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PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

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WASHINGTON, D.C. 20543

**CAPTION:** OLAF A. HALLSTROM, ET UX., Petitioners V. TILLAMOCK COUNTY

**CASE NO:** 88-42

**PLACE:** WASHINGTON, D.C.

**DATE:** October 4, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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OLAF A. HALLSTROM, ET UX., :  
Petitioners :  
v. : No. 88-42  
TILLAMOOK COUNTY, :  
A MUNICIPAL CORPORATION :  
-----x

Washington, D.C.  
Wednesday, October 4, 1989

The above entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 o'clock a.m.

APPEARANCES:

KIM T. BUCKLEY, ESQ., Portland, Oregon; on behalf of the  
Petitioners.  
I. FRANKLIN HUNSAKER, ESQ., Portland, Oregon; on behalf of the  
Respondent.  
BRIAN J. MARTIN, ESQ, Assistant to the Solicitor General,  
Department of Justice, Washington, D.C.; as amicus curiae  
supporting the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next  
in Number 88-42, Olaf A. Hallstrom versus Tillamook County.  
Mr. Buckley, you may proceed whenever you are ready.

ORAL ARGUMENT OF KIM T. BUCKLEY  
ON BEHALF OF THE PETITIONER

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

This case presents the question of interpreting the  
citizen suit provisions of the Resource Conservation and  
Recovery Act. These citizen suit provisions are virtually  
identical in many other citizen suit provisions in other  
federal environmental laws. This case presents the question  
whether dismissal and refiling is required if there has been a  
failure to notify the government of the violation.

In this particular case, through inadvertence on my  
part, I notified Tillamook County that it was in violation of  
the Resource Conservation and Recovery Act in the operation of  
its landfill operation. At the time that I notified Tillamook  
County, I intended also to notify the government. The statute  
requires that the EPA and the Oregon Department of  
Environmental Quality also be notified of the violation. And  
I was aware of that statute and aware of the regulation, but  
somewhere between the execution -- the intention and the

1 execution something went wrong.

2           Nevertheless, a year later, the citizen suit was filed  
3 and approximately, say nine months later, Tillamook County  
4 moved for summary judgment, asking the Court to dismiss the  
5 case on the ground that there was lack of subject matter  
6 jurisdiction because notice to the government had not been  
7 given. Immediately after having received the motion for  
8 summary judgment I sent notice to the EPA and DEQ, upon  
9 learning, to my surprise, that I had not done so; in fact, I  
10 thought I had done so and was very surprised to learn that I  
11 hadn't.

12           The case came on for hearing approximately 50 days  
13 after the motion was filed, and about 50 days after I sent a  
14 notice to the EPA and the Oregon Department of Environmental  
15 Quality. And, at that time, the District Court said that he  
16 thought it would be a waste of judicial resources, given the  
17 fact that the EPA and the Oregon Department of Environmental  
18 Quality had not indicated either any objection or that they  
19 intended to do anything.

20           QUESTION: Mr. Buckley, you say the case came on for  
21 hearing; this was in the District Court in Portland --

22           MR. BUCKLEY: Yes, yes.

23           QUESTION: What sort of a hearing?

24           MR. BUCKLEY: Motion for summary judgment --

25           QUESTION: A hearing on the motion for summary judgment

1 filed by your opponents?

2 MR. BUCKLEY: Yes. And that hearing took place  
3 approximately 50 days after the motion for summary judgment  
4 was filed and after I gave the formal notice required by the  
5 statute, and the judge said that it would be a waste of  
6 judicial resources to require dismissal at this time.

7 About two years later, and about two years after --

8 QUESTION: May I ask, though, at that time, was one of  
9 the grounds of the motion the failure to comply with the  
10 notice requirement?

11 MR. BUCKLEY: Yes, that was the whole ground of the  
12 motion.

13 QUESTION: The whole ground, yeah.

14 MR. BUCKLEY: After the district judge essentially said  
15 to me that I had done everything that was required because the  
16 defect had been cured, the case went to trial about two years  
17 later and an injunction was entered against Tillamook County.  
18 A finding was made that it was in violation of the Resource  
19 Conservation and Recovery Act standards.

20 So we are here today under this, what I consider to be  
21 a fairly unusual factual situation, to determine whether or  
22 not a dismissal and refileing would be necessary. The way to  
23 determine whether or not a dismissal and refileing would be  
24 necessary is to take a look at the statute itself to determine  
25 whether or not the statute makes giving the notice a

1 jurisdictional requirement that would require dismissal and  
2 refiling.

3 Now, of course, the first place -- this obviously  
4 presents a question of statutory interpretation and the  
5 starting point, obviously, is the text of the statute. The  
6 text of the statute has one sentence that refers to the  
7 jurisdiction of the District Court. And that one sentence  
8 says that the District Court shall have jurisdiction to  
9 enforce an order brought in a citizen suit, enforce  
10 compliance. That is the one sentence that talks about the  
11 District Court's jurisdiction.

12 The rest of the statute, the rest of the provision,  
13 refers to timing requirements of the notice and timing; it  
14 refers to how and who may intervene; it refers to attorney  
15 fees. And, in the most recent amendments to the Resource  
16 Conservation and Recovery Act, there is also an additional  
17 requirement that if the citizen is going to bring an action  
18 for immediate endangerment to the health or the environment,  
19 that he must serve a copy of the complaint on the Attorney  
20 General and the administrator of the EPA.

21 So the question that we have here is, are these  
22 additional requirements jurisdictional requirements --

23 QUESTION: I wonder, Mr. Buckley, if you are quite  
24 right in calling the question here, is it a jurisdictional  
25 requirement. To me a jurisdictional requirement might mean

1 that, if you had litigated this issue without it ever having  
2 been, litigated you case without the question ever having been  
3 raised all through the District Court, the Ninth Circuit, the  
4 judgment become final, you know, could it be set aside because  
5 the Court didn't have jurisdiction. We are not obviously  
6 talking about something like that. We're just talking about a  
7 precondition to the commencement of the action. Now, whether  
8 that is "jurisdictional" or not, I don't know, but I wonder if  
9 it is quite that stark a requirement.

10 MR. BUCKLEY: Well, I think it is, Your Honor, because  
11 the Ninth Circuit ruled that it was a jurisdictional  
12 requirement.

13 QUESTION: I mean, we don't have to follow the  
14 interpretation of the Ninth Circuit if we are not convinced of  
15 its wisdom.

16 MR. BUCKLEY: Well, I hope that the Court does not  
17 follow the Ninth Circuit.

18 [Laughter]

19 QUESTION: But I, you know, to the extent that the  
20 requirement would prevent you from proceeding with your suit  
21 and refileing, and still not be a jurisdictional one, that  
22 analysis really doesn't help you. I mean, the analysis I have  
23 suggested I don't think helps your case.

24 MR. BUCKLEY: Well, I agree, Your Honor, that it is a  
25 requirement. I mean, Congress indicated that giving notice to



1 the government and to the violator was a requirement, and I  
2 agree that it is a requirement.

3 QUESTION: So, how stringent is the requirement is  
4 really what we're talking about.

5 MR. BUCKLEY: I guess that's the point. And it seems  
6 to me that the best way to effectuate the intent of Congress  
7 to accomplish the purpose that Congress intended is to grant  
8 or recognize that the District Courts have limited  
9 jurisdiction to fashion an order that will somehow serve both  
10 the overlying purpose of the statute, which is to protect the  
11 environment; the secondary purpose of the statute, which is to  
12 encourage citizen enforcement; and the third purpose, which,  
13 of course, is to try to trigger government action and to also  
14 trigger voluntary compliance.

15 QUESTION: Well, the language of the statute, of  
16 course, is rather explicit. It says that subsection (a)  
17 authorizes citizens to commit civil actions, except as  
18 provided in subsection (b) or (c). And subsection (b) says  
19 actions prohibited -- no action may be commenced under  
20 subsection (a) unless the notice is given.

21 MR. BUCKLEY: Yes, the language is very --

22 QUESTION: I mean, that's pretty explicit.

23 MR. BUCKLEY: Well, yes, it is. But this Court, in a  
24 number of other cases where private attorney generals have  
25 been entrusted by Congress with the right to bring an action

1 to enforce policies that Congress deems important, has held  
2 that similarly explicit requirements are not a basis for  
3 requiring dismissal and refiling.

4 QUESTION: Well, of course it's possible that the  
5 legislative history here indicates that at least, in part,  
6 those provisions were intended to prevent the federal courts  
7 from having to deal with litigation until after the government  
8 agencies had an opportunity at least to act.

9 MR. BUCKLEY: Right, and the legislative history in  
10 this case dealt primarily with a situation, this particular  
11 situation, that there are going to be lots and lots and lots  
12 of violations of environmental law out there, and it can't be  
13 expected that the government is going to be able to monitor  
14 every single violation out there. And it was thought that it  
15 would be a good idea to enlist the aid and the eyes and the  
16 ears of the citizens to uncover those violations.

17 And so it was thought that if there is an unknown  
18 violation out there that the government doesn't know about,  
19 then it's a good idea to allow the citizens to bring that to  
20 the attention of the government so the government can make its  
21 own investigation or prioritize. I mean, it has to prioritize  
22 because it doesn't have the -- pardon me -- it doesn't have  
23 the resources to go after every single violation. And, of  
24 course, it was thought then that if the government did not  
25 act, that the citizen could then bring a suit.

1 Well, in this particular case, and the reason that I  
2 focus on the facts of this case is because there are going to  
3 be unique facts presented all the time, and the reason, since  
4 there are going to be unique facts presented all the time,  
5 it's a good idea to let the District Courts have the  
6 flexibility to meet real life situations.

7 QUESTION: Or is it a good idea to have a rule that  
8 everybody can understand?

9 MR. BUCKLEY: Well, that is true. You know, a bright  
10 line rule always has the advantage of giving clarity and a  
11 bright line rule, but that's also --

12 QUESTION: In this case, I take it, under this statute,  
13 one of the prohibitions on bringing this suit is if the  
14 government has itself brought a suit, correct?

15 MR. BUCKLEY: Yes.

16 QUESTION: And how do you know whether or not that  
17 statutory exception has been met by the government?

18 MR. BUCKLEY: You mean how do I know if the government  
19 has brought a suit or not?

20 QUESTION: Yes. What do you look for? The first thing  
21 you do to see whether action, what -- has been filed?

22 MR. BUCKLEY: Well, I suppose that you could do that.  
23 Usually, I suppose --

24 QUESTION: But isn't, doesn't, isn't the point that the  
25 statute (b)(2) says that if the administrator or state has

1 commenced and is diligently prosecuting.

2 MR. BUCKLEY: Um hum.

3 QUESTION: So the statute itself makes a distinction  
4 between commencement and prosecution, and it seems to me that  
5 we should interpret the word commencement the same way in the  
6 previous paragraph.

7 MR. BUCKLEY: Well, I think that is the apparent way to  
8 interpret it, Your Honor. I do.

9 QUESTION: But if that is so, commencement means  
10 filing, doesn't it?

11 MR. BUCKLEY: Yes, it does. I agree. I don't think --

12 I think there's room for disagreement given the legislative  
13 history, but I think that that is the best interpretation.

14 But also in the legislative history there was --

15 QUESTION: But if you agree with that it seems to me  
16 that you must lose, because you commenced the action without  
17 going through the waiting period and the notice period.

18 MR. BUCKLEY: Well, if I may answer, yes, that is true  
19 if you look only at that particular section and don't try to  
20 interpret that section in the context of the statute as a  
21 whole, and if you don't instead also look to the purpose that  
22 that provision was intended to serve.

23 QUESTION: You have to argue that this is one of those  
24 rare instances when the Court shouldn't apply the statute as  
25 it is written.

1 MR. BUCKLEY: Yes.

2 QUESTION: That is basically what you are saying, that  
3 we shouldn't --

4 MR. BUCKLEY: Yes, I am making that argument.

5 QUESTION: We don't do that very often, but you think  
6 that's what we should do here.

7 MR. BUCKLEY: I think that would effectuate the will of  
8 Congress in this particular case, when --

9 QUESTION: And yet, it certainly would be workable as a  
10 scheme and as a statute if we did enforce it as it's written.

11 MR. BUCKLEY: I think it would be at the cost of  
12 injustice in many cases, and I think it would also be at the  
13 cost of defeating the will of Congress on the statute as a  
14 whole.

15 QUESTION: Well, don't you think once the rule is clear  
16 that people would understand that that is the requirement? So  
17 how would it result in injustices thereafter?

18 MR. BUCKLEY: Well, first of all, if there are other  
19 lawyers like me out there, who realize that that is a  
20 requirement, and yet, as I said between the intention and the  
21 execution something falls through the cracks, and, at the same  
22 time the government in fact has, the government with  
23 enforcement authority has actual authority, has actual notice,  
24 and decides to do nothing, then to have the Court impose a  
25 bright line rule would have the result, in this case, of

1 requiring a dismissal and refiling to serve no congressional  
2 purpose.

3 QUESTION: Congress could have written it that way.  
4 Congress could have said, you know, no action may be commenced  
5 unless the administrator has been given notice or is given  
6 notice within a reasonable period after commencement. It  
7 could have written it a lot of different ways. It happened to  
8 write it this way, and this way you --you're clearly wrong.  
9 You have an appealing case, your case, because the judge told  
10 you never mind, I won't dismiss the suit, go file, don't,  
11 you'll just have to file it all over again, we'll shortcut it  
12 all. I agree that your case is an appealing one, but you're  
13 asking us to adopt a general rule that will permit this to be  
14 done regularly. I wish you were just arguing some kind of  
15 judicial estoppel or something, but that is not what you're  
16 arguing.

17 MR. BUCKLEY: Well, I am arguing judicial estoppel.

18 QUESTION: Well, no, you're arguing the statute should  
19 generally, for everyone, be interpreted this way so that  
20 judges in the future can do just what this judge did here, and  
21 could say, it doesn't matter that you haven't given notice.  
22 So long as it's here, give notice now, and we'll keep the  
23 case. That is how I read your brief.

24 MR. BUCKLEY: Well, I'm arguing that the Court should  
25 interpret the requirement of notice to be a procedural

1 requirement, one that the District Court can have flexibility  
2 to meet real life situations.

3 QUESTION: Right. So that District Courts can rewrite  
4 the statute.

5 MR. BUCKLEY: Well, no, I disagree, Your Honor. Not to  
6 rewrite the statute. To enforce the intent of the statute. I  
7 mean, this Court has held --

8 QUESTION: We are not in the business of enforcing  
9 intent. We are in the business of enforcing statutes. There  
10 are a lot of different ways of achieving the possible  
11 congressional intent. It chose one way, and you acknowledged  
12 the word commenced means commenced.

13 MR. BUCKLEY: Well, in other situations in the civil  
14 rights context, this Court has held that similar prelitigation  
15 requirements specified by Congress in similar mandatory  
16 language are, in fact, requirements where the Court can  
17 fashion a remedy. In fact, in the Oscar Mayer case, this  
18 Court said that dismissal and refiling is not good, that a  
19 stay would be far more appropriate to allow the litigant in  
20 that case time to provide the notice to the state.

21 And the same thing was held in the Baldwin case;  
22 however in the Baldwin case, the Court held that the Plaintiff  
23 in that case had not satisfied the requirement because she had  
24 been told three times what she had to do. And that's not what  
25 happened in this case. And in Baldwin, this Court

1 specifically said that this, that Baldwin wasn't a case where  
2 the District Court had led the plaintiff in that case --

3 QUESTION: Well, I suspect there are cases where we've  
4 stuck by the strict wording and cases where we haven't struck  
5 by, stuck by the strict wording. Is there any rhyme nor  
6 reason to when we do and when we don't?

7 MR. BUCKLEY: I think that the rhyme or reason is that  
8 the Court generally tries to construe remedial statutes, and  
9 particularly statutes that are enforced by private attorney  
10 generals, to effectuate the remedial purpose of the statute.  
11 And to require dismissal and refileing in this case would be,  
12 would serve no purpose. I mean after all, the Department of  
13 Environmental Quality knew about the violation before the case  
14 was filed, before the notice was given, and didn't do  
15 anything. It knew about the filing of the case even before  
16 the formal notice was given and didn't do anything.

17 QUESTION: It had served the purpose of making that  
18 inquiry unnecessary in future cases. If we simply held today  
19 commenced means commenced, you can look on the paper record  
20 and say, you know, was the notice given before it was  
21 commenced or not? That is an end of the matter. What you  
22 argue for is a rule that says, in every case we'll have to  
23 look to whether the substance of the rule, whether the real  
24 purpose to be achieved by the rule, was somehow achieved in  
25 another fashion. If your case is an exception, I don't know



1     how many others there are out there that the lower courts  
2     might have to wrestle with.

3             MR. BUCKLEY:  But there probably are not many other  
4     exceptions.  I mean, one of the advantages of giving  
5     flexibility to the District Court, is to rule in the  
6     exceptional case, as this one is, that -- that to require  
7     dismissal and refiling when there is only nine days left in  
8     the period would be a waste of judicial resources.

9             QUESTION:  Well, this won't be exceptional if we say  
10    that this doesn't mean what it says, is what I am saying.  
11    This case will not be exceptional.  If this exception can be  
12    made, why not a lot of other ones that achieve the substantial  
13    purpose of the statute?

14            MR. BUCKLEY:  Well, I think that -- that's what this  
15    Court should hold, and I think that's what this Court has held  
16    repeatedly.  That when the words of the statute compel a  
17    result that is plainly at variance with the policy of the  
18    statute, that you have to go along and look behind the statute  
19    to try to interpret the statute to achieve the purpose.  I  
20    mean, the language here says it's mandatory, but at the same  
21    time -- look at the Save Our Sounds versus Callaway case.  I  
22    mean, that's a wonderful example of the District Court having  
23    struggled with the idea, that thinking that it was a  
24    jurisdictional requirement that required dismissal and  
25    refiling, and yet came up with a theory that there had been

1 some kind of substantial compliance, when, in fact, there  
2 really hadn't been.

3 That case involved a dredging question, the Army Corps  
4 of Engineers had known that there was a citizen group that was  
5 concerned about --

6 QUESTION: What's the name of that court case, Mr.  
7 Buckley?

8 MR. BUCKLEY: It was in the District of Rhode Island,  
9 and it is Save Our Sounds versus Callaway.

10 QUESTION: Oh, it's a District Court case?

11 MR. BUCKLEY: It's a District Court case, and the point  
12 of that is not that it has precedential value, but that it  
13 presented a unique factual situation, as this case does, where  
14 it made sense for the District Court to have discretion. In  
15 that particular case, the Army Corps of Engineers knew that  
16 the citizens were concerned about the dumping of polluted,  
17 dredged material on a beach somewhere, and knew that it was  
18 also, under statutory requirements, under the National  
19 Environmental Protection Act, the Marine Protection Act, and  
20 the Water Pollution Act, that it had to have public hearings  
21 and notices and certain time periods had to be -- had to be  
22 observed, like 90 days for circulation of a draft  
23 environmental impact statement.

24 And what the Army Corps of Engineers was -- did was  
25 that it was so anxious to get the case going, that it shortcut

1 those. It violated those statutes and let the contract out  
2 before the 90-day period had run, without any public hearing  
3 or anything like that. And the citizens found out that this  
4 contract was going to be let, and if they waited for the  
5 entire 60 days, that dredged material would have been dredged  
6 and deposited. And the Court said that it thought, in a  
7 footnote, that it was a jurisdictional requirement, but, at  
8 the same time, it said that it thought that there had been  
9 substantial compliance because the citizens had made their  
10 objections known to the Army Corps of Engineers several months  
11 before. But, in that case, there had been no notice sent to  
12 the Environmental Protection Agency and there hadn't been any  
13 notice sent to the state Department of Environmental Quality.  
14 So there had been no compliance with the letter of the  
15 statute.

16 You know, long ago in the 1800s, this Court decided the  
17 Holy Trinity case, and went and said and provided the  
18 principle, that this Court said that it can look through the  
19 letter to the spirit of the statute. And it gave several  
20 examples. I mean, one example was that there's a law that  
21 prevents a prisoner from trying to escape prison. Apparently  
22 there was a case where there was a fire in the prison and the  
23 prisoner escaped, and somebody --

24 QUESTION: The result in Holy Trinity -- that was a  
25 case in which a statute categorically prohibited the

1 importation of people to work in the court just out of whole  
2 cloth created an exception for clergymen.

3 MR. BUCKLEY: Well, I remember --

4 QUESTION: You thought that was a correct result?

5 MR. BUCKLEY: I do think that was a correct result  
6 because when the Court looked at the legislative history --  
7 and I believe that was a unanimous decision -- when the Court  
8 looked at the legislative history, it determined that the  
9 whole purpose of the statute was to prevent the wholesale  
10 importation of unskilled manual labor. And that the Court  
11 determined that that -- that there was even some discussion  
12 just before the statute was enacted, that the Senate was  
13 concerned that well, you know, if we just leave this broad  
14 language here --

15 QUESTION: They didn't make a skilled laborer  
16 exception; they made a clergyman except.

17 MR. BUCKLEY: I'm sorry, I misspoke. They made a, I  
18 think they made a brain toil exception I think is what they  
19 said. We're not short of people who toil by their brains.

20 You know, it seems to me that the only reason why this  
21 case would have to be refiled, dismissed and refiled, when it  
22 would serve no purpose, is if it is interpreted as a  
23 jurisdictional requirement, and Congress has had no problem  
24 interpreting, has had no problem saying that, when a  
25 requirement is jurisdictional. I mean, for example, in the

1 Norris LaGuardia Act it says that no Court shall --

2 QUESTION: Counsel, we are telling District Courts all  
3 over the country to expedite their dockets. We are telling  
4 them the minute a case is filed to call the counsel in, to  
5 schedule it. Under your rule, the judge would first be  
6 required to determine whether or not notice had been -- can be  
7 given over a period of time. It would have to enter a stay  
8 order. It would then have to wait to see if the administrator  
9 or the state has commenced. And under your interpretation of  
10 commenced, it's not even clear when the administrator or the  
11 state has commenced. So you are compounding the work in the  
12 District Courts, and you must not forget that case load and  
13 expeditious management is really one of the keys to justice.

14 MR. BUCKLEY: Well, one of the purposes to be served by  
15 the notice requirement -- in the legislative history, one of  
16 the purposes to be served by the notice requirement was to  
17 ease the burden on the courts. I mean, that was one of the  
18 thoughts. I, last week I looked in the, a report of the  
19 Administrator of the District Courts to determine exactly what  
20 kind of burden citizen suits impose on the Courts. And in  
21 fiscal 1987, there were 239,000 cases filed, 270 of which were  
22 private environmental cases. These do not present a huge  
23 burden on the Court. If the Court looks through West's  
24 publication of USCA, the citizen suit cases are very, very  
25 slight. There is just not that many of them and the reason is

1 because it is a very expensive business to get in, for a  
2 private citizen to get into the business of trying to enforce  
3 federal law.

4 And, of course, the preferred procedure would be to  
5 have the government do it. But if the government knows about  
6 the action and does not act, then it seems to me that it  
7 serves the purpose to allow the citizens to proceed.

8 Now, I think that also one of the other -- one of the  
9 other points is that since this Court has interpreted similar  
10 prelitigation requirements, requirements for gaining access to  
11 federal court for private attorneys general, not to require  
12 dismissal and refiling, or to allow the Court to have  
13 discretion to fashion some kind of an order that is going to  
14 serve the purpose, the remedial purpose of the statute as a  
15 whole, as well as the particular purpose of the particular  
16 requirement, the notice requirement --

17 QUESTION: Counsel, there is comment through these  
18 papers that once a suit is filed the position of the parties  
19 hardens, and that this is one reason for the preliminary  
20 giving of notice before the commencement of an action. You  
21 haven't commented on that, today anyway. Do you have any  
22 comments?

23 MR. BUCKLEY: Yes, I do. I don't think that is true.  
24 I mean, I disagree with that conclusion. I believe that was  
25 one that was advanced by Judge Merritt initially in a

1 dissenting opinion in the Ada-Cascade case, and then  
2 eventually was a majority opinion. I just don't think that is  
3 true, in general. Positions don't become hardened when  
4 litigation is filed, not particular, not in this kind of a  
5 case. I know that my clients' position became hardened as  
6 soon as the Tillamook County began operating the landfill in  
7 violation, in flagrant violation with the requirements. The  
8 positions --

9 QUESTION: If this case had to be refiled, do you think  
10 the county would immediately resume the action that it had  
11 previously taken, or do you think the problem is now  
12 corrected?

13 MR. BUCKLEY: The problem is not now corrected. The  
14 county has gone a long way toward correcting the problem, but  
15 it is not now corrected.

16 QUESTION: And you think that if this suit had to be  
17 refiled that the county would go right back to its former  
18 practices?

19 MR. BUCKLEY: No, I don't think that the county would  
20 go back to its former practices, but I do think that the case  
21 would be refiled -- I don't think this is a situation of  
22 mootness. You know, I mean, one of the things that happened  
23 in this case was in its efforts, in their efforts to try to  
24 get an injunction against the county, the Hallstroms spent  
25 \$95,000 in attorney fees and expert witness fees.

1           And, it seems to me, that if the Court were to say that  
2 this case had to be dismissed and refiled, that the message  
3 that citizens and citizens groups would be hearing throughout  
4 the country is that this Court is going to interpret strictly  
5 provisions that are against the citizens. I mean, it is not,  
6 I guess -- I hate to say this, but it is just not fair to say  
7 to the citizens, sure, it is fine for you to spend \$95,000 and  
8 get an injunction, but we're still going to require you, as  
9 this Court said in the Newman-Green case, to jump through a  
10 judicial hoop that would really serve no purpose.

11           QUESTION: Mr. Buckley, that is not fair. I really  
12 don't think it is a judicial hoop, and I don't see why you say  
13 it is a matter of interpreting it strictly. I think that is  
14 fair language where you have an ambiguous word and you can  
15 interpret it one way or another. But this is not at all  
16 ambiguous. It says no action may be commenced.

17           MR. BUCKLEY: Well, whenever the Court looks and  
18 focuses on one specific sentence in an entire statute and says  
19 that that is not ambiguous, I think the Court disregards the  
20 whole context of the statute.

21           QUESTION: It happens to be the sentence that relates  
22 to the matter at issue here.

23           MR. BUCKLEY: But it also -- but the whole statute also  
24 does as well, Your Honor. I mean, the whole statute was  
25 enacted to protect the environment, to encourage citizen



1 enforcement, and also to trigger governmental action and to  
2 trigger action by the violator to come into complete  
3 compliance. I mean, that is the context that we find that  
4 sentence in. And the context is also when the Court takes a  
5 look at the legislative history. And the context is also  
6 including this Court's other decisions in other private  
7 attorney general cases as well.

8 And I think that it makes sense for similar  
9 prelitigation requirements in a similar context in analogous  
10 situations to be interpreted consistently. And in the Baldwin  
11 case, this Court said that if the District Court has led the  
12 plaintiff to believe that she had done everything required of  
13 her, that it would be inequitable to then say that she hadn't.  
14 And in this particular case, the District Court said that the  
15 requirement had been cured and that we had done everything  
16 required of us under the circumstances of this case.

17 And this case has gone far beyond just a motion to  
18 dismiss, as in many of the cases. This case went to trial.  
19 An injunction was entered, the environment was protected, the  
20 government was notified and the government decided not to do  
21 anything, either because of resources or because of some other  
22 reason, I don't know.

23 QUESTION: If you lose, do you think the case will be  
24 refiled?

25 MR. BUCKLEY: It will be refiled. There is one that

1 has been refiled already, because I gave another notice as  
2 well for the violation that is ongoing now. It's stayed  
3 pending the decision in this Court. Thank you.

4 QUESTION: Thank you, Mr. Buckley. Mr. Hunsaker.

5 ORAL ARGUMENT OF I. FRANKLIN HUNSAKER

6 ON BEHALF OF THE RESPONDENT

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

9 The issue before this Court is very straightforward,  
10 and that is what does the statute mean. The answer we urge  
11 the Court to adopt is that the statute means exactly what it  
12 plainly and clearly says, that Plaintiff's failure to comply  
13 with the statutory notice requirement before filing their  
14 lawsuit, constituted a defect that compelled dismissal of the  
15 lawsuit. And this morning I intend to focus --

16 QUESTION: -- say that.

17 MR. HUNSAKER: I think it does, Your Honor, and I would  
18 like to respond --

19 QUESTION: Well, it doesn't say that in those words.

20 MR. HUNSAKER: It doesn't say that in those words, but  
21 I think the overall statute, taking all of the sections  
22 together, and the statute as it is relevant to this case as  
23 set forth in the appendix to our Respondent's brief. I would  
24 like to touch upon the words of the statute, its plain,  
25 ordinary meaning; if you construe those words together, why it

1 compels a dismissal in this case, the congressional intent  
2 which this Court recognized in the 1987 Gwaltney of Smithfield  
3 versus Chesapeake Bay --

4 QUESTION: Well, do you think you have to look at  
5 something besides the words that no case may be commenced  
6 without a notice? Do you have to look beyond those words?

7 MR. HUNSAKER: I don't think you do, Justice White.

8 QUESTION: Because that just, everybody agrees that you  
9 are supposed to give a notice before there is a commencement.  
10 But the question is, if you fail to do that, what's the remedy.

11 MR. HUNSAKER: That is correct. But this morning is  
12 the first time I have heard Plaintiff's attorney concede --I  
13 believe he conceded that commence means begin or initiate. In  
14 the past, and I think their briefs are replete with the  
15 argument -- that and before the District Court and the Court  
16 of Appeals -- replete with the argument that commence means  
17 other than to initiate or begin.

18 QUESTION: Well, let's start with that. It does mean  
19 what it says.

20 MR. HUNSAKER: I'd also this morning like to touch upon  
21 a matter that several of the justices raised this morning, and  
22 that is why a decision by this Court affirming the Court of  
23 Appeals and construing the statute as written will bring about  
24 predictability and even-handed administration of this law,  
25 rather than the litigation generating result advanced by the

1 plaintiffs.

2 QUESTION: Well, it might, but it certainly results in  
3 some unfortunate, an unfortunate situation in this case,  
4 doesn't it?

5 MR. HUNSAKER: There is no question about that, Justice  
6 O'Connor, and I think this Court has said on a number of  
7 occasions that the Court's sympathy for a particular plaintiff  
8 is no reason to ignore the clear meaning of a statute.

9 QUESTION: And, of course, the Court has overlooked,  
10 apparently, clear meaning in the Title 7 context?

11 MR. HUNSAKER: It has, but Justice O'Connor, those  
12 cases do not contain anywhere near the kind of clear language,  
13 we submit, that is in this statute. It, I really believe  
14 that, as I said a few minutes ago, that the Plaintiffs are  
15 essentially urging, by their argument, that the word commence  
16 means maintain. And I submit that the concurring opinion of  
17 Justice Scalia in Gwaltney, and joined in by Justices Stevens  
18 and O'Connor, draws that distinction between commence and  
19 maintain, and it just, it's untenable to say that it means  
20 something other than what it says.

21 But as to the argument that somehow this statute does  
22 not speak, the notice provision is not jurisdictional. As  
23 Justice O'Connor pointed out, I believe in her question, the  
24 subsection (a) which speaks in terms of jurisdiction -- that  
25 provides that a citizen may bring this law suit, this kind of

1 lawsuit -- expressly begins with the words except as provided  
2 in subsection (b) or (c) of this section any person may  
3 commence. So you can't read subsections (a) and (b)  
4 separately. They have to be read together. And I think by  
5 saying that somehow, as the Plaintiffs have said, that  
6 subsection (b), the notice provision, is entirely separate, to  
7 use their words, from subsection (a) just doesn't follow.  
8 It's tied in. And that subsection (b) is titled, "Actions  
9 Prohibited." And that was in the original act as passed by  
10 Congress.

11 QUESTION: Well, now tell me why those words  
12 unequivocally say that if you fail to give notice that,  
13 something that is filed without the notice must be dismissed,  
14 rather than just stayed. Why isn't a stay with notice given  
15 then an adequate remedy for this failure? If there hadn't  
16 been the failure you certainly wouldn't stay a case, but the  
17 judge says I think it's a perfectly adequate remedy for this  
18 failure, for this unfortunate failure, to stay the case. Why  
19 isn't that an adequate remedy for it?

20 MR. HUNSAKER: Justice White, I think it is not an  
21 adequate remedy, again because of the clear words, the use of  
22 prohibited --

23 QUESTION: Well, tell me what clear words require  
24 dismissal?

25 MR. HUNSAKER: Prohibited. Prohibited. No action. You

1 cannot bring this action, it is prohibited. Or it cannot be  
2 commenced, begun, by filing the complaint. They had -- if you  
3 say it can be stayed, you said that the words prohibit and  
4 commenced are meaningless, or don't mean what they say,  
5 because you have said that you can go ahead and commence but  
6 we will stay, but you can't maintain it until you give the  
7 notice or the 60 days runs. So I think those two words show  
8 that the Congress did, in fact, intend for this to be a  
9 prohibition and require a dismissal.

10 But the more -- I think an equally important reason is  
11 the overall statutory scheme; it wasn't to allow citizens to  
12 come in and file these suits without first triggering the  
13 administrative action. And as this Court recognized in  
14 Gwaltney, the primary enforcement tool is supposed, should be  
15 the administrative agencies, either the EPA or the state. As  
16 the Court said in Gwaltney, the central purpose of these  
17 citizen provisions, and they were talking about now the Clean  
18 Air and Clean Water Acts which are identical to this act, the  
19 central purpose of these provisions is to permit citizens to  
20 abate pollution when the government cannot or will not command  
21 compliance.

22 And the Court in Gwaltney also said that the purpose of  
23 the citizen suit notice provision is to give the alleged  
24 violator an opportunity to bring itself into complete  
25 compliance and render unnecessary a citizen suit. But

1 significantly they said it is intended to encourage citizen  
2 participation, but only as a supplement or secondary to.

3 Justice White, if you say that you can simply stay  
4 these procedures, notwithstanding the fact that no notice has  
5 been given, then it seems to me you undermine the whole  
6 purpose of the statutory scheme which is clearly set forth  
7 that the primary purpose is to allow the agencies to enforce.  
8 And, in fact, it is significant, as one of the justices  
9 pointed out this morning, that one of the, the statute clearly  
10 provides that if the government, the administrator or state  
11 has commenced and is diligently prosecuting a civil or  
12 criminal action in a court of the United States, no citizen  
13 suit can be maintained. That is in subsection (b) too.

14 QUESTION: Do you think the, whoever was entitled to  
15 the notice, could waive this requirement?

16 MR. HUNSAKER: Well, I guess my first response would be  
17 that is clearly not the case here, but no, I don't think so.

18 QUESTION: Well, you have to say that if you claim the  
19 jurisdictional, I suppose.

20 MR. HUNSAKER: Right.

21 QUESTION: And a court would --could raise it on its  
22 own motion, would have to raise it on its own motion.

23 MR. HUNSAKER: Yes. If it is jurisdictional it could  
24 be raised at any time as the, as has been done where courts  
25 have raised it. The Court of Appeals in the one case relied

1 upon by Plaintiffs raised it for the first time on appeal.  
2 But, so I think the words, the statutory scheme, the  
3 congressional intent as evidenced in that statutory scheme was  
4 to bring about a meaningful opportunity for the agencies to  
5 have the opportunity to have the first bite at the apple, if  
6 you will, and eliminating the need for citizen law suits --

7 QUESTION: What do you gain by your present position?  
8 Counsel has said the case will be refiled if necessary. What  
9 do you gain except to effectuate a lot of waste, judicially,  
10 in this particular case?

11 MR. HUNSAKER: Perhaps little in this case, Justice  
12 Blackmun, but I think as a matter of public policy what is  
13 gained by this Court enforcing the, or construing the statute  
14 as written and saying that it must be -- a notice must be  
15 given and, if not, a case must be dismissed -- is that  
16 predictability in the future, even handed administration of  
17 the law --

18 QUESTION: Well, if it is dismissed I guess the county  
19 doesn't pay the attorneys fees and costs?

20 MR. HUNSAKER: Well, there were no attorney fees  
21 awarded, and that was one of the bases for the appeal taken by  
22 the Plaintiffs to the Ninth Circuit, was that no attorney fees  
23 were awarded. I think the record demonstrates that while this  
24 matter went to trial the relief sought by the Plaintiffs was  
25 not anywhere near what they had wanted. And while the Court



1 did enter an order requiring the county to bring about some  
2 corrections to the landfill, it refused to close down the  
3 landfill as the Plaintiffs had requested. And it ended up not  
4 awarding any fees, as it was within its discretion to do.

5 But I'd like to amplify, if I may, on this clear bright  
6 line that we asked this Court to draw in this case because of  
7 the predictability aspect. If this Court draws that bright.  
8 line and says that a citizen must give at least 60 days notice  
9 before commencing a lawsuit and if not then the lawsuit must  
10 be dismissed, I think you make the statute and its enforcement  
11 predictable, and you make it even-handed.

12 On the other hand, if you hold, as the Plaintiffs  
13 contend, that the suit may be stayed until the requisite  
14 notice is given, you make every citizen suit amenable to  
15 appeals and after the fact wrangling over whether or not the  
16 plaintiff, the citizen, complied with the statute and whether  
17 adequate notice was given, whether the administrative  
18 agencies, if you will, were given that meaningful opportunity.  
19 And I think that will surely guarantee endless litigation and  
20 wasteful litigation.

21 It is significant in this case, or telling, that the  
22 District Court premised his decision denying the motion for  
23 summary judgment which was raised, which was filed as soon as  
24 the Defendant, the county found out about the lack of notice,  
25 based its decision on the fact that it would be a waste of

1 judicial resources to dismiss. And we submit that what has  
2 happened has been a waste of judicial resources, and, in fact,  
3 if this Court were to rule in favor of the Plaintiffs as they  
4 contend that would amount to a waste of judicial resources in  
5 the future. It will impose a hardship on these Plaintiffs, no  
6 question, if this Court affirms the Court of Appeals.

7 But imagine what would have happened if in March or  
8 April of 1983 when we filed, when the county filed its motion,  
9 the District Court would have granted the motion for summary  
10 judgment and dismissed the lawsuit because of the undisputed  
11 failure by the Plaintiffs to file their notice. And  
12 Plaintiffs could then have given the 60 days notice and then  
13 refiled their lawsuit, as they indicated in their notice that  
14 they ultimately gave the EPA and DEQ a year after the lawsuit  
15 was filed, they could have refiled. We would have gone ahead,  
16 tried the case without any jurisdictional cloud hanging over  
17 the case, and we wouldn't be here before this Court today.  
18 And I think that demonstrates why a clear bright line will  
19 avoid waste of judicial resources.

20 QUESTION: But, presumably, with the same result that  
21 took place the first time. Presumably. How can you escape  
22 the waste of judicial resources and time and attorneys time  
23 and everything else?

24 MR. HUNSAKER: If I understand your question, Justice  
25 Blackmun, it would be avoided simply because you wouldn't have

1 these lawsuits going on, as this one did, with an appellate  
2 court ending up saying there was no jurisdiction in the first  
3 place.

4 QUESTION: Well, maybe the appellate court was wrong.  
5 After all, it was a divided decision, wasn't it?

6 MR. HUNSAKER: Two to one, two to one.

7 QUESTION: Yes, that is circular because if we rule for  
8 the Plaintiff then that won't happen. You have assumed the  
9 point. If we rule for the Plaintiff then it won't be an issue  
10 any more.

11 MR. HUNSAKER: In this case, Justice Kennedy, it  
12 wouldn't happen. But we submit what would, the dangerous  
13 precedent that we would be set would be clogging of the courts  
14 as you pointed out. We submit in conclusion that the Court of  
15 Appeals correctly ruled based on Judge Wisdom's sound  
16 reasoning in the Garcia case, first that the notice  
17 requirement is part of the jurisdictional conferral from  
18 Congress that cannot be altered by the courts, that anything  
19 other than a literal interpretation of the plain language of  
20 the notice requirement would effectively render the provision  
21 worthless; and that to rule as Plaintiffs contend would in  
22 effect constitute judicial amendment in abrogation of  
23 explicit, unconditional statutory language. On that basis we  
24 ask that this Court affirm the Court of Appeals.

25 QUESTION: Thank you, Mr. Hunsaker. Mr. Martin, we'll

1 hear now from you.

2 ORAL ARGUMENT OF BRIAN J. MARTIN  
3 ON BEHALF OF THE UNITED STATES  
4 AS AMICUS CURIAE

5 MR. MARTIN: Thank you, Mr. Chief Justice, and may it  
6 please the Court:

7 This is, we submit, a case of statutory construction.  
8 It is not a case that asks the Court to adopt the best rule or  
9 to interpret one of its own rules or a rule of federal common  
10 law. So to answer your question, Justice White, this isn't a  
11 case that poses a question is the stay more efficient than  
12 complete dismissal. We submit that dismissal is required by  
13 the statute. Congress said that a certain type of action is  
14 "prohibited," an action such as this brought to enforce the  
15 solid waste requirements of the RCRA, but brought without  
16 prior notice and a 60 day waiting period. Such action is  
17 prohibited.

18 We don't think there is any basis for this Court to  
19 adopt a stay which would be inconsistent with that ruling,  
20 because a stayed action was nevertheless commenced without  
21 prior notice. Petitioners have framed the question as to  
22 whether the prior notice requirement is mandatory or  
23 procedural, and we think that that mistakes, that is their  
24 primary mistake, because it is both. It is a rule of  
25 Congress, a statute of Congress which is partly procedural but

1 it is mandatory. We can see no exceptions in the express  
2 terms of the statute and we have heard no evidence from  
3 Petitioners which would evidence an implied exception.

4 They have mentioned in their brief a concept of  
5 equitable modification. I don't know what that means. If a  
6 statute is not unconstitutional and there are no exceptions  
7 expressed or implied, I don't know how this Court gets the  
8 authority or where it derives the authority to adopt a  
9 different rule.

10 QUESTION: Well, what about the Holy Trinity case, Mr.  
11 Martin?

12 MR. MARTIN: I'm not on the Holy Trinity team today, I  
13 don't think.

14 [Laughter]

15 MR. MARTIN: I'm on the plain meaning team today.

16 [Laughter]

17 QUESTION: That's like, the Holy Trinity team is kind  
18 of like the Hail Mary.

19 MR. MARTIN: Well, that's right. There are cases, last  
20 year in Public Citizens against the Department of Justice  
21 case, there can be a statute where the result just seems too  
22 odd, absurd, unbelievable, Congress --

23 QUESTION: That isn't what the, the majority said  
24 absurd. The majority raised Holy Trinity and it --

25 MR. MARTIN: Difficult to fathom, unlikely to believe,

1 difficult to fathom. Others would have required absurdity.  
2 But neither is present in this case. The statutory scheme is  
3 completely coherent if it is applied according to its terms.  
4 In fact we, there may be some inefficiency in particular  
5 cases. This is one. But that has never been a reason, as  
6 Justice O'Connor noted, to disregard the statute.

7           And I don't know that there is, the Court need to be  
8 too concerned about sympathy for the Plaintiff in this case  
9 because the Plaintiff lost on its state law judgments which  
10 were vacated along with the federal court judgments. So they  
11 have resurrected their state common law claims for trespassing  
12 and reverse condemnation and the like. That is largely beside  
13 the point, I just wanted to bring it up because it came up  
14 earlier.

15           So we do not think this is a case like Newman-Green  
16 where the question is, does the Court have some authority to  
17 adopt a procedural rule in the absence of congressional  
18 action. Congress has spoken to this question and we think  
19 that it is mandatory. We have seen no exceptions implied or  
20 expressed.

21           To answer Justice Rehnquist's first observation,  
22 however, I suppose this case does not present the question  
23 whether the requirement is jurisdictional in its strictest  
24 sense. Could it be waived if it is not raised by a Defendant,  
25 could it be noticed first by the Court on appeal or the

1 Supreme Court. It does not present that question because it  
2 was raised by the Defendant in the summary judgment motion.

3 And, also, it does not present the question could the  
4 EPA waive or be estopped from asserting some sort of  
5 requirement to notes because the EPA frankly was not notified.  
6 We think --

7 QUESTION: I take it you are, maybe you don't have to  
8 answer this, but I take it you are representing the views of  
9 the EPA?

10 MR. MARTIN: I am. And they take the prior notice  
11 requirement seriously, for two reasons. One, the government,  
12 the EPA in particular, is primarily designated to enforcing  
13 environmental laws. They welcome citizen suits; citizens are  
14 encouraged to become involved. But the EPA wants to know  
15 about these suits and they can have an effect in compromising  
16 or preventing some litigation, both ways. They can bring  
17 pressure to bear on a defendant or they could point out to a  
18 potential plaintiff you don't have a case. And then with Rule  
19 11 such a plaintiff might not come to courts.

20 So we think that really the incongruent result would be  
21 from Petitioners' reading of the statute, which would make the  
22 prior requirement somewhat trivial. Why would a plaintiff  
23 give prior notice. If it is not raised it would be waived,  
24 and even if it is raised, you could give notice at that time.  
25 So we think that Congress certainly thought there was an

1 important reason to have prior notice. The EPA believes that  
2 notice is important. So, we think that there is nothing to  
3 recommend an approach that would make that requirement, if not  
4 meaningless, less important and perhaps trivial.

5 QUESTION: Mr. Martin, may I go back to Justice White's  
6 concern earlier that the language is plain as to the duty not  
7 to commence the action, but that the statute is silent as to  
8 the remedy for violating that duty. Do you think in this case  
9 an action was commenced?

10 MR. MARTIN: Yes.

11 QUESTION: If it was commenced, then the question is  
12 what is the remedy for violating the statute. You don't take  
13 the position that the action was never commenced?

14 MR. MARTIN: No, I think an action is commenced when  
15 you file a complaint.

16 QUESTION: Well then if it has been commenced, how can  
17 you say there is a wad of jurisdiction?

18 MR. MARTIN: Actions are commenced and they remain on  
19 the court's docket until they are dismissed for some reason.  
20 A court could, on its own motion, decide there is no  
21 jurisdiction and dismiss it. But it is commenced, there is a  
22 docket number, you have to respond. You're at some risk, I  
23 would think, as the defendant perhaps until it is dismissed.  
24 The action was commenced, but it was a prohibited action when  
25 it was commenced. That is our point.



1 QUESTION: Well, doesn't that force you to confront the  
2 nature of the remedy that must be imposed and whether it is  
3 jurisdictional in the true sense or whether it is waivable, or  
4 whether the Court could enter a stay?

5 MR. MARTIN: Well, the facts of this case --

6 QUESTION: It seems to me that you can't avoid  
7 answering the Chief Justice's inquiry.

8 MR. MARTIN: Is it jurisdictional, could it be waived  
9 by a defendant? We think not, but we seriously do not think  
10 it is presented by this case because it was raised as a  
11 defense in the normal course of litigation, timely --

12 QUESTION: Yes, but the lower court took the position  
13 that it could remedy it by entering a stay and allowing --

14 MR. MARTIN: Well, we think that remedy is plainly  
15 inconsistent with the statute, whether it is a jurisdictional  
16 requirement that can never be waived or -- we're talking about  
17 an intent of Congress, so Congress can intend anything they  
18 want along these lines. We know that Congress did not want  
19 this action to proceed. Now, whether it would allow another  
20 action to proceed if a defendant didn't raise it until it was  
21 up on Court of Appeals or in this Court, that is not  
22 presented. In such a case, a party would have to give some  
23 evidence that Congress legislated against the background of  
24 waiver laws and estoppel laws, something like Zipes, where  
25 this Court held that requirement was like a statute of

1 limitations where Congress knows of the background of waiver  
2 and estoppel. That would be a different case.

3 But we know that this case was, is one that Congress  
4 thought was prohibited, that the objection was raised in a  
5 timely manner.

6 QUESTION: Mr. Martin, I'm worried about this commence  
7 point. Suppose a man files a case and he is not, he is not 21  
8 years old. Would that case be commenced?

9 MR. MARTIN: I believe it would be commenced.  
10 Commenced --

11 QUESTION: Well, what do you mean by commenced, that's  
12 what --

13 MR. MARTIN: I mean what Rule 3 of the Federal Rules of  
14 Civil Procedure mean, an action is commenced by filing a  
15 complaint. So, if it looks like a complaint, it is commenced.

16 If there are no further questions, we think the  
17 judgment should be affirmed.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Martin. The  
19 case is submitted.

20 (Whereupon, at 11:58 o'clock a.m., the case in the  
21 above-entitled matter was submitted.)

22  
23  
24  
25

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:

No. 88-42 - OFAF A. HALLSTROM, ET UX., Petitioners V. TILLAMOOK COUNTY

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

BY JUDY FREILICHER

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