.

ATTORNEY PETER A. NOLAN: That's right, Your Honor.

JUSTICE DON R. WILLETT: And without the denial of that right, you know without her refusal to perform a ministerial act, how can a court wag a finger and mandamus her, order her to take action if you yourself, if she's never refused to do what you asked?

ATTORNEY PETER A. NOLAN: I'm relying upon the large body of case law that says you don't need to request that the officer take a particular ministerial act if it would be futile to do so and this case there is no question that it would have been futile while she is fighting equal protection in the Texas Supreme Court to go to her and say-

JUSTICE DON R. WILLETT: And why not pay them under protest at least?

ATTORNEY PETER A. NOLAN: Paying them under protest would be necessary if we were going through other sections to protest, but as this Court pointed out, Section 24 is an exception. It's not 112. It's something different than 112 and there's not a requirement that you follow the requirements of 112 in order to use Section 24.

JUSTICE PHIL JOHNSON: So that means going back to Justice Medina's question, that means anyone who has paid taxes under the franchise tax then would be free to file suit against the Comptroller for refund of all those taxes that would not be barred by limitations, I presume? Whether they had paid it under protest or whether they requested a refund or anything, they can just go to the courthouse tomorrow as soon as our opinion issues, if we were to follow your lead here, as soon as the opinion is issued they go to the courthouse, file these lawsuits all over the state and there's no reason they can't, except they would file them where, here or in the trial court or where?

ATTORNEY PETER A. NOLAN: All right. I don't know what the limitation period is on Section 24. It's not in there and I'm sorry I just didn't look at it to see what limitations would apply.

JUSTICE PHIL JOHNSON: But they could follow your lead I guess and file them all up here.

ATTORNEY PETER A. NOLAN: If this Court ordered that the statute was unconstitutional and it ordered a refund of all the taxes of the taxpayers before this Court, then, yes, I think other taxpayers could come in and ask for that. If this Court ordered that the tax is unconstitutional and said these are what the standards are, Legislature fix it and we're not going to order a refund then, no, no one else could come in and ask for a refund.

JUSTICE PHIL JOHNSON: Say that again. I'm sorry you lost me, that last part.

ATTORNEY PETER A. NOLAN: If the Court said the statute is, I'm sorry, yes, the statute is unconstitutional-

JUSTICE PHIL JOHNSON: And we grant you relief and tell her to give you your money back or not?

ATTORNEY PETER A. NOLAN: No. In the second situation, you're saying no we're not.

JUSTICE PHIL JOHNSON: Okay, just relief.

ATTORNEY PETER A. NOLAN: Just relief, we'll give you the declatory judgment, and injunction, but we don't grant you any monetary relief. In that instance, no one else would come back in and ask for the monetary relief.

JUSTICE PHIL JOHNSON: But how do we just grant declaratory relief without mandamus? We said in Allcat that the declaratory relief would be just simply to enforce our mandamus.

ATTORNEY PETER A. NOLAN: That's right and the mandamus we're asking for is both the money back, but we're also asking that the Court instruct the Comptroller and the State, let me say the State, you're instructing the State that they've got to fix this. If they don't fix this, then they're going to have to pay money back. In other words, you're going to give them a certain time like you did in the school tax cases. You're going to give them a time by which they need to act in order to fix the problem.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

ORAL ARGUMENT OF RICHARD B. FARRER ON BEHALF OF THE RESPONDENT

ATTORNEY RICHARD B. FARRER: Good morning. May it please the Court, the revised margin tax is unfair and unconstitutional and this Court can and should overturn it now. The Legislature clearly wanted the Court to consider the tax now upfront and for good reason. For many small businesses like those that comprise the membership of NFIB, the tax is unfair, unnecessarily complex and poses disproportionately high compliance [inaudible]. Two NFIB surveys that we cite in our brief show the pernicious effects of this tax for small business and illustrate why it's important to NFIB's members to have the tax's constitutionality decided now upfront. These surveys show that because of this tax, our members' actual tax bills have increased. Prices have gone up as a result and hiring has slowed.

JUSTICE NATHAN L. HECHT: I guess if the Plaintiffs win in this case, your members would sue as well?

ATTORNEY RICHARD B. FARRER: Well, not necessarily. I think that--

JUSTICE NATHAN L. HECHT: They don't want their money back?

ATTORNEY RICHARD B. FARRER: Well, that assumes, I mean I think what NFIB is primarily concerned with is getting an equal playing field so that all businesses in Texas are playing on the same playing field, something like the old version of the tax, which applied equally to all people in this sort of earned surplus model and then applied--

CHIEF JUSTICE WALLACE B. JEFFERSON: How much money are we talking about that you say has been unconstitutionally collected over the, since the tax was in place?

ATTORNEY RICHARD B. FARRER: I'm afraid Amicus doesn't have any information on that, Chief Justice.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is it millions? It is billions? What are we talking about?

ATTORNEY RICHARD B. FARRER: Again, quite frankly, I'm sorry I don't have an answer. I can try and investigate it. I think one response is that the Court can and I think the Court does have discretion to issue really prospectively and not necessarily retrospectively and perhaps if this were an appropriate case, the Court could do that in deciding the case and not necessarily ordering a refund of all the amounts that have been previously paid.

JUSTICE DAVID M. MEDINA: In your brief you say that the taxes failed to live up to expectations. Why do we have to even consider that in our analysis as to whether or not this is constitutional?

ATTORNEY RICHARD B. FARRER: Well, that's not a point that the tax is unconstitutional, right? Every tax that fails to live up to expectations is not unconstitutional. You're exactly right, but what it does show is that it's not achieving its purpose and at the same time, it's actually producing a lot of very pernicious effects for our

members and these effects include disproportionately high compliance costs. They include unnecessary complexity and unfairness and these we think point to, these are symptoms of deeper constitutional problems of the nature that Mr. Nolan and the Relators are talking about so we raise that point just to draw the Court's attention to the fact that it's kind of a red flag that there are problems here. For instance, just talking about compliance costs, this tax requires a specific cost of goods sold calculation that's unique to this tax. It has nothing to do with the federal cost of goods sold calculation and it has nothing to do with generally accepted accounting principles. It also has this maze of different provisions to determine what tax rate applies. All that means is that small businesses have to hire special Texas tax, franchise tax specialists to help them prepare their taxes and yet even the experts are confused. Our members are reporting audits are up even when these professionals have been retained and this means that our businesses who have a relatively lower absolute level of revenue are disproportionately affected by the tax, not just because of their tax bill, but just because it's so costly to comply with this tax and again, that we think points to--

JUSTICE PHIL JOHNSON: We've been making that complaint about the Internal Revenue Code for years and it doesn't, it seems that they just keep adding paper up there so I'm not sure that that affects the constitutionality, does it?

ATTORNEY RICHARD B. FARRER: Sure, no, again that's not an, again it's not an argument that it's unconstitutional, but it is we think, a symptom that there is something wrong here and it also signals to the Court why it's so important to our members to have this decided now upfront and that's what the Legislature intended. The Legislature wanted the Court to decide these issues now for these reasons and also because it didn't want this cloud hanging over the State's fisc where we have this cloud of uncertainty and if the Court adopts the State's arguments and sends a number of these claims back through the district courts to work their way up for years and years and years, well this potential bill that you all are worried about, this tax bill that might come due if this tax is found wanting, well it's just going to grow and grow and grow and so that is why the Legislature wanted this Court to and empower this Court to in Section 24, address these issues now upfront.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any questions? Thank you, Counsel. The Court is ready to hear argument from the Respondents and Real Parties in Interest.

MARSHAL: May it please the Court, Mr. Craft will present argument for the Respondent.

ATTORNEY RANCE L. CRAFT: May it please the Court, Relators have not properly invoked the Court's jurisdiction because they have neither paid their taxes under protest nor filed a refund claim with the Comptroller. Because of that omission, they have not satisfied the statutory prerequisite to bringing a suit to recover taxes from the State and they have not established the requisite demand and refusal from a public official that is a necessary predicate to mandamus relief.

JUSTICE DEBRA H. LEHRMANN: What is your response to their argument that it would be futile, would have been futile?

ATTORNEY RANCE L. CRAFT: Two responses. One, it would not have been futile. I don't agree that the claims they're advancing here are the same as the claims that were advanced by Allcat. Allcat was bringing as-applied challenges to the Comptroller's interpretation of the tax. They have one claim like that. They're bringing both facial and as-applied challenges to applications of the tax for their as-applied challenges and to the tax as a whole, so it's not the same. Now, the Comptroller can't issue a declaratory judgment that a tax is unconstitutional, but that doesn't mean it would be futile because she can, for example, look at the tax period of protest and see if they've made a mistake about the liability, perhaps the challenge deduction they've got it wrong. That can be fixed, avoid the constitutional question. The Comptroller has authority to interpret the tax code. She may interpret it in a way that avoids the constitutional question or as this Court pointed out in the Corsicana Cotton Mills case, she might agree with them and say I think it is unconstitutional. I'm going to decline to enforce it. Those are all reasons why it would not be futile to go to her first, but more importantly, the Legislature requires

it. The Legislature said in Chapter 112 that in order to recover taxes from the State, you have to either pay them under protest or bring a refund claim with the Comptroller.

JUSTICE DALE WAINWRIGHT: Mr. Craft, how would that work? They'd file a lawsuit in Travis County District Court demanding a refund? The statute at issue here giving us original and exclusive jurisdiction says we have original and exclusive jurisdiction. So how do they then make the claim, constitutional claims they're bringing, they were talking about today here in this Court? They have two separate pending proceedings or--

ATTORNEY RANCE L. CRAFT: No, Justice Wainwright. They would not go to Travis County District Court. They would pay their taxes under protest with the Comptroller, then they could file a constitutional challenge in this Court just like Allcat did. That's what Allcat did. It paid its taxes under protest and then it came here. That's how that would work. So --

JUSTICE DALE WAINWRIGHT: What about the requirement to file in district Court in Travis County? That's just not applicable in this context?

ATTORNEY RANCE L. CRAFT: What the Court said in Allcat is that Section 24 is not, as they have described it, a completely separate procedure to bring a constitutional challenge. This is what the Court said. It said, first, that Allcat's constitutional claims "is subject to Chapter 112 of the tax code." That's what the Court said. Allcat's claim is subject to Chapter 112 of the Tax Code. Then the Court said, Section 24 is "a specific, limited exception to the provisions of the tax code that confer exclusive jurisdiction over suits such as Allcat's on the district courts of Travis County." So Section 24 just displaces that part of Chapter 112 that puts jurisdiction in Travis County and says, no, jurisdiction is here and the Court confirmed that later in Allcat when it was confronted with Section 112.108, which says you can't issue mandamus relief regarding the constitutionality of a tax statute. If they were right, the Court simply would have said that's Chapter 112, it doesn't apply. That's not what you said. You said that Section 24 is a more specific, later-enacted provision that trumps 112.108, but it doesn't displace the prerequisites to suit because there's nothing in Section 24 that conflicts with those provisions in Chapter 112.

JUSTICE EVA M. GUZMAN: If we were to determine though that demand would be futile, then would our jurisdiction be invoked if that was our conclusion?

ATTORNEY RANCE L. CRAFT: I don't, the futility exception is an exception that applies to mandamus. I don't think this Court can carve out an exception like that in the statute in Chapter 112 and indeed it did not in Allcat. It said that Allcat's claims, their constitutional claims, remain subject to Chapter 112 and what's more is that if you say Chapter 112 just doesn't apply, as they have, you're not simply getting rid of the jurisdictional prerequisites. Justice Johnson, you hit on this, you're also getting rid of the limitations period because that's where we get limitations periods for taxpayer suits, Chapter 112, subchapter b, which applies to protest suits and subchapter d, which applies to refund suits incorporate by reference the four-year limitations period for administrative claims from Chapter 111. So if you say Chapter 112 doesn't apply, not only are you going to have to withdraw something you said in Allcat, but you're taking away the limitations period because there is not one for Section 24 so if in a few years this Court were to hold some or all of the franchise tax constitutional, you wouldn't just be seeing refund claims for the last four years, you'd be seeing them going all the way back to the beginning of the franchise tax, January 2008. That can't be the law.

JUSTICE PHIL JOHNSON: And where would all of those have to be filed?

ATTORNEY RANCE L. CRAFT: They would have to be filed here. If --

JUSTICE PHIL JOHNSON: Because we have a reasonable exclusive jurisdiction under the provision.

ATTORNEY RANCE L. CRAFT: That's correct. Now if they comply with the statutory prerequisites as they

must, what would likely happen is everyone would line up at the Comptroller and say this applies to us too, give us our money back. I mean that's what has happened in the past when courts have held some aspect of the tax constitutional, everybody lines up.

JUSTICE NATHAN L. HECHT: We could say as we did in the school finance case that the result is unanticipated and an unusual situation that should apply only prospectively. Why not here?

ATTORNEY RANCE L. CRAFT: Because that's not in the nature of mandamus relief and that's what this Court said Section 24 is all about. What makes mandamus proper or necessary is that they're asking for their money back and as Justice Johnson pointed out, the declaratory injunctive relief is only available just to ensure that the mandamus you issue is complied with. Now, aside from the fact that they have not either met the Chapter 112 requirements or made the demand and refusal that is the general rule for mandamus cases or lacks jurisdiction over their as-applied challenges. NSVMA's as-applied challenge isn't substance of challenge to the Comptroller's rule about what heavy construction equipment means. They say that that deduction is not available to them because they rent out cooling towers for use at construction sites and so they don't get that deduction, but there's nothing about the language, heavy construction equipment, in the text of the statute that necessarily excludes that equipment. It's heavy, it's equipment, it's used at construction sites. In fact, they presumed it applied because they took the deduction. The reason in fact why they did not get that, why it was disallowed was because the Comptroller audited their return and said your equipment doesn't qualify for the rule, the definition of heavy construction equipment, that's the Comptroller's interpretation and that is precisely the kind of challenge that this Court said is outside of the scope of Section 24. Now as to their other as-applied challenge the court did not reach the question in Allcat of whether the Legislature could give you mandamus jurisdiction over an as-applied challenge challenging an application of the act independent of the Comptroller's interpretation, but you flagged the issues. You said assuming without deciding that Article 5, Section 3 lets the Legislature confer original mandamus jurisdiction on this Court and then proceeded with the analysis, but reading Section 24 to cover those kind of as-applied challenges runs into two limits on the Legislature's ability to confer original mandamus jurisdiction on this Court. Those limits were set forth in footnote six of Allcat. One of those is that the Court can't decide or can't exercise mandamus jurisdiction if there are material fact questions and an as-applied challenge by definition is fact specific. It requires the development of a factual record so if you say as-applied challenges are included, you're running the risk that you're going to have an exclusive jurisdiction over a case that you can't decide.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, could we appoint a magistrate or a special judge to hear the facts for the Court? Is that possible?

ATTORNEY RANCE L. CRAFT: I don't think so Your Honor, because the constitution specifically limits the authority of this Court to decide fact questions.

JUSTICE NATHAN L. HECHT: In appeals. In appeals, right? In appeals, but not in anything.

ATTORNEY RANCE L. CRAFT: No, even in mandamus jurisdiction, the Court has said that. Now you do have authority under Section-

JUSTICE NATHAN L. HECHT: The Court said that, but the Constitution doesn't, right?

ATTORNEY RANCE L. CRAFT: I think the Court has read that as a limit emanating from the Constitution because Article III does or Article V, Section 3 does say you can decide factual questions related to jurisdiction and you've so held. So that would be a reason not to construe this to cover as-applied challenges. The other limit that's pertinent that was recited in footnote six of Allcat is that, and again the Court has said this emanates from the Constitution, is that there must be some strong and special reason for the exercise of this extraordinary jurisdiction and the Court said that's met when a case involves questions which are of general public interest and call for a speedy determination. On as-applied challenge, by definition, is not one of general public interest be-

cause the relief is specific to that taxpayer so that's another limit on the Legislature's authority to do what it did in Section 24. You can avoid that problem by construing Section 24 only to apply as-applied challenges. Now I do want to turn to the merits of their claims.

JUSTICE PHIL JOHNSON: Excuse me just a second, you say construing Section 24 to apply only to as-applied or to not apply?

ATTORNEY RANCE L. CRAFT: I'm sorry if I misspoke, to apply only to facial challenges. Facial challenges would not run into that limit because they would be some structural defect in the act as in Allcat. Now on the merits, Relators have failed to overcome the robust presumption that the franchise tax is constitutional. They're equal in uniform claim fails because it depends entirely on appropriating a constitutional requirement that applies only to property taxes and as their reply brief and their argument today reveals they really don't have a response to the Comptroller showing that their federal claims lack merit. Now, on equal and uniform, they're relying on a standard that applies only to property taxes and I want to give you the constitutional provisions that frame this discussion. In Article VIII, Section 1(a) we have the general provision that says taxation shall be equal and uniform. In 1(b), the provision is all real property and tangible personal property in this state shall be taxed in proportion to its value and then Section 2A says all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority leveeing the tax so for taxes other than property taxes and occupation taxes the only limit in Article VIII is that that general provision that they have to be equal and uniform so the question is, what does that mean for the franchise tax? They're relying on the Lively case. That's a property tax case and the reason why Lively came out the way it did was because they were relying on that specific language that is now in Section 1(b) that property must be taxed in proportion to its value.

JUSTICE DAVID M. MEDINA: But don't you think that the taxation should be fair and equally distributed amongst the taxpayers, whether it's a franchise tax, an income tax or otherwise?

ATTORNEY RANCE L. CRAFT: What the Court has said that equal and uniform means as to a franchise tax is simply that it must have some rational basis and as long as the Legislature has some plausible policy reason for doing that, that's okay. The Legislature-

JUSTICE DAVID M. MEDINA: You said the policy reason is good here, but you have one business that's taxed at a 400% tax rate and another at a 5% tax rate. That doesn't seem to be equitable.

ATTORNEY RANCE L. CRAFT: That is equitable under the proper standard because the Legislature has authority to draw those distinctions between businesses and they can favor one business over the other and that will result in a different tax burden for some businesses and not for others. That is a decision for the Legislature.

JUSTICE DAVID M. MEDINA: So we're not to look at the tax burden on the small businesses here? We just look at the result? Is that what you're saying?

ATTORNEY RANCE L. CRAFT: Well, first I'm going to take issue with the argument that this is somehow targeting small businesses. What Mr. Farrer didn't point out is that there's an exemption for the franchise tax for businesses that have a million dollars or less in total revenue or pay or would owe $1000 or less in franchise tax so I don't agree that this is an anti-small business tax, but in terms of the, looking at the outcomes, no you don't look at that. You just look and see if there is a plausible policy reason for the Legislature to distinguish one kind of business from the other and a difference in business is enough.

JUSTICE NATHAN L. HECHT: Doesn't it have to relate to the privilege of doing business?

ATTORNEY RANCE L. CRAFT: Two responses to that, Justice Hecht. First, I want to talk about this language that they're relying on it has to be commensurate with the value of the privilege granted. Where does that language come from? It's been recited by this Court in cases such as General Dynamics v. Bullock, but if you go

back through the case law, it comes from an old writ refused case, United North and South Development v. Heath and what the Court said in that case was it looked at the franchise tax formula that has been in place and said it's apparent to us that the purpose of the Legislature in enacting this franchise tax was to impose a tax on the value of the privilege of doing business in Texas. What they're trying to do is to take that judicial observation about the old franchise tax and spin it into a constitutional limitation on the new franchise tax. It's not. There's actually nothing in Article VIII about a franchise tax so it can be for whatever the Legislature wants it to be subject only to that general provision that taxation must be equal and uniform. In fact, the only thing the Constitution says about--

JUSTICE NATHAN L. HECHT: It seems to me that that leaves nothing [inaudible]. I mean it seemed to me that your argument says a rational basis or a plausible basis just means whether rational people could think it up and of course, that is what happened here, but if it has to be rationally related to something that you could tax like the privilege of doing business then it seems to me it's a much harder argument to make.

ATTORNEY RANCE L. CRAFT: Two responses to that. First, what the correct standard is, which is the standard under equal protection and I'll address that in a minute, the relationship just can't be so attenuated as to render the tax irrational so that gets back to the rational basis standard. The second response is you're right. Almost everything will meet that standard because it is a highly deferential rational basis standard. Indeed, this Court said in Enron it's even more deferential when you're talking about tax classifications.

JUSTICE DALE WAINWRIGHT: So the State could decide to fund public education, a laudable goal, that all of the billions of dollars needed will come from the hundred largest companies, the hundred largest companies operating in Texas and the other tens of thousands or more will not be taxed. Whether it's good or bad policy, you can argue that. Is it constitutional? It sounds like you would say yes.

ATTORNEY RANCE L. CRAFT: I would say yes.
JUSTICE DALE WAINWRIGHT: Or could get it all from one company.

ATTORNEY RANCE L. CRAFT: Well, I mean that might run into other constitutional problems such as-

JUSTICE DALE WAINWRIGHT: But as for Article VIII and the Equal and Uniform Provision you would say yest the State could do that?

ATTORNEY RANCE L. CRAFT: Yes, the State can do that. I'll give you an example of something that wouldn't meet the test Justice Hecht, the MetLife v. Ward case from the U.S. Supreme Court. That's at 470 U.S. 869. There, Alabama imposed a higher tax on insurance companies because they were incorporated, that were incorporated out of state so you could have two insurance companies that are doing the same business in Alabama, one pays a higher tax simply because it's incorporated in Delaware rather than Alabama, but every time someone brings one of these challenges, they almost always fail because it's a deferential standard and getting back to the other point I wanted to make about commensurate with the value of the privilege even if we accept that that is a purpose of the franchise tax or even the main purpose of the franchise tax, it's not the exclusive purpose of the franchise tax. It doesn't have to be. Indeed that's something that the U.S. Supreme Court pointed out in the Fitzgerald v. Racing Association of Central Iowa case cited in our brief. This is what the Court said: Tax laws "might predominately serve one general objective while containing subsidiary provisions that seek to achieve other desirable, perhaps even contrary ends as well." So it's fine for the Legislature to say our general goal here is to impose a tax on the value of doing privilege in Texas, but they can achieve other goals, even contrary goals, through the exclusions classifications deductions, exemptions that are challenged here today. They might say, for example, one of the distinctions that's being challenged here is that there's an advantage for the compensation deduction for businesses that use employees. These are the employees who use independent contractors. Well, the Legislature might say we want to give a tax advantage to businesses that create jobs, that provide benefits for Texans and so we're going to give them a tax advantage that we don't give to companies that just use independent contract labor. That's a perfectly permissible goal and there's nothing about, there's

nothing in the constitution that precludes the Legislature from trying to achieve that through the franchise tax. I want to go back to what is the proper standard under 1(a). It's not Lively because that's a property tax case and it deals with that language in 1(b) that applies only to property tax. The simple authority you should look to is the Enron case. Enron v. Spring ISD noted that property taxes are subject to that constraint in 1(b) that tax be in proportion to value, but then the court said there is no similar constraint on occupation, use, excise or sale taxes. Well, a franchise tax is a type of excise tax so there you have it. You said that that constraint on property doesn't apply to a category of taxes that includes the franchise tax. The other significant thing you said in Enron was that the requirements of Article VIII, Section 1(a), the Equal and Uniform Clause, are similar to the Federal Equal Protection Clause and you said those cases provide guidance and then you cited the Nordlinger v. Hahn case and you quoted it. You quoted for the proposition that equal and uniform and equal protection are satisfied so long as there is a plausible policy basis for the classification and that that standard is especially deferential in the context of classifications in tax laws. There's another case not cited in our brief that also is relevant here and that is the State v. Hogg case. It's 72 S.W.2d 593. It's an opinion adopted case from the Commission of Appeals so it's treated as an opinion of this Court. That was a challenge to the State Inheritance Tax and that inheritance tax drew classifications that charged different rates to different classes of persons and much like the relators here, the challenges in that case said that tax has to be in proportion to value because what you're taxing is the value of the property that's inherited so those classifications are unconstitutional under Equal and Uniform and this Court said no because the inheritance tax is not a property tax. It's a privilege tax and because it was a privilege tax the court said the challenge classifications, the validity of those challenge classifications are "free from doubt." So again, the court drew that distinction between property taxes and everything else. The other line of precedent I want to point you to on this are the courts of appeals because the courts of appeals have entertained an equal and uniform challenges to the franchise tax and almost all of them have applied this deferential, rational basis standard. Many of these cases are cited in the briefs. The Grayson County State Bank v. Calvert case cited at page 27 of our merits brief. Rylander v. Palais Royal, Rylander v. 3 Beall Brothers 3 cited at page 12 of their merits brief. Rylander v. B&A Marketing cited at page 8 of their reply brief and another case no one cited, Southwestern Bell Telephone v. Combs. That's at 270 S.W.3d 249, an Amarillo Court of Appeals case from 2008. All of these courts applied this deferential rational basis standard when looking at an equal and uniform challenge to the franchise tax. The one outlier is this Sage Energy case and not surprisingly, that's the case they hang their hat on. Sage Energy is simply wrong and I disagree with Mr. Nolan that Sage Energy engaged in some sort of logic, some sort of analysis to tie the standard for property taxes to the franchise tax. What Sage Energy did was it cited the language in 1(a) and 1(b), it used to all be in one paragraph, they just quoted that language and then they cited Lively. They cited the Lively case, which we know is a property tax case that depends entirely on 1(b) and it said, you know it cited the standard, the proportion in value and then it just applied that to the franchise tax so it wasn't any reasoning why they would make that leap. They just did it. They made a mistake. That case is wrong because the language that Lively turned on, that proportion to value language only applies to property taxes and that's what Braden has concluded. Braden has looked at this issue in his treatise on the Texas Constitution and what he determined and I am quoting from page 568 of his treatise, the law is that equal and uniform does not prohibit reasonable classifications in the case of any tax except the property tax. As for property, the law is that all property must be taxed at the same ad valorem rate and then later on page 570, same thing. All property must be taxed equally and uniformly in proportion to its value. All other taxation must be equal and uniform, but the Legislature may classify the objects for taxation so long as the taxation is reasonable. Now, beyond that precedent from this Court and Texas courts and Braden's analysis, we looked at other states. There are five other states that have what I call standalone equal and uniform taxation clauses where they're just saying like Texas' constitution taxation shall be equal and uniform and they don't tie it to a particular tax. Those states are Mississippi, Nevada, South Dakota, West Virginia and Wisconsin. All of those states interpret that equal and uniform taxation clause in the same manner that the U.S. Supreme Court interprets the Equal Protection Clause and that is this highly deferential, rational basis standard. If you expand that inquiry to all the states and look at any equal taxation clause, they have or even their equal protection clauses, only three states have said that they will apply that equal taxation clause or equal protection clause more rigorously than the federal government applies the Equal Protection Clause to tax laws. Those states are Iowa, Illinois and Utah and only Iowa has actually done it. Only Iowa has actually applied its tax equality clause more rigorously to strike down attacks. So because the standard is just this very deferential, rational basis standard and because the

Legislature can accomplish any other goal it wants to in the franchise tax it doesn't have to be tied to the value of the privilege granted by the Legislature. It can be for other purposes as well as long as we can come up with a plausible policy reason for doing so. They haven't engaged on that because they know they're going to lose under that federal standard. What they want to do is move the goal post and say that there is a heightened standard for the franchise tax and that you should treat it just like the property tax, but that's not what the law says. Unless there's any questions about the due process or commerce clause claims, because they didn't address those in the reply brief and they didn't address them here today, the Comptroller will stand on her briefs for these claims and ask the Court to dismiss this case for lack of jurisdiction or deny relief.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you. Mr. Craft. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF PETER A. NOLAN ON BEHALF OF PETITIONER

JUSTICE DON WILLETT: Mr. Nolan in Allcat, the Relators, all satisfied the Chapter 112 requirements. Nobody disputed the applicability for the application of Chapter 112 and the State rather forcefully says that your failure to abide by those prerequisites is jurisdictionally fatal and we did say in Allcat there's a passage where we said that suits under Section 24 are subject to Chapter 112 of the tax code and you say what?

ATTORNEY PETER A. NOLAN: We say, Your Honor, we say two things. One, you said in there that Section 24 is an exception [inaudible] and that--

JUSTICE DON WILLETT: And you interpret exception to mean completely supplant like establish a totally new, comprehensive regime for taxpayer suits?

ATTORNEY PETER A. NOLAN: Right, that there's no need to go through the requirements of 112 and have this same case in two different courts in order to take advantage of Section 24. We think that would be a very unusual concept. I don't know that that's ever been employed in Texas law before.

JUSTICE DON WILLETT: I'm just trying to figure out what in the act suggests that lawmakers intended to create a whole new regime and to supplant all the prerequisites of Chapter 112 for all purposes?

ATTORNEY PETER A. NOLAN: We read the words original and exclusive to answer your question. When it said this Court has original and exclusive jurisdiction over this narrow challenge and the reason for that is, there's a very good reason for that, as everybody has pointed out from the questions from the bench, what about the dollars involved? As council for the state pointed out, this is an extraordinary remedy, what the Legislature said is this needs the extraordinary remedy of going to the Supreme Court because if you work your way through the district court and the appellate courts and come to the Supreme Court years later then whatever the magnitude of that problem, whether it's tens of dollars, millions of dollars, billions of dollars, trillions of dollars, it will be that much greater by the time you get here. It is imperative, not necessarily from a legal standpoint, but the Legislature and we at least think it is imperative that the Legislature have the guidance of this Court. They are begging for it as they now work on changing the franchise tax. This is so much a better time to give them that answer.

JUSTICE DON WILLETT: If we agree with you that Chapter 112 is, doesn't apply here I assume your argument is that Chapter or Section 24 is itself a clear enough, unambiguous enough waiver of immunity that you would get your tax refund?

ATTORNEY PETER A. NOLAN: Yes, Your Honor. Can I address a few things from what Counsel for the State said? I don't know that he did this on purpose, but he misquoted the Enron case. The Enron case says the Legislature's authority to make classifications in levying occupation, use and sales taxes and he added in the word excise, but my copy of the case does not have that word in here so and it's true. You've got two different types of constitutional provisions. You have the occupation tax constitutional provision which says you can

make classifications. It says you can make classifications for any reasons you want. All we require is that within the classifications you treat people equally and uniformly.

JUSTICE DALE WAINWRIGHT: The Enron case does, two sentences further down say there is no similar constraint on occupation, use, excise or sales taxes.

ATTORNEY PETER A. NOLAN: That's right and Your Honor, in this, well I apologize. That's was my mistake. I don't know that the franchise tax is an excise tax. I think it is a franchise tax and we have all these cases that say it's not a property tax; it's not an income tax. An excise tax is like a tax on the sale on cigarettes or something and that's not really what this is so you really have something which has not been addressed by the courts. This we write on a bit of a blank slate on the franchise tax, how are we going to treat the franchise tax? The court of appeals cases, which Counsel mentioned, most of those cases use sort of general language, we've got to have a rational basis, but then tie that rational basis to the value of the privilege of doing business in Texas. For instance, in the Central Power and Light Company, it was tied to the value of capitol equity. In the Sharp v. Caterpillar, the deductions were rational because an economic reason tied to the value of the company. In the Rylander B&A case, it was tied to capturing benefits provided by the State. Universal Frozen Foods is just like Rylander v. 3 Beall Bros, the difference in the calorie treatment was okay, but that's because it was the taxpayer's choice as to which [inaudible] they were going to pick. Everybody was treated equally. These appellate cases, the lower court cases do not stand for the proposition that this tax is not commensurate with the value of the privilege. Nobody says that. No court in a hundred years has said that. In fact, when you asked that question, what does equal and uniform mean? This Court has issued opinions saying deductions and exemptions and changes are an anathema to equal and uniform. That is what this Court has said. They are an anathema to equal and uniform and in the franchise tax arena because it should be taxing the value of the privilege of doing business in Texas it is an anathema to that, to have all of the myriad exceptions, exemptions, deductions, you can take this deduction, you can't take this deduction. They take it completely away from valuing the privilege of the business of doing business in Texas. If I can briefly address our other two constitutional arguments, the due process and the commerce clause, they kind of go in with this same theme and that is it's got to be somehow related to the privilege. Under the due process we're complaining because we pick one example, Texas franchise taxes, wholesalers who sell their own products at one percent and wholesalers who sell other products at one half percent we say that's a violation of due process. And the due process analysis says due process requires the taxing power exerted by a state bear a fiscal relation to benefits given by the State even under due process. You just can't be willy-nilly. It has to bear some fiscal relation to the benefits given by the State. The State points out that Nestle is a unitary business, therefore the State may determine the appropriate tax base in Texas by doing three things; define the scope of the business, that means for Nestle it would be both their instate wholesaling and then out of state manufacturing. Everything else they do out of state. You determine the total income from all the parts of the business and then you apportion the income between Texas and the rest of the world. You can use any objective measure and in our instance it uses a ratio of Texas gross receipts to total gross receipts in the world and that's the portion that comes to Texas. The State says that this Court has approved this approach because it better approximate a unitary business' value. The unitary business principle does a better job of accounting for the many subtle and largely unquantifiable transfers of value that they place among the components of a single enterprise. The State's apportion that better approximates the value of the wholesale activities of Nestle in Texas taking into account the transfer of value from outside of Texas that increases Nestle's benefit that it gets from Texas. You do all these things outside of Texas, they increase the benefit that you get in Texas, we're taking that into account thus the State argues apportionment works to arrive at a rational, fiscal relationship between the benefits given by Texas to the wholesale activities of Nestle within Texas and because of apportionment Nestle will pay on a larger tax base then if you just looked at what they did in Texas. Now, citing the Grosjean case, the State points out that because of unitary businesses out of state operations affected the value of its Louisiana business unless the value is a privilege to conduct business in Louisiana the Legislature may rationally take the out-of-state operations into account in assigning the tax rate so they said look, you can do both. However, the stores in Grosjean had not already had their tax base jacked up to reflect out of state activity. There was no apportionment in that case that already raised their tax base so what Louisiana did is say we're going to make it fair by changing the tax rate. They didn't say, we're going to make it fair by apportioning

and then we're going to double it.

JUSTICE DON WILLETT: A quick question, in Chapter 112, which I know you believe does not apply at all, but Chapter 112 has a pretty expressed, clearly defined mechanism for recovering already paid improper taxes.

ATTORNEY PETER A. NOLAN: Yes, Your Honor.

JUSTICE DON WILLETT: There's no such regime or system set up explicitly within the act, but you say there's no problem with that, that's it's sort of implicit?

ATTORNEY PETER A. NOLAN: Yes, Your Honor. In fact, I think this Court has said in order to enforce our mandamus authority, which we have, we can take those actions necessary to do that and yes, I would think that would be implicit in the-

JUSTICE DON WILLETT: The fact that the Act gives you permission to sue and allege a constitutional violation you believe kind of embedded in that is authorization that that itself is an appropriate sort of waiver of immunity and permission to recover your-

ATTORNEY PETER A. NOLAN: Yes, Your Honor.

JUSTICE DON WILLETT: Okay.

JUSTICE PHIL JOHNSON: May I follow up, Chief Justice?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes.

JUSTICE PHIL JOHNSON: Just to follow up and make sure if we simply take the act, the grant of exclusive jurisdiction in this Court and we disregard chapter, the tax code, prerequisites and limitations and all of that then it seems like, do you have any answer about what there would be a limitation on? Any limitation anywhere that you find as far as time period or anyone to file suit in this Court alleging a constitutional violation and requesting all of their money back? Is there any limitation on who could do that time wise or otherwise that you see?

ATTORNEY PETER A. NOLAN: I haven't looked at that, Your Honor. I imagine you'd go to the Civil Practice and Remedies Code or something appropriate and look for the limitations, provisions, which relate to that which is not--

JUSTICE PHIL JOHNSON: Just as a general limitations provision?

ATTORNEY PETER A. NOLAN: That's just off the top of my head, Your Honor. I'm sorry I--

JUSTICE PHIL JOHNSON: And then whether they alleged it was an as-applied or facial challenge or whatever, they're all going to file in this Court because they may not have paid under protest, well if they didn't pay under protest there's nowhere else they could go so they would be coming here I presume? Is that a fair conclu sion?

ATTORNEY PETER A. NOLAN: If this Court ruled that it was unconstitutional and that people get their money back then I don't know if they would file in this Court or this Court would set up some other mechanism, but if you said it's unconstitutional, you get your money back--

JUSTICE PHIL JOHNSON: You get your money back.

ATTORNEY PETER A. NOLAN: It would only be fair the people get their money back. I don't think this

Court speaking in equal and uniform would say you get people get your money back and you people don't get your money back because that wouldn't be equal and uniform.

JUSTICE PHIL JOHNSON: Unless they were, maybe as-applied challenges with factual determinations in there?

ATTORNEY PETER A. NOLAN: Perhaps. In ours we say are not as-applied by the way. They're not just strictly as-applied. Everything that we've alleged applies to numerous people. There aren't any specific facts. I haven't argued one fact in here I needed to establish. They haven't disputed one fact.

JUSTICE PHIL JOHNSON: Your time was up and I didn't mean to get into a whole other area.

ATTORNEY PETER A. NOLAN: I'm sorry, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The cause is submitted and that concludes the arguments for this morning. The Marshal will adjourn the Court.

MARSHAL: All rise.

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