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COURT OF APPEALS

STATE OF NEW YORK

KIMMEL,

Respondent,

-against-

No. 36

STATE OF NEW YORK,

Appellant.

20 Eagle Street
Albany, New York
March 21, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
FIRST DEPARTMENT JUSTICE ROLAND ACOSTA

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 36, Kimmel v. the
3 State of New York.

4 Counsel.

5 MR. BANAS: Good afternoon. May it please the
6 court, my name is Mitch Banas. I represent the appellants,
7 the State of New York and State Police. I would, with the
8 court's permission, request to reserve three minutes for
9 rebuttal.

10 CHIEF JUDGE DIFIORE: You may have three minutes,
11 sir.

12 MR. BANAS: Thank you. The issue on - - - on
13 this appeal is whether CPLR Article 86 applies to actions
14 seeking purely monetary damages. CPLR 8602(a) contains the
15 definition of civil action and defines the civil action to
16 which the statute applies is any action or proceeding
17 brought to seek judicial review of state action. Judicial
18 review, of course, is a term of art. It has a definite,
19 precise meaning that's been supplied by the case law for -
20 - - for hundreds of years, and it refers to oversight by
21 the courts of the executive and legislative branches. If
22 judicial review meant simply - - -

23 JUDGE ACOSTA: The respondents take - - - they
24 question the - - - the validity of your statement that
25 somehow judicial review is limited in the fashion that you

1 claim that it is. Particularly, they take - - - they make
2 much of your - - - your failure to refute the definition of
3 this court of the term judicial review in the Pan Am v.
4 Division of Human Rights case. Do you want to address
5 that?

6 MR. BANAS: I - - - I would love to address that,
7 Judge. The - - - the Pan Am case, first of all, it was not
8 an Article 86 case. So the - - - the court was not
9 addressing whether or not Article 86 applied in that case.
10 To the extent that the court in Pan American does use the
11 term judicial review, it's really in dicta. It's not
12 stating a - - - a broad proposition of law, and it
13 certainly was not departing from hundreds of years of - - -
14 of precedent. And - - -

15 JUDGE ACOSTA: But it was a civils rights action
16 much like this one, right?

17 MR. BANAS: Yes.

18 JUDGE ACOSTA: State Division of Human Rights
19 case.

20 MR. BANAS: Well, it - - - it was, Judge. But
21 then in later cases, the Marine Midland case and the New
22 York City Department of Environmental Protection cases,
23 this court, I - - - I wouldn't say retreated, but - - - but
24 used a different language in referring to the type of - - -
25 of actions to which those statutes applied and backed off

1 from the use of the - - - the term judicial review in favor
2 of using phrases like judicial actions or judicial forums.
3 And actually, the - - - the court in both the Marine
4 Midland case and in the New York City Department of
5 Environmental Protection case cited this court's decision
6 in Pan American for the textbook definition of judicial
7 review. So I submit, Judge, that this court's use of - - -
8 of the term judicial review in the Pan American case is in
9 no respect dispositive of the issue - - -

10 JUDGE ACOSTA: Well, why do you think - - - why
11 do you think that it is a term of art? I mean I know you -
12 - - you go back to Marbury v. Madison, but even in that
13 context, it is used not in terms of reviewing
14 administrative determinations, but in our branch of
15 government reviewing what the legislature and the executive
16 branch does or do.

17 MR. BANAS: It - - - the - - - the words judicial
18 and review when commonly used in conjunction to mean
19 administrative - - - I'm sorry, reviewed by the courts of
20 administrative determination rules and decisions. When - -
21 -

22 JUDGE ACOSTA: But you concede that that's not
23 what Marbury v. Madison talked about. It wasn't review - -
24 - it wasn't judicial review of an administrative
25 determination. It was judicial review of conduct or

1 actions by two different branches of government.

2 MR. BANAS: Well, exactly, Judge. Yes. I
3 actually agree with that. But - - - but the point is - - -
4 is more that it's the judiciary reviewing the actions of
5 either the legislative or the executive/administrative
6 branches. That's where the concept of judicial review
7 requires - - - acquires, rather, its specialized meaning as
8 a term of art.

9 JUDGE WILSON: Supposing the plaintiff had
10 brought a Human Rights Law action as a class action seeking
11 injunctive relief, maybe the appointment of monitors for
12 institutional reform action, what's your position there as
13 to whether then they'd be allowed to proceed or not
14 proceed? That is, could they recover fees in that
15 circumstance?

16 MR. BANAS: I don't - - - I don't think so,
17 Judge. The - - - the reason being that in the action you
18 described, the - - - the object of the statute, as I
19 understood your - - - I'm sorry, the object of the actions,
20 as I understood your question, was monetary relief.

21 JUDGE WILSON: No, no. The injunctive purely.

22 MR. BANAS: Okay. Purely injunctive relief? I -
23 - - I believe that, Judge, yes. In the - - -

24 JUDGE WILSON: And to stop discriminating, to
25 appoint a monitor to review decisions about promotions,

1 about work assignments, that sort of thing. Purely
2 injunctive.

3 MR. BANAS: I - - - I think so, Judge, in that -
4 - - in that sit - - -

5 JUDGE WILSON: When you say you think so, you
6 think what?

7 MR. BANAS: I'm sorry. The - - - that Article 86
8 would apply in such a situation.

9 JUDGE WILSON: That you - - - that you could
10 recover fees under the EAJA?

11 MR. BANAS: Correct.

12 JUDGE WILSON: Okay. And that fits within your
13 definition of judicial review?

14 MR. BANAS: Yes. It - - - it does, Judge,
15 because it - - - it - - -

16 JUDGE WILSON: Now if we add to that a money
17 damage claim, as well. So we have the same request for
18 injunctive relief, but we added a money damage claim. Does
19 that change things?

20 MR. BANAS: And the - - - and the litigant
21 prevails on - - - on both claims?

22 JUDGE WILSON: Let's say yes for the moment.

23 MR. BANAS: Okay. I would think for the - - -
24 for those fees that would be attributable to the injunctive
25 relief. Yes.

1 JUDGE WILSON: And if the litigant prevailed only
2 on the injunctive claims, then all the fees, I take it is -
3 - - is how you'd answer that?

4 MR. BANAS: I think so, Judge. I mean there - -
5 - there - - - I know there's a body of - - - of case law
6 that sort of requires a court in reviewing the
7 reasonableness of fees to kind of parse out, you know, to
8 what extent did the - - - did the litigant prevail on - - -
9 one issue versus another. What were the fees?

10 JUDGE WILSON: Right. But at least in terms of
11 entitlement to some fees under the EAJA, there'd be - - -
12 there'd be some?

13 MR. BANAS: I think so, Judge. Yes. Because
14 again, you're - - - you're talking about the - - - the
15 judiciary overseeing the other coordinate branches of
16 government.

17 JUDGE WILSON: Via injunctive relief?

18 MR. BANAS: Correct. Yes.

19 JUDGE ABDUS-SALAAM: And that can never happen in
20 an action under your view of this statute?

21 MR. BANAS: In an - - - in an action for monetary
22 damages?

23 JUDGE ABDUS-SALAAM: In an action where there
24 might be both monetary damages and other relief.

25 MR. BANAS: And - - - and what would not - - -

1 I'm sorry. I'm not - - - I'm not following the question.

2 JUDGE ABDUS-SALAAM: In nonmonetary relief. If
3 there is an action for injunctive relief, that's still an
4 action, right?

5 MR. BANAS: Yes. It - - - it is. Yes. Yes.
6 But - - - but it's an action if you're looking - - - if the
7 plaintiff is looking for injunctive relief, then it's
8 seeking judicial review. And then that's what
9 distinguishes that situation from the situation in - - -

10 JUDGE ABDUS-SALAAM: Well, my understanding is
11 the plaintiff here did bring claims for injunctive relief,
12 but she was frustrated in those claims by the State's
13 actions.

14 MR. BANAS: Well, I - - - I disagree with - - -
15 with that characterization. The fact of the matter is that
16 the - - - this plaintiff did not pursue those claims for
17 injunctive relief. And I don't think you can invoke the
18 benefits of Article 86 of the CPLR merely by including a
19 claim for injunctive relief, which - - - which you don't
20 either ultimately pursue or prevail on. Here, the
21 plaintiff prevailed only on the claim for monetary damages.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. BANAS: Thank you.

24 CHIEF JUDGE DIFIORE: Mr. Buzard.

25 MR. BUZARD: Good afternoon.

1 CHIEF JUDGE DIFIORE: Good afternoon.

2 MR. BUZARD: May it please the court, my name is
3 Vince Buzard, and I'm here representing the plaintiff,
4 Betty Kimmel, the state trooper, and her two former
5 employees. She did bring an action for both, and the
6 reason she didn't pursue or insist upon an injunction was
7 it was twelve years later after she was out of there. She
8 was gone. She wanted an injunction. She wanted to be
9 reinstated. It was moot by the time she got there. It was
10 an action for both.

11 JUDGE GARCIA: Counsel, to - - - counsel, I'm
12 sorry. To change topics a little bit, one of, I think,
13 your arguments is the Court of Claims carve out - - -

14 MR. BUZARD: Yes.

15 JUDGE GARCIA: - - - within the statute.

16 MR. BUZARD: Yes.

17 JUDGE GARCIA: And if we read it the way your
18 opponent reads it, it's unnecessary.

19 MR. BUZARD: Yes.

20 JUDGE GARCIA: But it seems to me the Court of
21 Claims already has a provision that provides that you can't
22 be awarded attorneys' fees in that court. So why would you
23 need the carve-out anyway, even under your theory?

24 MR. BUZARD: Well, I have turned the table. If -
25 - - it also makes no sense to say that the - - - that the

1 legislature intended to limit the matters to be reviewed to
2 judic - - - to declaratory judgment actions in Article 78
3 proceedings when they can't be brought there in the first
4 place. They can't be brought there. An administrative and
5 an action - - -

6 JUDGE GARCIA: Right. But I think the point
7 would be it doesn't matter either way because you wouldn't
8 get attorneys' fees in the Court of Claims anyway. So if
9 they didn't carve it out, it would be the same effect. So
10 it seems to me there's no basis for a Court of Claims carve
11 out, either one that supports your opponent's view or one
12 that supports your view.

13 MR. BUZARD: Well, I stick with my description
14 because I - - - I can't tell you whether or not there are
15 some situations where legal fees can be collected per the -
16 - -

17 JUDGE STEIN: Well, let me ask why - - - but why
18 would - - - why would the statute but such that if you
19 brought a claim for money damages in the Court of Claims
20 you could not get attorneys' fees, but if you brought that
21 same action in supreme court you could? What - - - what
22 would be the rationale behind that?

23 MR. BUZARD: Well, as it applies to actions under
24 the Human Rights Law, you have a right to bring it under
25 either.

1 JUDGE STEIN: But then why would anybody ever
2 bring it in the Court of Claims?

3 MR. BUZARD: Well, you may not want to bring an
4 action for human rights in the Court of Claims, but there
5 are other kinds of actions, of course. The - - - the Court
6 of Claims applies primarily to torts and other kinds of
7 cases where there are contingent fees, primarily torts. In
8 the human rights cases, the contingent fee is not adequate.
9 It - - - we've demonstrated that - - - demonstrated that
10 here. So - - -

11 JUDGE GARCIA: Well, why would - - -

12 MR. BUZARD: - - - in the Court of Claims - - -

13 JUDGE GARCIA: I'm sorry. I'm sorry. Counsel,
14 why would it not be adequate? There's never been an award
15 of attorneys' fees in these cases before this that anyone
16 can find. So that would mean no one's bringing human
17 rights contingency cases?

18 MR. BUZARD: Well, my understanding is very few.
19 She - - - the record indicates - - - Mr. Banas contests it,
20 but the record indicates that she tried - - - at Appendix
21 597, she interviewed seven lawyers. And this case is a
22 good example and - - - and they refused to take it. Here's
23 a good example of why. The jury verdict was 720,000
24 dollars. The claimed legal fees were well in excess of a
25 million dollars. The agreed reasonable fees by the State

1 are over 800,000. Private lawyers are not going to take
2 cases where the State has the power to end up paying
3 twenty-five cents on the dollar.

4 JUDGE GARCIA: We agree - - - we can agree that
5 these are particularly egregious facts and dilatory tactics
6 and all the things you outlined in your brief. It seems to
7 me one of the main purposes of the statute, though, is to
8 give an incentive to people to bring these lawsuits. This
9 was a fifteen-million-dollar contingency claim. So twelve
10 years later, you're talking about what the fees are. But
11 in terms of access to justice, getting someone to file a
12 fifteen-million-dollar contingency human rights lawsuit?

13 MR. BUZARD: Well, if you're saying fifteen
14 million because that's what they put in the complaint, she
15 - - - I mean that's neither here nor there. The fact is
16 she tried five or six lawyers. She got 700,000 dollars,
17 and the legal fees, as reduced, were in excess of that. So
18 it - - - it is a blocking of access.

19 And if - - - if I may say, this court in December
20 in Diegelman reinforced and - - - and reiterated the rule
21 that remedial actions are - - - statutes which are remedial
22 are intended to be read broadly not restrictively. This is
23 a remedial action. The FEJA (sic) has been held to be
24 remedial rather than, therefore, becoming we have to read
25 the words, but in case of doubt it ought to be resolved in

1 favor of the plaintiff or of Mrs. Kimmel and - - - and
2 others similarly situated. Here, the - - - the State is
3 trying to take the words judicial review, which do not have
4 an established meaning, which I'd like to talk about in a
5 second, and put in words that aren't there to make it - - -
6 the - - - make the words any civil action mean declaratory
7 judgment actions.

8 JUDGE GARCIA: But why has no court - - -

9 MR. BUZARD: And that's a very narrow - - -

10 JUDGE GARCIA: Why has no court, and apparently
11 no plaintiff, asked for these type of fees in the past if
12 the statute is that clear? And while you're thinking about
13 the answer to that, there's a provision for reports in this
14 statute, I think it's 8604. I looked at all the reports
15 that are available. They're all declaratory judgment type
16 actions. All Article 78s. So nowhere in the history of
17 this statute, as applied as the Appellate Division
18 dissenters pointed out or in the reporting from the statute
19 itself, has there ever been a case where attorneys' fees
20 were awarded.

21 MR. BUZARD: They may not have been able to find
22 a lawyer to bring - - - to bring the case in the first
23 place. Go to the administrative - - - through the
24 administrative route - - -

25 JUDGE GARCIA: So this is the only human rights

1 case in the - - -

2 MR. BUZARD: - - - where you get less - - -

3 JUDGE GARCIA: So this is the only human rights
4 case on the books?

5 MR. BUZARD: What's that?

6 JUDGE GARCIA: This is the only human rights case
7 like this on the books is your point? Because the other
8 ones, they didn't find lawyers to file?

9 MR. BUZARD: Well, that was your point, but I - -
10 - but I'm saying one explanation. And I'm not sure you can
11 take what's happened after to infer legislative intent.

12 Maybe nobody was smart enough to do this or because the - -
13 - the stakes were so high for this person. The other - - -

14 JUDGE ACOSTA: Mr. Buzard, have you - - - are you
15 familiar with any action, using the private right of action
16 under the state Human Rights Law, where you've had an award
17 of twelve million dollars?

18 MR. BUZARD: No.

19 JUDGE ACOSTA: I - - - okay.

20 MR. BUZARD: No. But I haven't - - - I must say
21 I haven't searched.

22 JUDGE ACOSTA: Okay.

23 MR. BUZARD: But - - -

24 JUDGE WILSON: If we think that the legislative
25 history is not clear - - -

1 MR. BUZARD: Yes.

2 JUDGE WILSON: - - - what is your response to the
3 State's argument that when you look at the legislative
4 history, particularly the prior attempts, it really looks
5 as if this is meant to reach regulatory action to give
6 people incentive to challenge that.

7 MR. BUZARD: Well, that's a very good question
8 because there's nothing in - - - the State makes a big
9 thing about the legislative record, but there's nothing in
10 the legislative record that says that it's limited to
11 administrative actions. This whole - - - whole judicial
12 review construct that they've come up with, it's not in the
13 legislative history. The early legislative history, the
14 earlier bills were for - - - clearly administrative. They
15 were in the Administrative Procedures Act, they said they
16 applied to agencies, all that's left out. There's nothing
17 in here limiting this to - - - this statute as written and
18 adopted.

19 JUDGE ACOSTA: Is there - - -

20 MR. BUZARD: To - - - to administrative - - -

21 JUDGE ACOSTA: Is there any part of the
22 legislative history? I mean I looked at the - - -

23 MR. BUZARD: Yes.

24 JUDGE ACOSTA: - - - for example, the letters
25 from the sponsors of the bill, the support memorandum, and

1 they all seem to refer to a civil action brought against
2 the State without a limitation or judicial review that - -
3 -

4 MR. BUZARD: Absolutely - - - I'm sorry.

5 JUDGE ACOSTA: - - - the appellants seem to bring
6 in.

7 MR. BUZARD: Absolutely right, Your Honor. And I
8 would direct you particularly to the legislative sponsor's
9 memorandum in the - - - in the assembly, which repeat - - -
10 repeatedly refers to any civil action without - - - without
11 limitations.

12 JUDGE ACOSTA: Is the September 21, '89, letter
13 to the governor from the sponsor of the bill?

14 MR. BUZARD: No. This is in - - - at Appendix
15 551, the memorandum of support from the legislature. May I
16 use my final minute here - - -

17 CHIEF JUDGE DIFIIORE: Certainly.

18 MR. BUZARD: - - - to talk about this business of
19 what judicial review means. The federal statute when it
20 said - - - it referred to judicial review it didn't say
21 that it was implied. The State's saying that you - - -
22 that it's implied, it's implicit, that means implied
23 without expressing the words, that - - - that when the feds
24 wrote their statute, they said including judicial review of
25 administrative agencies. All the state cases which all - -

1 - which all - - - which the State cited for the proposition
2 that in other states judicial review is limited to
3 administrative actions, it said administrative actions.

4 JUDGE STEIN: Can't - - - can't that be
5 interpreted two ways, though? Can't it be interpreted that
6 the State didn't say that? It could have said exactly what
7 the federal statute said but didn't. So maybe they
8 intentionally left out - - -

9 MR. BUZARD: Yes. Well, that supports our
10 position. They - - - the State intent - - - that's exactly
11 our position, the State intentionally left out the words
12 administrative review - - -

13 JUDGE STEIN: Well, no.

14 MR. BUZARD: - - - thereby limiting it.

15 JUDGE STEIN: They left out - - - left out
16 including administrative review, thereby indicating that
17 they were not including - - -

18 MR. BUZARD: No. The feds did - - -

19 JUDGE STEIN: I'm sorry. I'm sorry.

20 MR. BUZARD: The federals did include.

21 JUDGE STEIN: Yes.

22 MR. BUZARD: But that also doesn't explain - - -

23 JUDGE STEIN: To - - - I'm sorry. To make it
24 clear that it - - - that it was not just administrative
25 review. I misspoke.

1 MR. BUZARD: Well, that doesn't explain - - - I
2 don't agree with that and - - -

3 JUDGE STEIN: No. I know. But I'm just saying -
4 - -

5 MR. BUZARD: But - - -

6 JUDGE STEIN: - - - that that could be another
7 interpretation - - -

8 MR. BUZARD: I think the fact they left it out is
9 - - - is very instructive as is the situation with the
10 other state actions. All the other state statutes which
11 are limited to administrative review so state, and they're
12 trying to insert words into it. And there's no better case
13 to fulfill the purpose of this statute than this case to
14 open up the - - - the courthouse to people like Ms. Kimmel.
15 Thank you very much.

16 CHIEF JUDGE DIFIORE: Thank you, Mr. Buzard.

17 Mr. Banas.

18 MR. BANAS: Thank you very - - -

19 JUDGE STEIN: Mr. Banas, would you address that
20 federal state - - -

21 MR. BANAS: Sure. And I was going to - - -

22 JUDGE STEIN: - - - statute issue?

23 MR. BANAS: - - - so thank you. Yes. There - -
24 - this court in the - - - in New York State Clinical
25 Laboratories case noted that while there are some

1 similarities between the federal EAJA and the state state's
2 that we're looking at here, there are some - - - some
3 critical differences. One of those differences is in the
4 way in which the respective statutes address the - - - the
5 judicial review issue. Under the federal statute, there's
6 a presumption that all actions are included, except tort
7 cases, which is kind of where we get, I think, our Court of
8 Claims exception, including actions for judicial review.
9 So under the - - - the federal scheme, actions seeking
10 judicial review are a subset of the actions to which the
11 statute applies. Whereas under the State's scheme - - -

12 JUDGE RIVERA: Isn't that in response to case
13 law?

14 MR. BANAS: Pardon?

15 JUDGE RIVERA: Wasn't that in response to case
16 law?

17 MR. BANAS: What do you mean?

18 JUDGE RIVERA: Wasn't that in response to a
19 particular interpretation that the legislation was
20 addressing?

21 MR. BANAS: You mean the - - - the state
22 legislation?

23 JUDGE RIVERA: No. The fed - - - federal.

24 MR. BANAS: Oh. I'm - - - I - - -

25 JUDGE RIVERA: Okay. Go ahead.

1 MR. BANAS: I'm - - - I'm not - - - I apologize,
2 Your Honor. But - - - but in any case, under the - - -
3 under the State's scheme, the action seeking judicial
4 review are the entire universe of actions to which the
5 statute applies.

6 JUDGE ACOSTA: You - - - you don't dispute that
7 this is a remedial statute, as the - - - as the
8 respondents' contend, right? So it should be interpreted
9 broad to carry out the purposes of it.

10 MR. BANAS: Well, I think there you've - - -
11 you've got two competing canons of statutory construction
12 in play. One is yes, to a certain extent it is remedial.
13 But also, it's in derogation of the common law. So you got
14 the - - - the canon of statutory construction, which
15 requires the statute in derogation of the common law to be
16 - - -

17 JUDGE ACOSTA: Well, once it is determined to be
18 remedial, we have to interpret it broadly. Isn't that what
19 this court's precedent is?

20 MR. BANAS: I don't - - - I don't think so,
21 Judge. And - - - and here's why. If - - - if the statute
22 had a broad remedial purpose, if the intent was to level
23 the playing field for litigants against the state
24 generally, then you wouldn't have the Court of Claims
25 exception. I mean the Court of Claims is where the vast

1 majority of actions seeking money damages against the state
2 are brought. And - - -

3 JUDGE ABDUS-SALAAM: Those are tort actions,
4 aren't they, generally, counsel? Not Human Rights Law
5 violation actions.

6 MR. BANAS: Then we get back to the - - - the
7 concurrent jurisdiction issue, and - - - and is there any
8 indication in the legislative history that the legislature
9 intended to make the - - - the state the only entity
10 subject to a fee award in Human Rights Law cases. And
11 there's - - - there's no suggestion of that.

12 JUDGE ACOSTA: But most cases are brought
13 administratively within the Agency. In fact, if you - - -
14 if you look at the number of cases that are brought in
15 court pursuant to this private right of action under the
16 executive law, that's minimal in comparing - - - in
17 comparing it to the administrative proceedings that are
18 brought, right?

19 MR. BANAS: That - - - that's probably true, Your
20 Honor.

21 JUDGE ACOSTA: So - - - so it's not rare. I mean
22 it's not remarkable that we don't have cases using the - -
23 - the equal acts as to justice act when most Human Rights
24 Law cases are brought administratively.

25 MR. BANAS: Well, I don't - - - I don't know if -

1 - - if it's not - - - if it's not rare. The - - - the fact
2 of the matter is, in setting the proportions aside, there
3 are - - - are many discrimination suits that are brought
4 under the Human Rights Law.

5 JUDGE RIVERA: Not many succeed if you're really
6 going to count the numbers.

7 JUDGE ACOSTA: Yeah.

8 MR. BANAS: No.

9 JUDGE RIVERA: If you're really going to count
10 the numbers - - -

11 MR. BANAS: But - - - but they are brought.

12 JUDGE RIVERA: - - - the opportunity for this
13 kind of a case, this particular kind of a case considering
14 the time frame, is almost zero.

15 MR. BANAS: But - - - and the last thing I'd like
16 to point out on that, though, is that the - - - the Human
17 Rights Law under which this action was brought does use the
18 term judicial review and - - - and it defines judicial
19 review - - - or prescribes the means by which to bring
20 judicial review of an adverse decision by the - - - by the
21 human rights department. And what it talks about there is
22 exactly the type of action to which I submit the statute is
23 intended to apply, which is an Article 78 proceeding
24 brought to set aside the determination as arbitrary and
25 capricious.

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CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. BANAS: Thank you.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Kimmel v. State of New York, No. 36 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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