ORIGINAL

In the

Supreme Court of the United States

EDWARD W. MAHER, ETC.,

PETITIONER

V.

VIRGINIA GAGNE, ETC.,

RESPONDENT.

No. 78-1888

Washington, D. C.
January 9, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

EDWARD W. MAHER, ETC., Petitioner	:	
v.	:	No. 78-1888
VIRGINIA GAGNE, ETC., Respondent	:	

Washington, D. C.

Wednesday, January 9, 1980

The above-entitled action came on for oral argument at 10:02 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

EDMUND C. WALSH, ESQ., Assistant Attorney General, of Connecticut, 90 Brainard Road, Hartford, Connecticut; on behalf of the Petitioner

MS. JOAN E. PILVER, ESQ., the Legal Aid Society of Hartford County, Inc., 525 Main Street, Hartford, Connecticut 06103; on behalf of the Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Maher v. Virginia Gagne, and others.

Mr. Walsh, you may proceed whenever you are ready.

ORAL ARGUMENT OF EDMUND C. WALSH,

ON BEHALF OF PETITIONER

MR. WALSH: Mr. Chief Justice, and may it please the Court:

This is a case which is here on certiorari through the Second Circuit. It is a case in which the District Court awarded attorney's fees against the Petitioner, the Commissioner of the Department of Income Maintenance in his official capacity to be paid out of State funds of the State of Connecticut to the respondent's attorneys in the amount of some $3,000.

The District Court found the award to be authorized by the Civil Rights Attorney's Fees Awards Act of 1976 to the plaintiff as the prevailing party. The case was settled by consent decree.

QUESTION: Mr. Walsh, looking at page 21A of the petition for certiorari, did their consent decree reserve to the court the right to fix attorney's fees for the plaintiffs in the case?

MR. WALSH: It did not, Your Honor, but in all candor it must be said that prior to the entry of the consent decree the State proposed that each party would pay its own

costs and the respondents' attorneys refused to agree to that and we decided we would leave it to the District Court when they brought a motion subsequently for attorney's fees.

QUESTION: So the State, in effect, consented that after the consent decree was entered a motion for attorney's fees or a new suit for attorney's fees could be brought?

MR. WALSH: Yes, Your Honor, that is the only way that we could get the consent decree signed. We do not agree that attorney's fees were awarded. We do not agree to awarding of attorney's fees.

QUESTION: But you also say that, at least orally, you did not agree that the consent decree settled all the issues in the case, including the issues of whether attorney's fees should be awarded.

MR. WALSH: That is correct, Your Honor. We just apprised the District Court judge of our agreement that we had not remained silent and it was not to be inferred that the agreement was inclusive. In other words, they reserved the right to bring the motion before the court, if I am answering your question correctly.

The Gagne case presents two issues to this Court. The first issue is whether the award is in fact authorized by the Attorney's Fees Awards Act or, conversely, whether or not the Eleventh Amendment prohibits such an award. And, secondly, even if the award is authorized -- is not authorized by the

Fees Act, whether or not as the Second Circuit has held the award has but the ancillary effect of an award for prospective injunctive relief under Edelman v. Jordan and would not be barred by the Eleventh Amendment.

The case began when the respondent, who was a recipient under Connecticut's aid to families with dependent children program, challenged the State's practices and policies with respect to awarding her her employment expenses. She was employed at full-time and under the Federal statute, Section 402(a)(7) of the Social Security Act, that statute required that any expenses reasonably attributable to the earning of income will be -- must be deducted from a person's gross earnings in computing the amount of their welfare assistance award.

The respondent claims specifically that the departments imposed a maximum allowance with respect to transportation allowance for her private automobile at 6 cents a mile and a maximum lunch allowance of 50 percents per lunch. She also claimed that they did not allow her certain work-related clothing expenses which she had.

Before bringing the action the respondent requested and received an administrative fair hearing on these issues of the expenses and the State was upheld on the transportation and lunch expenses. It was directed to award her any fee she had for work-related clothing which she could prove. And the fourth issue she brought at the administrative hearing

was abandoned when she brought this case. She also claimed she was entitled to deduct her 16-year-old son's working expenses from her award.

Five months after bringing the suit the State amended its policy which is contained at A66 of the appendix so as to provide expressly that any expenses reasonably attributable to employment were to be allowed to AFDC recipients and the amended policy is at A68 and 69 of the appendix.

Subsequently, about a year, in September of 1976, the plaintiff filed an amended complaint claiming that the new policy as revised still routinely disallowed expenses of the plaintiff.

Finally, after some discovery, the consent decree was entered into and the District Court I think awaited this Court's decision in Hutto v. Finney and subsequently entered its award of attorney's fees in favor of plaintiff's attorneys of approximately $3,000 as the prevailing party under the Fees Act.

The case was appealed to the Second Circuit, the Second Circuit affirmed the District Court's award, holding that the Attorney's Fees Award Act authorized a fee payable against the State in a case where the -- a constitutional claim was combined with a statutory claim under 1983 and the case was settled without a final determination on the merits of the constitutional claim so long as there was a common

of operative fact between the statutory and the constitutional claim.

The State claims that the Court of Appeals test which was adopted from the legislative history of the House Report does not meet the requirements of this Court in the case of Fitzpatrick v. Bitzer which held that in order to abrogate the State's Eleventh immunity Congress must be acting pursuant to section 5 of the Fourteenth Amendment to enforce a substantive guarantee of that amendment.

It has become clear since this Court decided Chapman v. Houston Welfare Rights Organization, last June I believe it was, that the respondent, in our view, did not even assert, much less prevail, upon a claim seeking to enforce a substantive guarantee of the Fourteenth Amendment. We arrived at that conclusion by the fact that in Chapman this Court said that standing alone, section 19(a)(3) confers no substantive rights on a plaintiff's claim and that you must look to the underlying statutory claim then to determine what is the substantive basis of the plaintiff's claim.

And in this case, the substantive basis of the plaintiff's claim is a claim to enforce a provision of the Social Security Act.

What had been somewhat unclear before Chapman was that customarily these claims for welfare, as we call them, were asserted in the format also of a constitutional claim of

violations of the due process and equal protection clauses of the Fourteenth Amendment. Under the doctrine of Hagans v. Lavine that would confer jurisdiction on the Federal Court to hear the case and unless the claim was wholly insubstantial or frivolous and the court would then proceed to dispose of the statutory claim, in most cases the constitutional claim was never decided.

And so we claim --

QUESTION: Well, what about in a case like that where there is unquestionably a constitutional claim joined with a statutory claim and the Court proceeds to decide the statutory claim, never reaches the constitutional claim, and the plaintiff wins on the statutory claim. Is it your position that no fees are allowable?

MR. WALSH: That is right, Your Honor. No fees are allowed because in fact we say that --

QUESTION: Is that the practice in the courts now or are holdings --

MR. WALSH: I would say that there are several holdings otherwise.

QUESTION: But even if they decide only the statutory claim there is fees available because of the joinder of a constitutional claim?

MR. WALSH: As long as the claim has a common nucleus of operative facts.

QUESTION: I see.

MR. WALSH: Now, precisely what --

QUESTION: Well, I suppose if those cases are right, then this case is right, too, then.

MR. WALSH: That is right, sir.

QUESTION: O.K.

MR. WALSH: That would be the case.

Now, --

QUESTION: Doesn't the legislative history support that?

MR. WALSH: I think, Your Honor, that the legislative history does not support the claim in this case. It may have supported it in Hutto v. Finney. That was a case where a constitutional violation was found.

In this case there was no constitutional violation found and the legislative history does not address specifically the Eleventh Amendment State immunity but the District Court concluded that on the basis of the House Report which provided that when the claims are combined that an award may be made. But it is our claim that the Congress did not intend or purport to abrogate the threshold requirement of Fitzpatrick, which is that the threshold fact of congressional authorization abrogated State's immunity could only be present when there is authorization of Congress specifically authorizing a suit against the State in a claim and in legislation enacted pursuant to section 5 to enforce the substantive guarantee of the Four-

teenth Amendment.

Now, if Congress meant nevertheless to make a pronouncement that we declare we are enforcing a substantive guarantee the Fourteenth Amendment when we say any claim brought under section 1983, I don't think the history justifies that, because I think you must read when it says any claim brought it is implicit that it means any claim brought to enforce civil rights or a substantive guarantee of the Fourteenth Amendment.

QUESTION: Wasn't 1983 passed pursuant to section 5 of t Fourteenth Amendment?

MR. WALSH: Under the analysis of the --

QUESTION: Isn't that true?

MR. WALSH: I would say "No," Your Honor, under the analysis of Chapman, because in a case of this kind that is just, if you will, the admission ticket that the Federal Court in 1983 -- but the underlying --

QUESTION: You are not talking about this case.

My point was: Was it,1983 itself passed pursuant to section 5 of the Fourteenth Amendment?

MR. WALSH: Our position is, Your Honor, that you cannot tell that in a case of this kind until you examine the underlying statute, which is the substantive basis of the 1983 claim.

And Chapman says 1983 confers no substantive benefits --

rights on a claim of and by itself you must look to the underlying claim.

Now of course if the statutory claim was --

QUESTION: But in one case 1983 was passed pursuant to section 5 and in another case it is not. Is that your answer?

MR. WALSH: No, Your Honor, I think 1983 is never passed, it is just an admission ticket to get the Federal Court, it is the underlying claim that determines whether or not the Fourteenth Amendment claim is being enforced.

QUESTION: Mr. Walsh, maybe you have already covered it.

The underlying claim here is the same kind Mr. Justice White described, both constitutional and statutory, wasn't it?

MR. WALSH: Well, I would say, Your Honor, I referred to the underlying claim. You mean the statutory claim and the 1983 claim is the constitutional claim.

QUESTION: Well, there was here an underlying Constitution -- there is an allegation of violation of the Constitution here, wasn't there?

MR. WALSH: There is a recital of a constitutional claim, Your Honor. Our position is --

QUESTION: And that is what says that is a part of Federal Jurisdiction, is the statutory claim is pendent to the Constitution.

MR. WALSH: Under Hagans v. Lavine.

QUESTION: Yes.

MR. WALSH: But under Chapman, when you analyze the Chapman decision, that this Court has analyzed it, it really says there is no constitutional claim because --

QUESTION: Wasn't that a case in which there was no constitutional claim?

MR. WALSH: Chapman was a jurisdictional question, yes, Your Honor, there was no constitutional claim.

QUESTION: And here there was both a constitutional and a statutory claim.

MR. WALSH: Yes, Your Honor.

QUESTION: So doesn't it fit the description of the kind of case in which the statute allows attorney's fees. It is a proceeding brought under 1983 in view of the fact that one of the underlying claims is the constitutional character.

MR. WALSH: See, Your Honor, Chapman tells us that 1983 confers no substantive rights.

QUESTION: Well, they don't argue that 1983 confers any substantive rights. As I understand, they say their substantive rights were protected (a) by the Constitution -- the merits of that wasn't resolved -- (b) by the statute. That is where the substantive rights come from. I don't think they rely on 1983 as granting themselves the rights.

MR. WALSH: Well, they may be relying on 1988 but

when --

QUESTION: 1988 gives them the attorney's fees.

MR. WALSH: 1988 provides that in any claim brought under 1983.

QUESTION: Right. And they say it was brought under 1983, because the -- one of the underlying substantive rights was conferred by the Constitution.

MR. WALSH: But we say Congress didn't mean any claim when they said any claim. We say it is implicit that they meant any claim brought to enforce a civil rights or a substantive guarantee of the Fourteenth Amendment, That is how it must be read, that in effect they really did not agree with the constitutional claim, even though they recited one. That is what we get out of Chapman.

QUESTION: But if it is not part of the case, there is no jurisdiction.

MR. WALSH: Well, unfortunately that is the trouble. The liberal test of Hagans v. Lavine has been determined that the very liberal substantiality test --

QUESTION: Right.

MR. WALSH: -- the Court will say it is sufficient to get a Federal Court who will consider the statutory claim. But that still does not confer, as I understand Chapman, any substantive constitutional rights on the plaintiff's claim. You must look to the underlying statute.

QUESTION: I don't understand.

MR. WALSH: Now, the respondent has also cited the case of Katzenbach v. Morgan proposition, if I understood him correctly, that Congress -- once Congress has determined that it was acting pursuant to section 5 of the Fourteenth Amendment which has been suggested they said when we enacted 1983 we were acting pursuant to section 5 of the Fourteenth Amendment, and that is not for this Court even to question Congress as to whether or not that was a proper exercise of their power under section 5.

Mr. Justice Harlan in his dissenting opinion in Katzenbach spoke about that problem, saying that if Congress was making that claim they were claiming they had a right themselves, alone, without review by this Court, to define the substantive scope of the Fourteenth Amendment. And Mr. Justice Harlan pointed out if that were the case it would give Congress the right to alter decisions of this Court. In fact, we think that that is what happened here, in effect the legislative history was used to altera provision of Fitzpatrick v. Bitzer because under this test of a common nucleus of operative fact it isn't essential that Congress be acting pursuant to section 5 of the Fourteenth Amendment; they may be or they may not be; precisely what a common nucleus of operative fact between a statutory claim and a constitutional claim is unclear. If the statutory claim itself provided for

enforcement of the Fourteenth Amendment there would be no problem and there would be no case.

Now, of course the Senate Report in the legislative history points out at page 6342 of the 1977 Congressional notes that the Act is limited to causes arising under our civil rights laws. And of course the purpose of the Act was stated to cure the gaps brought about the Alyeska decision in the award of attorney's fees and civil rights cases.

And so we say Congress only intended when they enacted the Fees Act to authorize fees for claims brought to enforce the Fourteenth Amendment and in this case the plaintiffs were not trying to enforce the Fourteenth Amendment substantive guarantee, although they did recite 1983 and claimed their statutory claim in terms of constitutional due process and equal protection.

QUESTION: Well, what if the case had gone to trial and the judge addressed the statutory issue first and found against you. I suppose the statutory claim was that the State law was inconsistent with Federal.

MR. WALSH: Yes, sir.

QUESTION: That is called a statutory claim --

MR. WALSH: Yes, sir.

QUESTION: -- although it is a supremacy clause claim.

MR. WALSH: Supremacy clause claim; yes, sir.

QUESTION: Suppose the judge had said this is wholly consistent with say Federal law and then he had gotten to the constitutional claim and said, well, both the State and the Federal law are unconstitutional as a denial of equal protection. Would there be attorney's fees?

MR. WALSH: If the Court found that there was a violation --

QUESTION: Yes.

MR. WALSH: -- a constitutional violation of the Fourteenth Amendment, then I think there is no question that it would be interpreted as enforcing --

QUESTION: Yes.

MR. WALSH: -- the Fourteenth Amendment.

QUESTION: What would be?

MR. WALSH: The plaintiff's action as an action brought to enforce the Fourteenth Amendment.

QUESTION: Well, what if your settlement agreement had expressly recited that you were settling both the constitutional and the statutory claim?

MR. WALSH: Well, under my analysis, Your Honor, I think that --

QUESTION: Well, the suit would still have been brought for exactly the same purpose.

MR. WALSH: That is right, Your Honor.

I think the trouble is that these actions are brought

in terms of the constitutional question because there is no jurisdiction under 1331 because of a $10,000 limitation.

QUESTION: Yes, yes.

MR. WALSH: At any rate, the Senate Report says that the Fees Act was intended to just be limited to civil rights cases. This is not a civil rights case.

And so we think Congress and the legislative history had no such intention of abrogating the State's Eleventh Amendment immunity.

Now, the second issue in the case is, as the Second Circuit held, that the Eleventh Amendment is not a bar to an award of attorney's fees in this case in any event, because it comes within the permissible ancillary effect doctrine of Edelman v. Jordan which held that a State may be required to expend funds from its Treasury when it is enforcing an order limited to prospective injunctive relief and the subject case has an ancillary effect not barred by the Eleventh Amendment. The circuits are divided on this question, as the Court of Appeals indicated in its opinion. It seems to me, and I think that the respondent's brief concedes, that this is an extension of the careful definition of what an ancillary effect was in Edelman, and it is an expansion of that doctrine from one which is necessary consequence of compliance with an order for perspective conjunctive relief to a fee awarded in a case brought to obtain an order for prospective conjunctive relief.

brought to obtain an order for prospective injunctive relief. And so consequently we feel it is not in accord with Edelman v. Jordan, the ancillary effect, and that it should -- consequentl for both those reasons the decision of the Court of Appeals should be reversed. And there was a cross appeal which was remanded to the District Court, respondent's cross appeal, and that should be -- if the case is dismissed, that should be vacated.

I would like, Your Honor, to save any remaining time I have for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Walsh.

Ms. Pilver.

ORAL ARGUMENT OF MS. JOAN E. PILVER, ESQ.,

ON BEHALF OF THE RESPONDENT

MS. PILVER: Mr. Chief Justice, and may it please the Court:

My name is Joan Pilver and I represent the respondent Virginia Gagne in this matter.

I would like to begin by offering just a further response to the question posed by Mr. Justice Rehnquist with regard to why the matter of the attorney's fees was not taken up in the consent decree itself, and there are really two reasons.

One, because we felt it would create a potential conflict of interest situation, which we think can arise in any

situation where attorney's fees are attempted to be resolved with any consent decree. The fact that there was a legal dispute between the parties meant that there would have been no way the matter could have been resolved with with any consent decree and, in fact, the entire consent decree would not have been able to have been entered if in fact we had waited -- had insisted on the matter of attorney's fees being in the consent decree itself.

QUESTION: Well, I have been away from the private practice for ten years and perhaps things have changed a good deal since then, but for instance in other Federal statutes like title VII of the Freedom of Information Act, Equal Credit Opportunity Act also provide for the award of attorney's fees. And in the 'Sixties, at any rate, it was the practice if you were settling a case and the statute authorized an award under which the plaintiff was suing authorized an award of attorney's fees to the prevailing party, you settled that at the same time. That was one of the issues in dispute and if you were going to settle the case, you settled whether or not the person was going to get attorney's fees.

MS. PILVER: I think that is a good point, Your Honor. However, I would suggest in this particular case the law in this area was very unclear. The defendant took the position that as a matter of right we were not entitled -- as a matter of law we were not entitled to attorney's fees, and

this was prior to the decision of this Court in Hutto v. Finney. So it was really a legal decision that had to be made by the Court.

Additionally, I think several courts have expressed the opinion, in particular a recent decision by the Court in Prandini v. National Tea Company, of the various kinds of potential conflicts of interest that can arise when the matter of attorney's fees is settled within the consent decree itself, the fact that some of the substantive provisions in the consent decree can be bargained away in exchange for the attorney's fees.

QUESTION: Well, that is certainly true in any litigation that I am familiar with, is that one of the things on the table, so to speak, is whether the plaintiff recovers not only $150,000 for the loss of an arm but $25,000 attorney's fees. And --

QUESTION: And costs.

QUESTION: -- and costs. And you simply negotiate those out. You may have to give up some substantive right or give up some part of your substantive recovery in order to get your attorney's fees.

MS. PILVER: I think that is very possible in those cases where the plaintiff would otherwise have to pay his counsel's attorney's fees. In many of the cases brought under the Civil Rights Attorney's Fees Awards Act the plaintiff will

have no fees with which to pay his counsel and the only fee that will be paid will come from the defendant. So that where the only interest that the plaintiff has is in the substantive settlement and the attorney's interest on the other hand is in the recovering and in that --

QUESTION: That is typical in a contingent fee action, too, isn't it, where you have a plaintiff who doesn't -- has little or no money and is dependent upon the recovery to pay his own attorney?

MS. PILVER: That is quite true, Your Honor.

QUESTION: Do you think there is any analogy, Ms. Pilver, in this situation and the one where parties will agree or stipulate consent to liability but submits for a litigated basis the issue of the amount of damages?

MS. PILVER: I think there is a similarity and I think that kind of approach is very useful to settle the merits of the case first and then allow those other matters to be handled either in a separate negotiation or if they cannot settle it, then to allow it to be decided by the court. I think in these kind of cases I think it is really something that should be encouraged because of the potential problems that can arise.

Two terms ago this Court in Hutto v. Finney held that Congress has plenary power under section 5 of the Fourteenth Amendment to set aside a State's immunity from retro-

active relief and permit an award of attorney's fees to be entered against State officials acting in their official capacity under the Civil rights Attorney's Fees Awards Act of 1976.

The case before you today differs from Hutto in only two respects, neither of which do we believe are material or sufficiently different to justify a result different from that in Hutto.

While the case in Hutto was settled on the merits, this case was resolved by consent decree. And while in Hutto on the --

QUESTION: You mean it was settled on the merits or litigated on the merits?

MS. PILVER: It was -- I am sorry -- litigated on the merits, Your Honor. This case was settled.

While the claims in Hutto were based solely on the Constitution, in this case the plaintiff coupled her constitutional claim with a claim under the Social Security Act.

The plaintiff maintains that neither these differences is sufficiently substantial to justify any kind of result that would be different from that in Hutto.

QUESTION: What was the first difference cited?

MS. PILVER: The first difference is the fact that in Hutto the case was tried on the merits.

QUESTION: And here?

MS. PILVER: And in this case it was settled.

QUESTION: I see.

MS. PILVER: The Civil Rights Attorney's --

QUESTION: Isn't there still another difference. In Hutto the constitutional claim was an Eighth Amendment claim and here the constitutional claim is a Fourteenth Amendment claim. And in Hutto Mr. Justice Rehnquist thought that might be significant. So maybe you have a response to his position in this case.

MS. PILVER: Well, if I understood Mr. Justice Rehnquist's position in Hutto, it was that because the Eighth Amendment has been incorporated into the Fourteenth Amendment. It is not as clear that in the past in acting pursuant to section 5 of the Fourteenth Amendment --

QUESTION: Right.

MS. PILVER: -- that --

QUESTION: But you don't have that obstacle that --

MS. PILVER: No, we don't.

QUESTION: So in one sense your case is stronger than the other.

MS. PILVER: Yes, that is quite correct, Your Honor.

QUESTION: Yes.

MS. PILVER: That is true, this is.

The Civil Rights Attorney's Fees Awards Act itself sets only two criteria that must be met before an award of

fees can be made under the discretion of the judge.

One, it must be brought under one of the enumerated statutes.

And, two, the prevailing party, the person who is seeking the fees must be the prevailing party.

We believe that this case meets both criteria. It is clear that this case was brought under one of the enumerated statutes, namely 42 U.S.C. 1983. The plaintiff alleged constitutional claims which both courts below found to be substantial under the relevant Hagans v. Lavine test, the test which was also suggested by Congress to be used in these kinds of instances.

The defendant, however, suggests that this case is not properly brought under 42 U.S.C. 1983 because the plaintiff coupled her constitutional claims with statutory claims.

But this Court has yet to hold that a statutory claim may not be properly brought under 42 U.S.C. 1983. And even if this Court were to so hold in a future case, it would not be appropriate for decision here because in this case a claim was properly brought under the Constitution, thus bringing it within 42 U.S.C. 1983.

Additionally, it is very clear from the legislative history that Congress had intended for awards to be made in cases joining constitutional and statutory claims. In the debate and report by Congress it indicated that they wished to

continue the practices and judicial standard that had been established prior to the passage of the Fees Awards Act, including the coupling of constitutional and statutory claims. Congress was well aware of the impact that a decision denying fees in cases joining constitutional and statutory claims would have, the fact that plaintiffs would be discouraged from bringing cases if their rights to fees could so easily be defeated, the fact that the inability to award fees in cases joining constitutional and statutory claims might compel judges to unnecessarily decide constitutional questions, thus defeating a very important policy of this Court.

Alternatively, the prospect arises that a plaintiff who believes he has a meritorious statutory claim might refrain from raising it, in the fear that if he were to prevail on the statutory claim he would then be denied fees. This possibility alone would have a very negative impact on the judicial system.

The plaintiff thus maintains that Congress' purpose in passing the Fees Act to encourage the filing of meritorious litigation and the -- under the Fourteenth Amendment -- and the important goals and judicial economy, judicial efficiency and the appropriate adjudication of constitutional questions would all be disturbed if this Court were not to allow fees in cases joining constitutional and statutory claims.

Thus the plaintiff believes she meets the first criteria set out in the Civil Rights Attorney's Fees Awards

Act.

Additionally, she believes that she meets the second criteria,namely that she is the prevailing party.

Both courts below believe that the plaintiff had achieved almost all that she had sought in her complaint and that what she had achieved was significant.

The Court of Appeals in reviewing the case below concluded that the defendant changed his policies reluctantly and only under the pressure of this suit.

It is vitally important that plaintiffs who settle be treated as prevailing parties for the purposes of the Act. A large percentage of cases that are filed are settled and as an option often thought of and certainly always considered by parties and it would be unfair to deny that option to parties solely for them to be able to insure themselves of a fee award.

Truly, not allowing fees in cases resolved by consent decree would discourage the voluntary settlement of disputes, for as the Court of Appeals suggested it would otherwise require parties to litigate solely to insure fee award.

QUESTION: Ms. Pilver, do you make anything at all of the first paragraph in the consent decree saying nothing in this consent decree is intended to constitute an admission of fault by either party to this action?

MS. PILVER: No, I don't, Your Honor. That is some-

thing that was agreed to solely for us, for the parties to negotiate the settlement. And I would point out neither did the plaintiff agree that she was withdrawing any of the allegations contained in her complaint.

QUESTION: Well, the defendant hadn't accused her of any fault.

MS. PILVER: I am sorry, Your Honor.

QUESTION: The defendant hadn't accused her of any fault, had they?

MS. PILVER: No, but the plaintiff did make allegations in the complaint which, you know, we certainly maintained to the State that if the matter had gone to trial that we would have prevailed.

QUESTION: You regarded this as just kind of boiler-plate that you stuck in the request of the defendants?

MS. PILVER: That is correct, Your Honor.

QUESTION: Well, isn't it agreed that boiler plate -- have you ever seen a stipulation of this kind to a consent decree that doesn't have it in?

MS. PILVER: That is right, I haven't.

QUESTION: You will settle that the rule admit nothing?

MS. PILVER: That is right, Your Honor. That is always done in almost every case that I have ever -- I have ever dealt with.

Further, as I mentioned before, we feel that not allowing fees except in the context of a consent decree could create a potential for conflicts of interest which, you know, s have mentioned and which I think is something that should be considered by this Court.

Again, the legislative history is clear. It indicates that Congress intended fees to be awarded in cases resolved by consent judgment.

Neither would permitting an award of fees in cases resolved by consent further the filing of nuisance litigation, which is certainly of concern to the Court, because it is clear the Court must first find that there is at least a substantial constitutional claim warranting jurisdiction. They must find that there were benefits brought about as a result of the settlement and that the benefits that resulted came because of the plaintiff's conduct and would not otherwise have occurred, you know, regardless of the plaintiff's actions. All these are matters that the defendant remains free to contest in any hearing on attorney's fees.

To require any greater showing would only discourage settlement of disputes and discourage the benefits achieved by settlement, the saving of court time and effort, the saving of time, expense and effort by the litigants, the parties and the attorneys.

To require a greater showing of the likelihood of

success on the merits would also require the unnecessary decision of constitutional questions.

Thus, in sum, the plaintiff believes she meets the two primary criteria set out in the Fees Act for allowing an award of fees to be made in this case.

Because, however, the defendant claims that he is subject to an immunity under the Eleventh Amendment, he asserts that even if we did prevail, even if we are entitled to fees under these two criteria, we are nonetheless barred from an award.

The plaintiff believes, however, as mentioned earlier that Hutto v. Finney is the appropriate precedent for deciding this question. The validity of this Court's ruling that in passing the Fees Act Congress was exercising power under section 5 of the Fourteenth Amendment has no less validity in a case resolved by consent than in any other.

The legislative history relied upon by this Court in Hutto to come to the conclusion that States were intended to be covered by the Act in this case only but to further by the additional legislative history indicating that these were also intended tobbe awarded in cases resolved by consent.

Certainly the comparison of fees to cost in Hutto and the quotation from Fairmont Creamery Company v. Minnesota that a court interest in expeditious and orderly proceedings justifies it in treating a State as any other litigant has no

less validity in a case resolved by consent.

Additionally, although not explicitly stated, the plaintiff believes that the Court in Hutto implied strongly that attorney's fees, being so closely akin to cost, that like cost they should not be subject to a State's Eleventh Amendment immunity.

We believe that a holding by this Court to that effect here would follow logically from this Court's holding in Hutto and would not -- would not strain the distinction drawn by the Court in Edelman v. Jordan between prospective relief and the cost ancillary thereto and retroactively, which is akin to damages and barred by the Eleventh Amendment.

But even if this Court were to hold that attorney's fees are generally subject to the Eleventh Amendment we believe that Congress is acting appropriately under section 5 of the Fourteenth Amendment in passing legislation allowing fees to be awarded in cases resolved by consent.

Through extensive hearings Congress was well aware that many parties could not have afford the legal fees involved in bringing action under laws passed pursuant to the Fourteenth Amendment. And Congress reasonably concluded that shifting the attorney's fee to the losing party was a reasonable way of resolving -- of encouraging such litigation.

Likewise, Congress was acting reasonably in concluding that an award of fees in consent judgment cases also furthered

that policy.

Congress has acted remedially in giving another tool of use to the Judiciary to use for the process of encouraging the filing of litigation under the Fourteenth Amendment and the tool is as useful in consent judgment cases as in any other.

Further, the Act leaves the ultimate decision as to whether to award fees to the discretion of the judge, leaving it to him to decide as here whether there was a substantial constitutional claim justifying a finding of jurisdiction, whether the benefits achieved were valuable and whether they came as a result of the suit having been brought.

Thus, Congress, even in settle cases, has left the determination and the interpretation of the substantive guarantees of the Fourteenth Amendment to the Judiciary, where it rightfully belongs. Thus, the plaintiff below and respondent here believe that the award of fees made by the District Court and affirmed by the Court of Appeals was proper under the Civil Rights Attorney's Fees Act and follows logically from, and is consistent with this Court' holding in Hutto v. Finney.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Walsh?

REBUTTAL ARGUMENT BY EDMUND C. WALSH, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WALSH: Mr. Chief Justice, and may it please the Court:

I have just a couple of points.

In Hutto v. Finney this Court stated that attorney's fees may be awarded as part of the costs and the Eleventh Amendment would not seem to be a bar there. I would respectfully submit that I don't think that the legislative history warranted that conclusion. At least, even if it did in this case, if it is true that the plaintiffs were not seeking to enforce a Fourteenth Amendment guarantee and there is no congressional authorization, even if the Congress has the power to give such authorization under the Fees Awards Act, this Court distinguished Hutto --

QUESTION: Well, can I interrupt you on the question of whether the legislative history supports the notion that fees might be awarded as part of the cost. I think the statute itself, which you quote on pages 3 and 4 of your brief, ends up by saying that a reasonable attorney's fee as part of the costs.

Doesn't that kind of imply that it is supposed to be part of the costs?

MR. WALSH: Yes, Your Honor, but is it part of the cost where the Eleventh Amendment is not an issue. We see the Fees Act, the purpose of the Act and the policy of the Act all indicated that they were not enacting any startling new

legislation, it was just to fill gaps created by the Alyeska decision.

Now, actually the costs have not been changed since I think the Judiciary Act of 1853 and so if that was their intention, I think that would have been more than just no startling new remedy legislation and just to fill in the gaps. But in a case where civil rights are not being enforced there is no authorization, I think, in the legislative history specifically to abrogate that amendment in a non-civil rights case. Congress doesn't claim such a policy. It may have such power, but it doesn't claim it in this Act.

I want to make one other point and that is that Hutto itself distinguished Fitzpatrick from Edelman and it said Fitzpatrick begins where Edelman ends. But this case is very similar to Edelman. There was a constitutional claim in Edelman of equal protection and there was statutory social security claim.

So I think it would be fair to say that Edelman controls this case and that this case ends where Edelman ended. And Fitzpatrick began where there was a threshold question of congressional authorization, which isn't present here.

I would just like to make one other remark to Mr. Justice Marshall's earlier question. My point was that Chapman says there is no jurisdiction under U.S. Code 1343 or 1344 to hear a case in which there is just statutory

claim. And so it may well be that in this case we have what Mr. Justice Marshall pointed out in his dissent in the decision of Employees, a constitutional claim which the Federal District Court does not have jurisdiction over because Congress has not given, only implemented its Article 3 power to award that jurisdiction.

With respect to Mr. Justice Blackmun's remarks about being a customary provision, a boiler plate, if you will, we would just point out that there was only one single plaintiff throughout the entire more than two years of litigation in this case and that the plaintiff in the consent decree did not obtain the injunctive relief which he sought; she did not obtain the equivalent of the injunctive relief she sought, because the State did not change its amended policy, it is still in effect. That is the one contained in the appendix at paragraph -- pages 68 and 69.

So we think that Edelman v. Jordan should be controlling in this case because it is so similar to Edelman v. Jordan. And for that reason we ask that the Court reverse the decision.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

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