Dear Students,

Welcome to UW Law School and Civil Procedure I!

Our first class is scheduled for Wednesday, September 4, at 2:40 p.m. in Room 2211.

Your assignment for that class is to read the following:

- Pages 1-17 of our casebook—Geoffrey Hazard et al., *Pleading and Procedure* (11th edition 2015).
- *Armstrong v. Manzo*, which is attached here and will also be emailed to you.

Our second class is on Monday, September 9. Your assignment for that class is:

- From our casebook, pages 26-28 (¶ 7 only), and 31-45.
- *Ruckelshaus v. Sierra Club*, attached here and by email.
- Federal Rules of Civil Procedure 1, 2, 81, 83. You can find these rules online. You also may want to get a hard copy of the rules (2019 edition). There are fairly inexpensive paperback versions available, and companies like Westlaw and Lexis sometimes give away free copies to new students.

If you have any questions between now and September 4, please don't hesitate to reach out. I look forward to meeting you soon!

All the best,

Professor Rob Yablon (robert.yablon@wisc.edu)

Supreme Court of the United States

R. Wright ARMSTRONG, Jr., Petitioner,

v.

Salvatore E. MANZO et ux.

No. 149.

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Argued March 9, 1965.

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Decided April 27, 1965.

Mr. Justice STEWART delivered the opinion of the Court.

The petitioner, R. Wright Armstrong, Jr., and his wife were divorced by a Texas court in 1959. Custody of their only child, Molly Page Armstrong, was awarded to Mrs. Armstrong, and the petitioner was granted 'the privilege of visiting with said child at reasonable times, places, and intervals.' The divorce decree ordered the petitioner to pay $50 a month for his daughter's support. In 1960 Mrs. Armstrong married the respondent, Salvatore E. Manzo. Two years later the Manzos filed a petition for adoption in the District Court of El Paso County, Texas, seeking to make Salvatore Manzo the legal father of Molly Page Armstrong.

Texas law provides that an adoption such as this one shall not be permitted without the written consent of the child's natural father, except in certain specifie circumstances. One such exceptional circumstance is if the father 'shall have not contributed substantially to the support of such child during (a) period of two (2) years commensurate with his financial ability.' In that event, the written consent of the judge of the juvenile court of the county of the child's residence may be accepted by the adoption court in lieu of the father's consent.

Preliminary to filing the adoption petition, Mrs. Manzo filed an affidavit in the juvenile court, alleging in conclusory terms that the petitioner had 'failed to contribute to the support of' Molly Page Armstrong 'for a period in excess of two years preceding this date.' No notice was given to the petitioner of the filing of this affidavit, although the Manzos well knew his precise whereabouts in Fort Worth, Texas. On the basis of the affidavit, and without, so far as the record shows, a hearing of any kind, the juvenile court judge promptly issued his consent to the adoption. In the adoption petition, filed later the same day, the Manzos alleged that 'consent of the natural father, R. W. Armstrong, Jr., to the adoption herein sought is not necessary upon grounds that the said father has not contributed to the support of said minor child commensurate with his ability to do so for a period in excess of two (2) years, and the Judge of a Juvenile Court of El Paso County, Texas * * * has consented in writing to said adoption.' No notice of any kind was given to the petitioner of the filing or pendency of this adoption petition.

An investigator appointed by the court made a detailed written report recommending the adoption, and a few weeks later the adoption decree was entered. The decree provided in accord with Texas law that 'all legal relationship and all rights and duties between such Child and the natural father shall cease and determine, and such Child is hereafter deemed and held to be for every purpose the child of its parent by adoption, as fully as though naturally born to him in lawful wedlock,' and further provided that 'the said Molly Page Armstrong shall be known by the Christian and Surname as Molly Page Manzo, from this day forward.'

During this entire period the petitioner was not given, and did not have, the slightest inkling of the pendency of these adoption proceedings. On the day the decree was entered, however, Salvatore Manzo wrote to the petitioner's father, advising him that 'I have this date completed court action to adopt Molly Page as my daughter and to change her name to Molly Page Manzo.' The petitioner's father immediately relayed this news to the petitioner, who promptly filed a motion in the District Court of El Paso County, asking that the adoption decree be 'set aside and annulled and a new trial granted,' upon the ground that he had been given no notice of the adoption proceedings.

The court did not vacate the adoption decree, but set a date for hearing on the motion. At that hearing the petitioner introduced evidence, through witnesses and by depositions, in an effort to show that he had not failed to contribute to his daughter's support 'commensurate with his financial ability.' At the conclusion of the hearing the court entered an order denying the petitioner's motion and providing that the 'adoption decree entered herein is in all things confirmed.'

The petitioner appealed to the appropriate Texas court of civil appeals, upon the ground, among others, that the trial court had erred in not setting aside the adoption decree, because the entry of the decree without notice to the petitioner had deprived him 'of his child without due process of law.' The appellate court affirmed the trial court's judgment, and the Supreme Court of Texas refused an application for writ of error.

We granted certiorari. The questions before us are whether failure to notify the petitioner of the pendency of the adoption proceedings deprived him of due process of law so as to render the adoption decree constitutionally invalid, and, if so, whether the subsequent hearing on the petitioner's motion to set aside the decree served to cure its constitutional invalidity.

In disposing of the first issue, there is no occasion to linger long. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Questions frequently arise as to the adequacy of a particular form of notice in a particular case. But as to the basic

requirement of notice itself there can be no doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies.

The Texas Court of Civil Appeals implicitly recognized this constitutional rule, but held, in accord with its understanding of the Texas precedents, that whatever constitutional infirmity resulted from the failure to give the petitioner notice had been cured by the hearing subsequently afforded to him upon his motion to set aside the decree. We cannot agree.

Had the petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. It would have been incumbent upon them to show not only that Salvatore Manzo met all the requisits of an adoptive parent under Texas law, but also to prove why the petitioner's consent to the adoption was not required. Had neither side offered any evidence, those who initiated the adoption proceedings could not have prevailed.

Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burdens thus placed upon the petitioner were real, not purely theoretical. For 'it is plain that where the burden of proof lies may be decisive of the outcome.' Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.

A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted.

For the reasons stated, the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Reversed and remanded.

Supreme Court of the United States

William D. RUCKELSHAUS, Administrator, Environmental Protection Agency, Petitioner,

v.

SIERRA CLUB et al.

No. 82–242.

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Argued April 25, 1983.

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Decided July 1, 1983.

Justice REHNQUIST delivered the opinion of the Court.

In 1979, following a year of study and public comment, the Environmental Protection Agency (EPA) promulgated standards limiting the emission of sulfur dioxide by coal-burning power plants. Both respondents in this case—the Environmental Defense Fund (EDF) and the Sierra Club—filed petitions for review of the agency's action in the United States Court of Appeals for the District of Columbia. EDF argued that the standards promulgated by the EPA were tainted by the agency's *ex parte* contacts with representatives of private industry, while the Sierra Club contended that EPA lacked authority under the Clean Air Act to issue the type of standards that it did. In a lengthy opinion, the Court of Appeals rejected all the claims of both EDF and the Sierra Club.

Notwithstanding their lack of success on the merits, EDF and the Sierra Club filed a request for attorney's fees incurred in the *Sierra Club* action. They relied on § 307(f) of the Clean Air Act, which permits the award of attorney's fees in certain proceedings "whenever [the court] determines that such an award is appropriate." Respondents argued that, despite their failure to obtain any of the relief they requested, it was "appropriate" for them to receive fees for their contributions to the goals of the Clean Air Act. The Court of Appeals agreed with respondents, ultimately awarding some $45,000 to Sierra Club and some $46,000 to EDF. We granted certiorari to consider the important question decided by the Court of Appeals.

I

The question presented by this case is whether it is "appropriate," within the meaning of § 307(f) of the Clean Air Act, to award attorney's fees to a party that achieved no success on the merits of its claims. We conclude that the language of the section, read in the light of the historic principles of fee-shifting in this and other countries, requires the conclusion that some success on the merits be obtained before a party becomes eligible for a fee award under § 307(f).

A

Section 307(f) provides only that:

> "In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) *whenever it determines that such an award is appropriate.*" 42 U.S.C. § 7607(f) (emphasis added).

It is difficult to draw any meaningful guidance from § 307(f)'s use of the word "appropriate," which means only "specially suitable: fit, proper." Webster's Third International Dictionary. Obviously, in order to decide when fees should be awarded under § 307(f), a court first must decide *what* the award should be "specially suitable," "fit," or "proper" *for.* Section 307(f) alone does not begin to answer this question, and application of the provision thus requires reference to other sources, including fee-shifting rules developed in different contexts. As demonstrated below, inquiry into these sources shows that requiring a defendant, completely successful on all issues, to pay the unsuccessful plaintiff's legal fees would be a radical departure from long-standing fee-shifting principles adhered to in a wide range of contexts.

B

Our basic point of reference is the "American Rule," under which even "the *prevailing* litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the *loser*." It is clear that generations of American judges, lawyers, and legislators, with this rule as the point of departure, would regard it as quite "inappropriate" to award the "loser" an attorney's fee from the "prevailing litigant." Similarly, when Congress has chosen to depart from the American rule by statute, virtually every one of the more than 150 existing federal fee-shifting provisions predicates fee awards on *some* success by the claimant; while these statutes contain varying standards as to the precise degree of success necessary for an award of fees—such as whether the fee claimant was the "prevailing party," the "substantially prevailing" party, or "successful"—the consistent rule is that complete failure will not justify shifting fees from the losing party to the winning party. Also instructive is Congress' reaction to a draft of the Equal Access to Justice Act, which permitted shifting fees from losing parties to the Government, if "in the interest of justice." This provision, criticized by the Justice Department as a "radical" departure from traditional principles, was rejected by Congress. Finally, English courts have awarded counsel fees to *successful* litigants for 750 years, but they have never gone so far as to force a vindicated defendant to pay the plaintiff's legal expenses.

While the foregoing treatments of fee-shifting differ in many respects, they reflect one consistent, established rule: a successful party need not pay its unsuccessful adversary's fees. The uniform acceptance of this rule reflects, at least in part, intuitive notions of fairness to litigants. Put simply, ordinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it. Before we will conclude Congress abandoned this established principle that a successful party need not pay its unsuccessful adversary's fees—rooted as it is in intuitive notions of fairness and widely manifested in numerous different contexts—a clear showing that this result was intended is required.

Given all the foregoing, we fail to find in § 307(f) the requisite indication that Congress meant to abandon historic fee-shifting principles and intuitive notions of fairness when it enacted the section. Instead, we believe that the term "appropriate" modifies but does not completely reject the traditional rule that a fee claimant must "prevail" before it may recover attorney's fees. This result is the most reasonable interpretation of Congressional intent.

II

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III

We conclude, therefore, that the language and legislative history of § 307(f) do not support respondents' argument that the section was intended as a radical departure from established principles requiring that a fee claimant attain some success on the merits before it may receive an award of fees. Instead, we are persuaded that if Congress intended such a ***694** novel result—which would require federal courts to make sensitive, difficult, and ultimately highly subjective determinations—it would have said so in far plainer language than that employed here. Hence, we hold that, absent some degree of success on the merits by the claimant, it is not "appropriate" for a federal court to award attorney's fees under § 307(f). Accordingly, the judgment of the Court of Appeals is

Reversed.

Justice STEVENS, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

Even though the Court may regard the practice as "novel, costly, and intuitively unsatisfying," it is not at all unusual for a government to pay an unsuccessful adversary's counsel fees; indeed, in the largest category of litigation in which governments engage—criminal litigation—they do so routinely. The question presented in this case is whether Congress has authorized any such award in a challenge to rulemaking by the Environmental Protection Agency. Today the Court holds that, no matter how exceptional the circumstances may be, Congress intended such awards to be made only to prevailing parties. But in § 307(f) Congress deliberately used language that differs from the "prevailing party" standard, and it carefully explained in the legislative history that it intended to give the court of appeals discretionary authority to award fees and costs to a broader category of parties. If one reads that statute and its legislative history without any strong predisposition in favor or against the "American Rule" endorsed by the Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975), and repeatedly rejected by Congress thereafter, the answer is really quite plain—and it is not the one the Court engrafts on the statute.

I

The Court gives a one dimensional description of the role played by respondents, Sierra Club and

the Environmental Defense Fund, in the *Sierra Club v. Costle* litigation: they failed to obtain any of the relief they requested. It is necessary to examine this uniquely important and complex litigation more thoroughly in order to illuminate the other considerations that are relevant to an award of attorney's fees under § 307(f) of the Clean Air Act.

….

Sierra Club, the court [of appeals] noted, was the only party to brief and advocate … an issue conceded by EPA to be critically important. Had this issue not been debated, moreover, the outcome of other related issues in the case … might have been affected. The court expressly stated that "the argument pressed most intensely by the utilities, that a 90% reduction in sulfur emissions was technologically infeasible given the state of antipollution technology, would have been far less completely aired without Sierra Club's participation. The various parts of a complex rule like this one do not travel alone, and the court's education on each part of the rule informed its decisions on other parts."

The Court of Appeals explained that, even though respondents were not "prevailing parties," either in whole or in part, ***700** their participation may have made a difference in the outcome of the litigation.

> "It was absolutely essential in a case of this dimension that this court have expert and articulate spokesmen for environmental as well as industrial interests. The rulemaking process not only involved highly technical and complex data, but controversial considerations of public policy. Given the complexity of the subject matter, without competent representatives of environmental interests, the process of judicial review might have been fatally skewed." *Ibid.*

II

…

As the Court of Appeals correctly observed, the language of § 307(f) differs crucially from the wording of many other federal statutes authorizing the court to award attorney's fees and costs. Most of those statutes expressly require that a party "prevail" or "substantially prevail" in order to obtain fees. The contrast between the text of § 307(f) and the text of other attorney's fees statutes strongly supports the conclusion that Congress did not intend the outcome of the case to be conclusive in the decision whether to award fees under § 307.

Nevertheless the Court today asserts that a statute which does not refer to "prevailing parties" actually *does* refer to "prevailing parties." It does so by invoking the "American rule" that losing parties do not pay the attorney's fees of their successful opponents, and by asserting that "virtually every one of the more than 150 existing federal fee-shifting provisions predicates fee awards on *some* success by the claimant." Factually, as the Court's own opinion makes clear, this is something of an overstatement. After all, the Court notes that sixteen federal statutes and § 304(d) of the Clean Air Act contain provisions for awards of attorney's fees identical to § 307(f). Logically the assertion is a *non sequitur.* It begs the question at issue in this case—whether, by using significantly different language in § 307(f), Congress wished to depart from or to adopt the

more customary standard.

III

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IV

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Accordingly, I cannot agree with the Court's interpretation of the statutory language. Congress decided that in exceptional circumstances it might be "appropriate" to award attorney's fees to nonprevailing parties. Of course, as the Court of Appeals recognized, it would be unreasonable to presume, against the background of attorney's fees statutes generally, that Congress intended fees to be awarded to every nonprevailing party who has litigated a nonfrivolous challenge to an EPA regulation. The degree of success or failure should certainly be weighed in the balance to determine whether it is appropriate to require the Government to bear its adversary's costs of litigation. In my view it would be an abuse of discretion for the Court of Appeals to award fees to a nonprevailing party unless its contribution to the process of judicial review, or to the implementation of the Act by the agency, had truly been substantial and had furthered the goals of the Clean Air Act.

As the Court of Appeals recognized in this case, § 307(f) requires the court to consider the importance, novelty, and complexity of the issues raised by the party seeking fees and costs. A fee award might well be inappropriate if the party had challenged an agency decision of narrow applicability, or if the party's contentions, though nonfrivolous, were relatively weak. In addition to the importance of the issues litigated by the party seeking attorney's fees, it would be appropriate for the court to consider whether the party had an economic incentive to participate in litigation because it stood to gain substantial economic benefits. If so, an award of fees would be inconsistent with congressional intent. Further, § 307(f), properly construed, permits the court of appeals to take into account the degree of technical and legal assistance the party provided to the court in its evaluation of the case. The court of appeals is in the best position to make these determinations, because it is uniquely familiar with the circumstances of each case. In order to assure a reasonable exercise of discretion, it should be required to explain with some care—as the Court of Appeals has done in this case—why it deems an award of fees to a nonprevailing party to be "appropriate."

Regardless of our views about the wisdom of the choice Congress made, we have a plain duty to accept it. Congress consciously selected a particular course: that a party who seeks judicial review of an EPA regulation may be entitled to compensation from the Government, when the court deems it "appropriate," even if the reviewing court determines that there is no ground for disturbing the agency's conclusions. I would construe this category of "appropriate" cases to be narrow; it is wrong, however, to read it out of the statute altogether. It is not the function of the courts to "sit as a committee of review, nor are we vested with the power of veto."

I therefore respectfully dissent.