ORIGINAL

In the

# Supreme Court of the United States

STATE OF MAINE AND MICHAEL R. PETIT, COMMISSIONER OF THE DEPARTMENT OF HUMAN SERVICES, STATE OF MAINE,

PETITIONERS,

V.

JOLINE THIBOUTOT AND LIONEL THIBOUTOT AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

RESPONDENTS,

No. 79-838

Washington, D. C.
April 22, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

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| STATE OF MAINE AND MICHAEL R. PETIT, COMMISSIONER OF THE DEPARTMENT OF HUMAN SERVICES, STATE OF MAINE, Petitioners, | : | |
| v | : | No. 79-838 |
| JOLINE THIBOUTOT AND LIONEL THIBOUTOT, AND ON BEHALF OF OTHERS SIMILARLY SITUATED, Respondents, | : | |

Washington, D.C.

Tuesday, April 22, 1980

The above-entitled matter came on for oral argument at 11:50 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:

JAMES EASTMAN SMITH., ESQ., Assistant Attorney General, State House, Augusta, Maine 04333; on behalf of the Petitioners

ROBERT EDMOND MITTEL, ESQ., Sewall & Mittel, 178 Middle Street, Portland, Maine 04112; on behalf of Respondents

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will now hear arguments in the State of Maine v Thiboutot.

Mr. Smith, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES EASTMAN SMITH, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SMITH: Thank you, Mr. Chief Justice.

Mr. Chief Justice, and may it please the Court.

A Writ of Certiorari was granted to the Maine Supreme Judicial Court on January 21, 1980, in the above matter. Questions presented therein were threefold:

First, whether the Petitioners' good faith violation of the Federal Social Security Act and its regulations, with the resulting incorrect reduction of AFDC benefits to the Respondents, but without a violation of Respondents' constitutional rights, constitutes a violation of 42 USC Section 1983.

The second question posed was whether the Civil Rights Act of 1976, 42 USC Section 1988, allows consideration of an award of attorney's fees to Respondents who prevail solely on a Social Security Act claim in an Action where no violation of constitutional rights is found.

The final question was whether or not 42 USC Section 1983 affords Respondents a remedy in the State Court

for a violation of the Social Security Act.

The statement of the facts follows.

The Respondents, Lionel and Joline Thiboutot, are married and have eight children. Four of those children are theirs pursuant to their common marriage. Three of the children were brought into the common marriage pursuant to a prior marriage of Mr. Thiboutot's. One child was Mrs. Thiboutot's pursuant to a prior marriage.

In November of 1975, the State of Maine, Department of Human Services, reduced, or notified Mr. Thiboutot they were going to reduce, his benefits pursuant to a change in what we believe, deemed by Federal Regulations. They notified him of this proposed change.

The change was as follows: In computing the net available income of Mr. Thiboutot, in order to determine the amount of AFDC benefits to be allowed for his three children by a prior marriage, the Department would no longer subtract that portion of Mr. Thiboutot's income which went to the support of the four children by the common marriage. The effect of this was to count as available, in the computation of the eligibility benefits, income which was actually unavailable due to Mr. Thiboutot's legal obligation to support his four mutual children.

After exhausting their administrative remedies, the Thiboutots, pursuant to a complaint filed in Superior

Court, appealed the Department's decision and on their computation basis. This appeal was brought originally pursuant to Maine Rules of Civil Procedure, Rule 80B, and two statutes which in and of themselves allow for the Maine State Courts to take jurisdiction of cases such as this: the denial or a reduction of AFDC benefits.

On January 7, 1977, an amended complaint was filed in the same Court. This followed the enactment of the Civil Rights Attorneys Fees Act of 1976. The amended complaint brought pursuant to 1983, as well as the other State Statutes which would have allowed jurisdiction in the State as well as the cause of action, alleged violation of the Social Security Act, regulations pertaining to the Social Security Act, and also asked for certification as a class action which was granted.

The Maine Superior Court entered judgment for the Thiboutots on the merits. The Petitioners were enjoined from enforcing the challenged regulations; and in compliance with Court Order, adopted new regulations. The State also paid benefits, respectively, to all class members who were eligible; and also paid retroactive benefits to the Thiboutots.

However, another issue is still before the Court, and that issue is attorney's fees. The Court in subsequent motion denied the Respondents' plea for attorney's fees,

which was then appealed to the Supreme Judicial Court for the State of Maine.

QUESTION: What other issues are here now, other than attorney's fees?

MR. SMITH: Whether or not Section 1983 applies -- or whether a violation of the Social Security Act is encompassed within the parameters of Section 1983.

The reason for this, your honor, is that the wording of Section 1988, the Attorneys Fees Awards Act, allows the discretionary award of attorney's fees in order to enforce a provision of Section 1983. So without a violation of Section 1983, in this case, you would not have attorney's fees that could be awarded to Respondents.

The Supreme Judicial Court of Maine concluded that a right exists to sue under 42 USC 1983 in a state court; that a similar right also exists to enforce the provisions of the Social Security Act, even though the claim is not of constitutional dimension; and that an award of attorney's fees for violation of the Social Security Act may be considered.

A dispute over the computation of welfare benefits without a violation of the Fourteenth Amendment, or any violation of Civil Rights, was not in the Petitioner's mind within the realm of foreseeability or within the intent of the legislators, drafters, and enactors of the predecessors

of Section 1983; to wit, the Civil Rights Act of 1871, which was also known as the Ku Klux Klan Act.

The historical background, and this Court is well aware of this, of the times when the 1871 Act was enacted during Reconstruction days, depicted a very sordid time in the history of this country; almost all rights that Blacks were to have enjoyed under the Fourteenth Amendment were not available to them. There were burnings; there were pillages; there were no rights of property that Negroes could enjoy. This Court has recognized that.

However, in response thereto, Congress passed the Civil Rights Acts of 1866, the Fourteenth Amendment, as well as the Civil Rights Act of 1871, the Ku Klux Klan Act.

As this Court has said in Chapman v Houston Welfare Rights Organization, in cases of statutory construction, our task is to interpret the words of those statutes in light of the purposes Congress sought to serve. It is the State's contention that the purposes of the Ku Klux Klan Act, the predecessor of Section 1983, were to provide enforcement of the Fourteenth Amendment. That Amendment is not at issue today. There has been no due process violations or allegations thereof; there have been no equal protection violations or allegations thereof.

Another purpose of Section 1871 was to counteract violations of basic liberties. They are not at stake in

this case or at issue. Another purpose of the Act of 1871 was to provide a remedy when a state law existed in theory, but was unavailable in practice. Here, in contrast, we have a state law that was available in practice; it was available in reality; and indeed, the state law without Section 1983, afforded the Respondents the rights to appeal under the Fair Hearing Provisions and also to have the state's regulation overturned.

QUESTION: Is Barney v. New York on your side on that point?

MR. SMITH: Excuse me, sir.

QUESTION: Do you have any case other than Barney v. New York -- which has been thrown out so many times -- on your side?

What case says that?

MR. SMITH: Says what, sir? I didn't understand you.

QUESTION: When a state has laws that are the same as federal laws, the federal laws don't apply.

MR. SMITH: If we're getting into jurisdiction, sir?

QUESTION: No. I am getting into what you're talking about.

Didn't you say that the State of Maine provides all these things; therefore, you can't use 1983.

Now, I'm asking you: what case of this Court says anything close to that?

MR. SMITH: OK. I'm not aware of any cases of this Court that say that, your honor; however, I am reserving as a third argument the jurisdictional aspect of state courts of 1983.

What I am trying to say to this Court is that without 1983, the Respondents had appropriate remedies in a state court pursuant to state laws.

QUESTION: Would they have been able to receive fees there?

You can respond to that at 1:00 o'clock. You can think it over in the meantime.

MR. SMITH: Thank you, sir.

(Whereupon, at 12:00 o'clock, noon, the argument was recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Smith, you may continue.

MR. SMITH: Thank you, Mr. Chief Justice. And may it please the Court.

Shortly before the lunch break, Mr. Chief Justice Burger posed the question as to whether or not, in the absence of a Section 1988 authorization for attorney's fees in the present matter, the Respondents would be able to

collect attorney's fees, if they prevail.

The answer to that question is: no. There is no provision in the State of Maine under that situation as we had before the authorization in the award of attorney's fees; however, we would say that this certainly does not place the Respondents necessarily in a different category from other persons in this country who are serving or seeking to obtain legal services. Also there is the pro bono aspect of legal work; and finally, there is the Legal Aid Societies which have been in effect for several years in this country.

Your Petitioner was stating that the purposes of the Civil Rights Act, as shown by the enactors and legislaters pursuant to its predecessor, the Civil Rights Act of 1871, was basically to enforce the Fourteenth Amendment provisions and other rights; and to prevent further trampling of those rights by the Ku Klux Klan.

QUESTION: Were the words: and laws, in the original of the statute?

MR. SMITH: No, sir. They were not.

QUESTION: When did they come in?

MR. SMITH: They came in in 1874 pursuant to the revised draft.

QUESTION: Now, what do you suppose they were supposed to cover?

MR. SMITH: The Petitioner claims, your honor, that the "and-laws" provision was to relate to the Act of 1866; the laws contained therein, as well as the Fourteenth Amendment provisions: equal rights, civil rights; but not the Social Security Act without a violation of some due-process, equal-protection discriminatory action.

QUESTION: Well, specifically, to what kind of laws do you suggest the statute was limited?

MR. SMITH: Well, if I may give an example --

QUESTION: I mean, is there a label you can give it? Civil Rights Laws or something like that?

MR. SMITH: Civil rights laws; equal rights laws. Where one starts and the other stops, I'm not sure myself.

QUESTION: But one of those words, those modifiers are in the statute, as --

MR. SMITH: They are not.

QUESTION: -- of today?

MR. SMITH: No, sir. The statute says: and laws; however, as this Court is well aware, it has been interpreted by concurring opinions in the Chapman decision to encompass equal rights, as it has also been interpreted in a concurring opinion not to.

QUESTION: Has that been a suggested limitation upon the kinds of law? Two or three members of the Court in the Chapman case, in a separate opinion, expressed the pretty unambiguous view that the "laws" meant what it said. Didn't they?

MR. SMITH: Yes, sir.

QUESTION: And specifically, that they included the Social Security Act?

MR. SMITH: Just as three members stated the opposite --

QUESTION: Yes. Although the Chapman case involved not 1983 directly, but 1343. Didn't it?

MR. SMITH: Yes, sir. The jurisdictional aspect.

Here, again, we don't have problems with the Respondents obtaining what relief they're seeking, in the absence of 1983.

QUESTION: Right.

MR. SMITH: The Petitioner also asserts --

QUESTION: Without 1983, there's no authority for counsel fee awards?

MR. SMITH: For counsel fees. No, sir.

As far as the relief which Respondents sought and received, 1983 was superfluous.

QUESTION: But if "laws" in 1983; if we should construe that to mean just what it says: laws; and specifically, Social Security Laws, then I gather there's a basis for the 1988 counsel fee laws?

MR. SMITH: Yes, no doubt about it.

QUESTION: And that's really what we have to decide in this case. Isn't it?

MR. SMITH: That's correct, your honor.

The State would also refer to the majority opinion in Chapman and state that: one purpose again of the Congress in the Act of 1871 was to ensure right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto. And it is Petitioners firm assertion that the Social Security Act was not a law that was enacted pursuant to the Civil Rights Act.

In fact, taking into consideration the passions and events of the time, the Reconstruction day era, your Petitioners find it difficult to believe the legislators, drafters, or revisers could have contemplated a good faith error in computation of welfare benefits to be a violation of civil rights or the Constitution and "laws" as they knew them at that time.

QUESTION: There were no Social Security benefits at that time. Were there?

MR. SMITH: That's correct, your honor.

If there had been and if people had been deprived of benefits pursuant to a discriminatory action because of their race or ethnic background, such, we'd say it would apply; but not under the facts in this case.

QUESTION: There certainly were Social Security benefits at the time the civil rights attorney's fees Act was enacted in '76.

MR. SMITH: Yes, sir.

However, it's the State's contention that Section 1988 would not apply to the violations in this case before the bar, before the banc.

This is predicated upon two main assertions.

The first is that the Civil Rights Attorney's Fees Awards Act was based upon Fourteenth Amendment violations. The second is predicated upon the lack of specific statutory authorization, as we believe was mandated by the Alyeska Pipeline decision.

Now, in Hutto v Finney, this Court awarded attorney's fees; but they awarded attorney's fees pursuant to violations of both the Eighth and the Fourteenth Amendment, neither of which are at issue herein.

In FitzPatrick, we had a discrimination claim. We do not have any discrimination in this case.

Since 1866, Congress has seen fit to enact over 50 statutes is provide for attorney's fees, but they have not done so regarding the Social Security Act, except in limited areas. One of those areas was Section 406(b)(1) which, I believe was amended in 1966, 1968, and dealt with disability claims. Had Congress seen fit to specifically authorize the award of attorney's fees for a good faith violation in computing of benefits, it is Petitioners' assertion that they surely would have done so, and made it more plain than is made in the ambiguous history of that Act as going

through the record as well as through the debates.

Once more, the wording of the Act is, that in the discretion of the Court, if a party prevails on the Civil Rights 1983 among other Civil Rights claims, and if it is a proceeding or action to enforce a provision of Section 1983, attorney's fees would be proper. Once again, this was not an action to enforce a provision of 1983, as Petitioners assert.

Respondents have argued that the plain meaning theory would prevent any research into the history of Section 1983 prior to the revised statutes of 1979. The State would counter this by saying that throughout concurring opinions and dissenting opinions in Chapman, we believe that the Court has already gone beyond the revised statutes of 1874 and recognized that delving into the history prior to 1874 is indeed necessary. There are other cases in which the Court has also gone into the background of 1983 before the revision of 1874; one of those cases was District of Columbia v Carter, the other was Examing Board v Otero de Flores.

The Respondents have not considered Section 1983 in light of the events and passions of the times in which it was enacted for this reason: we believe that there are arguments that the "and laws" provision applies; must be denied.

Finally, the State, while reserving some time for rebuttal, would like to make brief mention of its third argument having to do with exclusive jurisdiction. The State alleges that the State Court does not have authority to hear a Section 1983 claim in a State Court. This was brought to bear in the State Court of Maine; we brought it forward for this Court for your disposition.

QUESTION: What can you tell me from the Martinez v. California case?

MR. SMITH: I am not aware of that case, your honor.

QUESTION: It says specifically you could.

The State Court could.

MR. SMITH: Excuse me.

I believe that an issue reserved in there was whether or not the States must hear. In reading that case, the State does not -- I guess the State would contest that, it strictly and solely held that; and that it precluded this argument.

Our argument is basically that if one were to look at the specific words of the Act of 1871, we would find that the District and Circuit Courts were given jurisdiction to the exclusion of the State Courts; as well as the legislative history of the purposes of the Act, when State Courts were indeed violating many of the civil rights which the Acts of 1866 and 1871 were passed to enforce.

For these reasons, the State would ask this Court to overturn the decision of the Maine Supreme Judicial Court and specifically to state that the Social Security Act is not within the provisions of Section 1983.

QUESTION: Now what the Maine Supreme Court did is to remand this case to the trial court. Didn't he?

MR. SMITH: He did, sir, for the sole purpose of--

QUESTION: Exercising his jurisdiction, but upon the hypothesis that 1988 was applicable.

MR. SMITH: Yes, sir. For determination of attorney's fees. The lower court did not state why they denied attorney's fees. That was the purpose for remand.

QUESTION: But, so far as now appears the trial court may still deny attorney's fees.

MR. SMITH: That's quite correct, sir.

QUESTION: As a matter of discretion.

MR. SMITH: As a matter of discretion.

QUESTION: The Supreme Court of Maine has said that the authority is there. Has it not?

MR. SMITH: Yes, sir.

QUESTION: In his opinion. Thank you.

CHIEF JUSTICE BURGER: Mr. Mittel.

ORAL ARGUMENT OF ROBERT EDMOND MITTEL, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. MITTEL: Mr. Chief Justice. And may it please

the Court.

I have two major points that I would like to make on behalf of the Respondents.

QUESTION: Would you raise your voice a little, Mr. Mittel?

MR. MITTEL: I will.

The first of those major points is that over many years, this Court has given all of the Civil Rights Statutes a broad reading.

The second major point deals with the plain meaning of Section 1983 as it now reads.

To turn first to what this Court has done in the United States v Price and in Griffin v Breckenridge, it said quite clearly that all of the Reconstruction Civil Rights Statutes were to be read broadly and literally; and following that instruction, this Court has over the last 12 years reached a number of decisions in Section 1983, Social Security Act cases. And in each of those cases, there was before this Court a claim for relief which had to turn on Section 1983.

Two of those cases bear particular note. The first is Rosado v Wyman; and the second is Edelman v Jordan. Now Rosado is important because by the time that case came to this Court, there was no constitutional claim of any kind remaining in the case. In fact, the constitutional

claim had dropped out several years previously in the District Court; and in fact, even prior to a remand, if that is the proper word, from the three-judge court to Judge Weinstein. This Court reached and decided the statutory claim; and the only possible cause of action that the Plaintiff in that case could have asserted was based on Section 1983.

What had been done in Rosado was later specifically recognized and accepted in Edelman; now be it in dicta, Edelman was of course about retroactive benefits. But in the course of that opinion, both the majority and one of the dissenting opinions specifically recognize what had happened in Rosado and specifically stated that the cause of action that was before this Court was the statutory 1983 cause of action.

The second point is that, as our brief points out, this is a case for the application of the traditional primary rule of statutory construction. One looks to the plain meaning of the statute and applies it unless there is some very clear and convincing reason initially on the face of the statute to not do so; and in this case, looking at this statute, there is no ambiguity on its face of any kind that permits the insertion of modifying or limiting words.

I should point out here that there are, of course, a range of cases involving federal statutes where Section 1983 actions cannot be brought.

First and foremost, there must be defendants who are acting under color of state law.

Second Congress can, either expressly or impliedly, preclude federal courts from entertaining Section 1983 statutory causes of action. We discuss that point in some more detail in footnote 12 of our brief.

But once those two major exceptions fall by the wayside, we are then left with a very clear, very plain, very unambiguous statute.

QUESTION: Well, except there still remains, unless I've missed something you've said, one more issue, it seems to me.

Even if you are correct that 1983 embraces claims of violations of the Social Security Act, and even if you are correct that such claims under 1983 can be brought in state courts which have concurrent jurisdiction, there still remains the question, does there not, of whether or not Section 1988, which was enacted in response to the Alyeska opinion in this Court which had to do only with the practice of federal courts in awarding attorney's fees, is applicable at all to attorney's fees in state courts.

Even assuming that the first two questions are answered: yes; that you're correct.

MR. MITTEL: The answer to --

QUESTION: The 1983 action can be brought in a state court; that a 1983 action embraces a violation of the

Social Security Act; but nonetheless, the question remains: does 1988 apply to the award of attorney's fees to the prevailing party in a state court, by contrast to the federal court.

MR. MITTEL: The answer to that question, your honor, is: yes.

QUESTION: That's an issue though. Isn't it?

MR. MITTEL: It certainly is.

QUESTION: I mean, that's a remaining issue; even if you're right on the first two.

MR. MITTEL: That's correct. That is one of the questions that the Maine Supreme Judicial Court reached and resolved unanimously.

QUESTION: I know that. But the case is here now.

MR. MITTEL: Oh, yes.

QUESTION: And that is one of the issues. Is it not?

MR. MITTEL: No doubt.

And the way I would address that issue is by saying several things.

First, again looking to the plain language of the statute, it applies in all courts.

QUESTION: But it is true as an historic matter of fact, is it not, that the enactment of 1988 was in direct response to this Court's decision in the Alyeska case.

MR. MITTEL: Oh, yes.

QUESTION: Then it's really true that the Alyeska case had to do only with federal courts, is it not?

MR. MITTEL: Except for footnote 31, I believe that's correct.

QUESTION: And what did footnote 31 say?

MR. MITTEL: Footnote 31 addressed the question of whether or not a state attorney's fee provision, statutory or otherwise, was substantive; and would be applied by federal court in a diversity action.

There is also --

QUESTION: But it's a little bit different --

MR. MITTEL: Yes, I realize that.

But in terms of looking to whether the fees act applies in state courts, one can, if one wishes then, look beyond the plain meaning of the act itself; and look here to a very clear and very unambiguous legislative history.

QUESTION: Let me get you back a moment, if I may, to the first part of your answer in my Brother Stewart's question.

Your Supreme Judicial Court rejected in terms, did it not, that attorney's fees were recoverable under state law for this kind of thing. It said it had to be 1988 or nothing, in Part I of its opinion, because the State of Maine hadn't waived its sovereign immunity.

MR. MITTEL: No question about that, your honor.

The history of this statute though is also plain; and there are several indications which we've cited in our brief, one speech by Father Drinan, who was here this morning, indicating that the act was to apply in both state and federal courts; and this court has held in Sullivan that it does apply in state courts although that decision focused on the first sentence of Section 1988 which has been in place since the revised statutes were enacted in 1874.

It stands to reason though --

QUESTION: The first sentence is the one that borrows from state law.

MR. MITTEL: Yes. The long sentence explaining what remedies are to be applied.

QUESTION: The Sullivan opinion was rendered before the enactment of the present 1988. Was it not?

MR. MITTEL: That's correct.

Well, the present 1988 is nothing but an additional sentence attached to the original Act.

And the other reason though to look to applying the second sentence, the fees act, if you will, in state court, is that in many states, Maine being one, it's a long, long way to the federal court. For people in the northern part of the State -- if people are to retain counsel of their choosing and to bring cases in a straightforward statutory fashion, they should be able to do that in state

court. They should not have to if they don't want to, go to federal court.

And while we believe that in this case a constitutional claim may very well have been made and may very well have passed the Hagans test, there seemed no reason to do that.

QUESTION: Of course, we've rejected the same argument when made from an opposite side in the sense that you must have counsel for a person charged with a misdemeanor who may get a prison sentence in a very large state where there may be 12 or 14 counties and it would be a very great burden on the state to supply counsel or a magistrate or that sort of thing. We've said: that doesn't make any difference; that if the right is there, it's there.

And I would think that by inverse logic, the same is true here.

MR. MITTEL: The problem, I suppose, in terms of focusing on the right is that in Chapman, this Court has indicated that the Federal District Court may not have jurisdiction over many of these cases; and the only point, I'm trying to make is that rather than in some cases go without and in other cases strain to resolve the problem that one is left with after Chapman and with Hagans, why not just turn to the Superior Court:

QUESTION: In some of the Far Western States,

thinly populated, the prosecution's option is frequently to just go without in prosecuting a misdemeanor case where they might want a prison term of 6 months or one month or whatever it may be; simply because there are just not enough resources there.

MR. MITTEL: I understand that.

QUESTION: Mr. Mittel, you mentioned in some of these cases, there'd be no federal jurisdiction. I take it there'd be no federal jurisdiction in this case. This very case.

MR. MITTEL: Well, if we had filed the complaint, as we have it here, there certainly would not be. What I suggested --

QUESTION: You suggested you might have drafted a constitutional claim of some kind.

MR. MITTEL: No question.

QUESTION: But, no [Inaudible.] restriction to this appeal?

MR. MITTEL: This was a certiorari petition.

QUESTION: And we granted certiorari?

MR. MITTEL: Yes, sir.

QUESTION: This clearly isn't a final judgment. Is it?

MR. MITTEL: Well, let me say this: we are not certain. We think it is, and I can tell you why.

QUESTION: Attorney's fees may or may not be

awarded. We don't know.

MR. MITTEL: If you look at the Act and you look at the history of the Act and you look at the way it has been interpreted by a number of Circuit Courts, you see that while indeed the language of the Supreme Judicial Court leaves open, quote/unquote, the discretion of the Superior Court, I do not see how that Court could exercise its discretion in any fashion, other than attorney's fees.

QUESTION: Well, you don't see how; but other people might.

MR. MITTEL: Well, I understand that.

But secondly, this case is not unlike any other case where, after the judgment here, there will be, seeing things my way for a moment, nothing left to do but to award costs.

QUESTION: Well, if the trial judge does on remand award costs, the State might bring the question, depending on how we deal with it here; might bring the underlying question back here.

MR. MITTEL: They might. I'm not sure that under state law they can. That's one of the exceptions to the final judgment rule which is somewhat riddled with exceptions that this Court talks about in Cox Broadcasting v Cohen.

There's a Maine case that may raise some doubts as

to the ability to do that.

QUESTION: The rule is they're all exceptions now, isn't it?

MR. MITTEL: Just about. I mean, as I read Cox Broadcasting and especially footnote 7, I'm not sure I want to say it's left to the unreviewable discretion of this Court; but it is. And there seems to be no real hard, fast rule in any direction.

There's another point that I think that I might make about the statute, and the fees act in particular; and that is: contrary to the assertion that the State is making somewhat silently, the fees act was enacted not to benefit attorneys, but to benefit the people; and to enable them to obtain counsel and to be able to litigate their valid claims. And that without the fees act, many, many cases involving many, many justifiable claims, will go unremedied.

And that is the purpose of the Act. That's what both the Senate and the House Reports say, and that is what's made clear in the floor debates.

QUESTION: Of course, every law is always enacted in the public interest in the view of Congress that enacts it. Isn't it.

MR. MITTEL: I think that could be stated with some certainty.

QUESTION: I'm sure Congress would so state, if asked.

MR. MITTEL: Yes. No question about it.

QUESTION: And often when unasked.

MR. MITTEL: Probably.

If the Court has no further questions then, the Respondents would only ask that the judgment of the Maine Supreme Judicial Court be affirmed.

Thank you.

CHIEF JUSTICE BURGER: Very well, Mr. Mittel. Do you have anything further, Mr. Smith:

REBUTTAL ARGUMENT OF JAMES EASTMAN SMITH, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SMITH: Very briefly, sir. May it please the Court.

Going to Mr. Justice Stewart's question about the finality of the decision, we would just state that the language of Section 1988: in any action or proceeding to enforce a provision of sections, among them 1983. When the Maine Judicial Supreme Court made that determination on remand that this issue is going to be considered and that the Civil Rights Attorney's Fees Awards Act is applicable in the State action that we believe that the finality to the present action, which was why we brought our writ at the time that we did.

QUESTION: Well, I'm not critical of you for filing a petition, after all, we granted it. But it just

occurred to me that this isn't final; that attorney's fees may never be allowed.

MR. SMITH: As far as the 1983 question goes though, we believe it to be final.

CHIEF JUSTICE BURGER: Thank you, gentlemen. And the case is submitted.

(Whereupon, at 1:28 o'clock, p.m., the Argument was concluded.)

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