IN THE SUPREME COURT OF THE UNITED STATES

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BUCKHANNON BOARD AND CARE :

HOME, INC., ET AL., :

Petitioners :

v. : No. 99-1848

WEST VIRGINIA DEPARTMENT OF :

HEALTH AND HUMAN RESOURCES, :

ET AL. :

- - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, February 27, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:17 a.m.

APPEARANCES:

WEBSTER J. ARCENEAUX, III, ESQ., Charleston, West Virginia; on behalf of the Petitioners.

BETH S. BRINKMANN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

DAVID P. CLEEK, ESQ., Senior Deputy Attorney General, Charleston, West Virginia; on behalf of the Respondents.

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P R O C E E D I N G S

(10:17 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-1848, Buckhannon Board and Care Home v. The West Virginia Department of Health and Human Resources.

Mr. Arceneaux.

ORAL ARGUMENT OF WEBSTER J. ARCENEAUX, III

ON BEHALF OF THE PETITIONERS

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

This case presents a simple issue, whether the Fourth Circuit's decision in this case that a party is not a prevailing party unless they obtain a judgment, consent decree, or settlement is in accordance with this Court's prior decisions and the intent of Congress in establishing the term, prevailing party, in the Civil Rights Attorneys' Fees Award Act of 1976, commonly referred to as section 1988, and the two statutes at issue in this case, the Fair Housing Amendments Act, and the Americans With Disabilities Act.

When Congress enacted all three of these fee-shifting statutes, it did not condition an award of fees only upon the result of a judgment, consent decree, or settlement. In fact, nowhere in these --

QUESTION: Well, the language of the statutes in each case, does it not, refers to prevailing party?

MR. ARCENEAUX: Yes, Your Honor, it does.

QUESTION: So we do have to be satisfied that the person seeking fees is a prevailing party.

MR. ARCENEAUX: Absolutely.

QUESTION: And how is that to be determined where the case is dismissed as moot?

MR. ARCENEAUX: Well, I think in that situation, we have a declaration that the case is moot, so -- in this particular case we had that as well -- and then we can look and see under what is known as the catalyst theory, whether that lawsuit caused the defendant to act to render that suit moot.

QUESTION: I would have thought the language, prevailing party, suggests something else, that there ought to be some nominal damages, or some judgment, or some indication that the person seeking fees did, in fact, prevail in a judicial proceeding.

MR. ARCENEAUX: If we look just to the word, prevail, I believe it is a broad word, and this is my point. Congress didn't say prevail by judgment, consent decree, or settlement, Congress said prevail, and I believe that --

QUESTION: But the term, prevailing party, has a

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pretty well-established meaning in the law, doesn't it? It means you prevailed by getting something in a lawsuit.

MR. ARCENEAUX: Yes, and I think that's a fine way to put it. If I sued someone for damages I think is an easy way to put it, if I sue them for $50,000, and they hand me $50,000 and say, go dismiss this lawsuit, I don't have a judgment, I don't have a consent decree, I don't have a settlement, but I have the $50,000.

QUESTION: But that's not the way lawsuits are ordinarily settled. If someone sues you for $50,000, you will probably pay it, but you'll get a stipulation and order dismissing the thing. It will be a matter of court record --

MR. ARCENEAUX: That's correct.

QUESTION: -- that it was dismissed not because of mootness but because you're paid.

MR. ARCENEAUX: That's right, but -- and that's the same thing in this situation, where, when I sue somebody and I say, don't shut down my home, don't throw the residents out of the home, and they say, okay, we won't do that, now, I don't have a judgment, consent decree, or settlement, but I have the same effect, the same result as if they had handed me the $50,000.

QUESTION: But that's not what the statute says. It says you have to be a prevailing party, and I think

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prevailing obviously means prevailing in the lawsuit, not -- it doesn't say the happy party, you know, the party who goes away smiling. It says the prevailing party. I think it means prevailing in the litigation, and to prevail in the litigation there has to be something that ties the result to the litigation, it seems to me --

MR. ARCENEAUX: And --

QUESTION: -- other than simply, it came out the way the plaintiff would have liked.

MR. ARCENEAUX: And that is one of the factors that is looked at, whether there is a causal relationship between --

QUESTION: But you would have to establish it. It's not just a factor. You would have to show --

MR. ARCENEAUX: Absolutely.

QUESTION: -- that the litigation caused the result, caused, in this case, the homes to remain open, even though they didn't have the --

MR. ARCENEAUX: Absolutely, and that is what we intend to do. We were not given our day in court, so to speak, because we were not allowed to proceed with any factual development of that, but we think that we have a very strong case, and we will absolutely be able to establish the causal relationship.

QUESTION: All right, suppose I sue my next-

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door neighbor for making loud music at night and keeping me awake, all right. He turns off the music, and I drop the lawsuit. Why am I the prevailing party? I mean, we both -- everybody agrees on the facts. I got exactly what I wanted, but also there is no piece of paper in the suit that says anything. All it says is, the suit is dropped.

Now, I think the Chief Justice and Justice O'Connor and I wanted to know why that's a prevailing party within the meaning of the word prevailing in this statute. Nobody doubts you got what you wanted, but why is that sufficient?

MR. ARCENEAUX: When you look to the prior decisions of this Court, the definition of prevailing party under the cases has been, they personally achieve some of the benefits they sought in bringing the suit. Their lawsuit completely changed the defendant's behavior towards the plaintiffs, and in this case and in your example --

QUESTION: And those are cases in which there was no piece of paper saying anything?

MR. ARCENEAUX: Sometimes there are settlement agreements --

QUESTION: No, but the question is, is there a case which, the person got just what he wanted, but there is no piece of paper saying anything in the lawsuit. All

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there is, is that the plaintiff dropped it.

MR. ARCENEAUX: Right. I mean, this is a case of first impression. There's not been a case from this Court.

QUESTION: All right.

MR. ARCENEAUX: There are obviously numerous cases in the courts of appeals.

QUESTION: Then we're back to my question. Why, given this statute, is the word prevailing party here to be interpreted to mean you are a prevailing party, even though there is no piece of paper saying anything in the lawsuit --

MR. ARCENEAUX: Right.

QUESTION: -- but for a piece of paper that says, I terminate the lawsuit?

MR. ARCENEAUX: Two reasons.

QUESTION: That's the basic question --

MR. ARCENEAUX: Yes.

QUESTION: -- in the case, and I want to hear your answer.

MR. ARCENEAUX: Two reasons. First, because I think it's consistent with the meaning of the word, prevail, which can also mean persuade, induce, or influence another to act, and second, because I believe that's what Congress intended.

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When one looks at the House report, for instance, it says similarly, after a complaint is filed, the defendant might voluntarily cease the unlawful practice. A court might still award fees, even though it may conclude as a matter of equity that no formal relief such as injunction is needed, and the legislature then cites to the decision of Parham v. Southwestern Bell Telephone Company.

QUESTION: I'm sure every Member of Congress read that case. They ran to their library and looked up that case. You really think that anybody who voted for that bill had the slightest idea what that case held?

MR. ARCENEAUX: I think that that --

QUESTION: How many people do you think knew what that case held? Two? You think -- I think two would be an extravagant number.

MR. ARCENEAUX: I think that it is consistent --

QUESTION: There is a presumption that we follow that the Congresspeople know what the law is, isn't there?

MR. ARCENEAUX: Yes.

QUESTION: We said that in some of our opinions.

MR. ARCENEAUX: Yes.

QUESTION: Cannon, for example.

MR. ARCENEAUX: Yes, and I think that had they --

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QUESTION: Do they know what the court of appeals law is? They know what the court of -- lower courts have been holding as opposed to what this Court has held?

QUESTION: The Marr case was a Supreme Court case, wasn't it?

MR. ARCENEAUX: Yes, and this was section 1988. where this Court had said in Alyeska that we were not going to have attorney's fee award under what was called the Private Attorney General, and so Congress intended to have these type of civil rights lawsuits filed, and they wanted to encourage these type of lawsuits. That's what the language says, and this is what is under the discussion of prevailing party, and so the issue is, is that what Congress intended, we think that you can look to the legislative history and to the plain meaning of the terms, prevailing party, and say that yes, that is what is intended here.

QUESTION: Mr. Arceneaux, in the event of ambiguity, I am reluctant to read a term in a way that's going to get courts into areas that it's very difficult for them to maneuver in.

In the present case, you want the opportunity to demonstrate below that an act of legislation, right -- I mean, what happened was that the law was changed.

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MR. ARCENEAUX: Yes.

QUESTION: And you want to show that the legislators who change the law were motivated by this lawsuit. This is a very peculiar area for courts to be functioning in, to try to figure out what prompted legislators to enact a particular law.

I mean, would it be enough to be a catalyst, for example, if one legislator found out about this lawsuit and said, why, that's outrageous, that the law should be that way. In other words, they weren't worried about losing money. All they were worried about is, all the lawsuit did was bring to their attention a disposition that seemed to them outrageous, and so they said, let's change the law. Is that enough to be a catalyst?

MR. ARCENEAUX: I do not think that we have to make that inquiry, Your Honor. I think that while --

QUESTION: Well, I'm happy to hear that.

MR. ARCENEAUX: Yes.

QUESTION: But I'd like to know why.

MR. ARCENEAUX: And I will tell you, Your Honor, because West Virginia is unique. It is unlike the Federal Government or most States in that administrative agencies cannot promulgate regulations. We don't think that the inquiry in this case, the facts rule investigation that we're trying to establish here, will

involve the legislature whatsoever. Certainly we have no intent, as one of the amici suggests, that we need to go out and depose legislators. This is not going to be an inquiry about a legislative activity.

QUESTION: What will you do? How will you prove it?

MR. ARCENEAUX: We think that we have an overwhelmingly strong case, because what happened here, we took the deposition of the State fire marshal in March of 1997. He said that it was absolutely impossible for the State of West Virginia to adopt this rule. Six to eight weeks later, he changed his mind. He made the decision to promulgate the rules and change the rules as we were requesting in the lawsuit. What happened in that interim? We took the deposition of Dr. Bernard Levin, who was the expert who explained how the States had all abandoned the position that he was taking.

QUESTION: But he had no authority to change the rules. It had to be done by the legislature.

MR. ARCENEAUX: But he had to initiate the process.

QUESTION: You said, I thought, that you wouldn't have to deal with the legislature at all, but here it had to be passed by the legislature.

MR. ARCENEAUX: That's correct, but we don't

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believe that in looking at the causation analysis we need to look at what the legislature did. It is not the legislature that made the decision to change the rule.

QUESTION: Well, I'm amazed that you say that. I would have thought that anything the legislature enacted, you would say the legislature made a decision to enact it. Do you think not?

MR. ARCENEAUX: Clearly they did, Your Honor.

QUESTION: Okay, well, how do you get from the fire marshal's change of mind to the legislature's legislation? What's the interim step?

MR. ARCENEAUX: The unique process of the rulemaking process that's in West Virginia. These rules are just all batched. Hundreds of agencies all --

QUESTION: Just tell me what -- tell us what happened in this case. What happened? What did the fire marshal do?

MR. ARCENEAUX: And all of the exhibits that are attached to our motion for attorney's fees has this all documented in it.

QUESTION: Okay, but we want to know here and now.

MR. ARCENEAUX: Yes. The fire marshal changed his mind, made a decision to promulgate these new rules. He has to go to the fire commission and then the fire

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commission presents it to the legislature.

QUESTION: Well, is that what he did?

MR. ARCENEAUX: Yes.

QUESTION: Did he go to the fire commission and said, I want to change these rules?

MR. ARCENEAUX: Yes.

QUESTION: And the fire commission says, we agree, we will change these rules?

MR. ARCENEAUX: Yes.

QUESTION: And the fire commission then did what?

MR. ARCENEAUX: Then the fire commission has to promulgate the new rules, and then they submit them to the legislature.

QUESTION: And what --

MR. ARCENEAUX: There's a special committee.

QUESTION: Was the legislation that was passed in effect the verbatim embodiment of what the fire commission proposed?

MR. ARCENEAUX: I believe that to be the case, and that is why I referred to the legislature in this process as merely a rubber stamp.

QUESTION: Now, do you think the fire commissioner changed his mind because he was afraid of losing the lawsuit, or because he was persuaded that it

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was a good idea?

MR. ARCENEAUX: We think he was motivated by the lawsuit.

QUESTION: Can you prove that? Is there any possible way of proving it?

MR. ARCENEAUX: Well, as some of the courts have noted -- I don't know what is in his mind.

QUESTION: Exactly. That's the problem.

MR. ARCENEAUX: Yes.

QUESTION: What if your lawsuit -- what if he had nothing to do with the lawsuit. It may be against his agency, but he happens to read about the lawsuit in the paper and he says, this -- what, this is an outrageous thing. You mean, that's what our rules say? And then, motivated by your lawsuit, okay, he does the same thing you said he's done here and gets the rule changed. Does that make your case a catalyst? I guess it does, in a sense.

MR. ARCENEAUX: Well, we have two distinctions that I would draw. One is, he knew about the case, and he was deposed in the case. He was active. He attended every deposition, so it's not like he's sitting back in his office, okay, and the -- I've lost my second point, but also there is this intervening deposition of our expert that he's in attendance and he hears what they have

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to say.

Unlike the regular --

QUESTION: Instead of reading it in the paper. I mean, what difference would that -- I don't see what difference it makes.

MR. ARCENEAUX: Well, most of the cases that I've seen where they talk about the legislature -- and there are some cases that are simple. Some cases they have found, and it's right there in the legislative history, they enacted this provision -- Paris is an example, where they say in the legislative history, we don't have documented legislative history. What we're saying is, there should not be a per se rule just when the legislature acts that we cannot then present our evidence.

The second thing is, unlike a lot of the legislative cases, when they talk about the legislative cases they talk about intervening causation, that here is some third party that has taken the lawsuit away, the legislature has acted.

We don't believe there's any intervening causation here, because we were suing the fire commission and the fire marshal, and they're the ones that made the decision to change this.

QUESTION: Do you rely at all on your warding off the cease and desist order?

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MR. ARCENEAUX: Yes.

QUESTION: Which, if you had done nothing would have surely followed, and then you would have been the object of an adverse judgment.

MR. ARCENEAUX: Yes, and we believe that we prevailed. We were under cease and desist orders, and the homes were going to be shut down, and all the residents were going to be thrown out, and we presented expert testimony -- these were clients that were 102 years old, and that they could suffer transfer trauma just by the very act of them being moved into another home. We went in on a TRO. We were able to obtain an agreed order. That agreed order remained in place for the duration of the litigation, and no one was ever thrown out of the home. The homes were never shut down.

QUESTION: Well, my goodness, you don't become a prevailing party by getting a preliminary order just leaving the status quo in effect while the case is being adjudicated. I mean, is that all it takes to prevail?

MR. ARCENEAUX: We think that it is part. We understand that it was only a interim relief.

QUESTION: Does it matter to your case whether the fire -- whatever it is, the fire marshal's judgment, or for that matter the legislature's judgment, was based on the fact that they thought the law was outrageous, as

distinct from the fact that they may not have wanted to take a hit by losing this case? Does it matter one way or the other?

MR. ARCENEAUX: Well, we think that our lawsuit brought that to their attention.

QUESTION: But that's not my question. Does it matter, on your theory --

MR. ARCENEAUX: I think we have to show --

QUESTION: -- whether they simply said, we're suddenly aware of the law and we think it's bad and it ought to be changed, or on the other hand they say, we think the law is great, but we don't want to lose this lawsuit, so we're going to change the law? Does it matter to your case?

MR. ARCENEAUX: I think that it would relate to the causal relationship. We do recognize that we would have to establish a causal relationship, so in your one we may not be able to do so.

QUESTION: But why isn't --

MR. ARCENEAUX: Your Honor --

QUESTION: Why isn't -- each case why isn't there a causal relationship? That's what I don't understand. I think he's trying to help you, in other words. I don't think you realize that.

QUESTION: I really was.

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(Laughter.)

MR. ARCENEAUX: Maybe I'm --

QUESTION: I'm with you. I think he was trying to hurt you.

(Laughter.)

MR. ARCENEAUX: Maybe I was just distracted by the light. I was going to --

QUESTION: Isn't there causation in either case?

MR. ARCENEAUX: Yes.

QUESTION: The one cause, the lawsuit brings it to the attention, but for the lawsuit it would not have come to the attention, it wouldn't have been changed.

In the other case, there's a different chain of causation, but it's still the same causation. They say, in order to avoid losing, we get rid of the lawsuit. Is causation in each case?

MR. ARCENEAUX: Yes, I agree.

QUESTION: Then why not, just reading about it in the papers, the legislators read about this lawsuit, and but for this lawsuit they would never have known about this outrageous law, and that's enough, right?

MR. ARCENEAUX: Yes. We think --

QUESTION: The fire marshal had nothing to do with it. He never ran to the legislature. They just read about it in the paper.

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MR. ARCENEAUX: That would be a different case.

QUESTION: I know it would be a different case, but why would it be different as far as your claim is concerned?

MR. ARCENEAUX: We think as long as we have the opportunity to establish causation we should be able to do so.

QUESTION: And that's causation. They would not have known about this thing except, because of your lawsuit, it gets in the papers. They read about it, they think, gee, that's a stupid law, let's change it.

MR. ARCENEAUX: Your Honor, may I reserve the remainder of my time for rebuttal?

QUESTION: Very well, Mr. Arceneaux.

Ms. Brinkmann, we'll hear from you.

ORAL ARGUMENT OF BETH S. BRINKMANN

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

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

The categorical rule adopted by the court of appeals that allows fees only in a case where there is a judgment, consent decree, or settlement, is contrary to the text, history, and purpose of the civil rights fee-shifting statutes. That rule would deny fees in the most

meritorious case that directly obtains all of the relief sought in that case if the defendant on the eve of trial complies with the demand without a court order.

QUESTION: In this case, was the matter moot as a matter of Article III jurisdiction, so the judge had no choice, or would the judge have had some discretion to retain jurisdiction to enter some sort of declaratory relief?

MS. BRINKMANN: It appears, Your Honor, that it was, in fact, moot because of a legislative change under this Court's standards in Laidlaw and City of Mesquite. There's such a minuscule likelihood that that law would be changed back.

The plaintiff did contest mootness at the trial court level --

QUESTION: I take it the usual rule is that it must be absolutely clear that the alleged wrongful conduct cannot recur before the case can be dismissed, is that the way the rule works?

MS. BRINKMANN: Yes, for mootness, Your Honor. That's under the Laidlaw case from last term and also the City of Mesquite case, that's correct.

QUESTION: Could the plaintiff here have asked for nominal damages in order to keep the case alive?

MS. BRINKMANN: No, Your Honor, because this is

Ex parte Young case against State officials enforcing a law.

QUESTION: Oh, okay.

MS. BRINKMANN: That's often the situation. Also, there are several statutes that we cite in a footnote of our brief that limit relief in civil rights cases to injunctive relief, and those are often the most important kinds of cases that the fee-shifting statutes are intended to get at, where a plaintiff has a meritorious claim for injunctive relief to enforce a civil rights law, but does not have the money to pay an attorney, and no possibility of a damages relief that could perhaps pay those attorneys' fees.

The court of appeals' categorical rule undermines that.

QUESTION: Ms. Brinkmann, what if I were a member of the West Virginia legislature and I know this suit has been pending for a long time, and they have hired very expensive lawyers to sue the State, there's a lot of money involved, and I would really -- I think this is a dumb law that's on the books, and I would really like to change that law, but then the fire marshal comes to me and he says, you know, if you change that law, the State is going to be liable for millions of dollars in attorneys' fees, because it will be held that the suit was the

catalyst for the change, and we'll have to pay all this money.

Why would we want to distort the legislative process in West Virginia by making a change in the law that the members of the legislature think desirable costly because of the existence of a lawsuit, even though the State believes it can win the lawsuit?

MS. BRINKMANN: A couple of --

QUESTION: They don't think they're going to lose. They just say, if we change the law because it's a bad law, we're going to have to pay all this money in attorneys' fees.

MS. BRINKMANN: A couple of responses, Your Honor. First of all, I just want to make clear that, of course, the catalyst rule does not just apply to legislative change, and also a point I want to get to later that it also applies in settlements and consent decree cases, but talking about the application of that to a situation in which there is a legislative change that would -- the legislature would want to make as a matter of policy, there are several approaches that the defendant has available.

First of all, the defendant has it within his control, if they make that decision promptly, to avoid the build-up of attorneys' fees. Indeed, that's what often

happens in Government cases. The most meritorious of claim may come in. There may be a settlement within a week.

QUESTION: I understand.

MS. BRINKMANN: In addition to that, the defendant is able to defend against the causation and the merits issue in this type of litigation. For example, if the legislature has another reason, they were already considering it, policy reasons, the plaintiff will not be able to establish causation.

QUESTION: Do you have to show, in order to establish the causation you're talking about, that the legislature made the change because it knew it would lose the lawsuit? Is that a condition, you have to show that the legislature made the change because it realized that its law was contrary to Federal law?

MS. BRINKMANN: No. You would have to show that the claim was not meritless. Our proposition is --

QUESTION: Ah, well --

MS. BRINKMANN: -- that you would have to show that the merit -- that --

QUESTION: So they could have changed it for a reason that has nothing to do with their -- with the lawsuit, except that the lawsuit brought the matter to their attention, even though they weren't worried about

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losing the lawsuit.

MS. BRINKMANN: That would not --

QUESTION: They knew they could win the lawsuit.

MS. BRINKMANN: That would not establish the causation requirement, and I want to --

QUESTION: Wait, that -- it --

QUESTION: Why wouldn't it, Ms. Brinkmann?

MS. BRINKMANN: Because it would not establish that that change was made as a result of the lawsuit.

There's two aspects of the causation, Mr. Chief Justice. There's the causation as a matter of fact, but then there's also the question more of a proximate causation, that that change has to be because of the claim, not because of the nuisance value of the lawsuit, for example. That's why there is -- the lower courts have always applied the type of frivolousness standard, and we suggest it should be a standard where you state a claim upon which relief could be granted.

And if I could, Your Honor, I want to really make the point clear that that is the same standard the courts currently, and have for a long time, applied to cases involving consent decrees and settlements. There's no reason to treat this case differently because --

QUESTION: Well, except that the statute says, prevailing party, and it's quite logical, I think, to read

the term, prevailing party, as meaning that you should have something to show from the lawsuit itself.

MS. BRINKMANN: And you do have something to show in these cases. You obtained the relief that you sought. In this particular case, you have a law to enforce, a regulation to enforce --

QUESTION: Yes, but it's not a part of any decree.

MS. BRINKMANN: No, Your Honor, and in a settlement, it is very analogous to a settlement and a consent decree.

QUESTION: Yes, but except that a typical settlement, you'll get some document from the court.

MS. BRINKMANN: But it's simply a contract, Your Honor, just as the law here, a separate lawsuit would have to be brought to enforce that, in fact, under this Court's opinion in Kincannon, it's not even clear there would be a Federal cause of action to enforce that.

Moreover, even --

QUESTION: If you get a settlement approved by the court, the court will enforce that settlement, won't it?

MS. BRINKMANN: As your opinion explains --

QUESTION: So you really have to prevail. You have some judicial power behind that contract. It's just

a contract, but this is one that the Court is behind.

MS. BRINKMANN: But, Your Honor, it depends. If the court incorporates that, otherwise you just have a contract. You have to go prove the validity of that contract. Here, they have a cease and desist order that was pending against them before the lawsuit that can no longer be enforced. They have a statute and a regulation they can enforce.

I also want to point out that in both the consent decree and settlement situations, there is no requirement of a determination of any violation of law, any determination of liability. In fact, as this Court repeatedly has recognized, that's one of the motivations for settlements, consent decrees, to be able to resolve the case without an admission of liability.

QUESTION: Ms. Brinkmann, correct me if I'm wrong, I think there's a difference between your position and Mr. Arceneaux's. As I understood his argument, it would be enough if the legislature learned about this bad law through the lawsuit, and you insist that the legislature must have changed the law because it was worried about losing the lawsuit?

MS. BRINKMANN: No, Your Honor, I'm sorry.

QUESTION: No?

MS. BRINKMANN: I must have misspoken.

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QUESTION: Okay.

MS. BRINKMANN: I thought your question to me was a situation in which there were other policy reasons that the legislature had taken into account to change the law. If the lawsuit is a factual causation for the relief, the relief is something that the plaintiff sought, and if the claim is not meritless, that does meet the standard for --

QUESTION: Even if the legislature just read about it in the newspapers?

MS. BRINKMANN: If it --

QUESTION: That's a factual predicate. That's how they learned about it, and it was not a meritless lawsuit, and that's all that's needed?

MS. BRINKMANN: If the lawsuit brought that about. I have to emphasize --

QUESTION: We'd have to read the Palzgraf case in order for this all to work out?

(Laughter.)

MS. BRINKMANN: Proximate causation does come to mind, Your Honor, when we talk about the fact that it cannot be a frivolous or a meritless claim --

QUESTION: But it sounds like but-for causation, not proximate cause, that you're talking about.

MS. BRINKMANN: Well, I think, Your Honor,

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that --

QUESTION: Why wouldn't that enable an astute lawyer to kind of spot administrative or legislative changes in the offing and file some suit so they can run in and get some kind of attorney's fees?

MS. BRINKMANN: Your Honor, the lower courts have rejected just those types of claims --

QUESTION: You don't object to tough causation requirements?

MS. BRINKMANN: No, Your Honor.

QUESTION: All right.

MS. BRINKMANN: We believe that that's the meaning of the statute --

QUESTION: And you respect Justice Scalia's practical point, which I thought was correct, isn't it? It's a correct point that sometimes the legislature would be in just the situation he mentioned. I wonder if that's neatly counterbalanced by what I would think would be a worse problem the other way, namely, the plaintiff has to fight to the last ditch, because if -- he can never settle, because if he doesn't push his most unreasonable claim, he won't get any attorneys' fees.

MS. BRINKMANN: Exactly, Your Honor.

QUESTION: That also is a practical problem, isn't it?

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MS. BRINKMANN: Exactly, Your Honor.

QUESTION: Is it a practical problem also for the legislature to be caught in what I'd call a formal settlement, with a Government department? I've seen a few of those, and if the only way you get attorneys' fees is to force the court to enter some kind of complex settlement decree, is it clear what happens later in State government? I mean, I've seen an awful lot where the legislature feels bound by a settlement decree of private parties, with a separate -- do you see my problem? I don't know if it's a practical problem, but I'd like you to comment on it.

MS. BRINKMANN: I'm not sure I understand your question.

QUESTION: If you recover only if a there's a piece of paper called, settlement, that means there are words on a piece of paper --

MS. BRINKMANN: Yes.

QUESTION: -- filed in court, those words can sometimes extend to thousands of pages, and legislatures and Governments don't like to be subject to such decrees.

MS. BRINKMANN: That's absolutely correct, and this is the most efficient -- may I respond to that --

QUESTION: No, I think that's enough, Ms. Brinkmann.

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MS. BRINKMANN: Thank you, Your Honor.

QUESTION: We'll hear from you, Mr. Cleek.

ORAL ARGUMENT OF DAVID P. CLEEK

ON BEHALF OF THE RESPONDENTS

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

Let me say at the outset I want to respond to a couple of the remarks that have been made in the arguments by counsel for the United States and also for the petitioner's counsel. It was an inaccuracy, and I'm certain an inadvertent inaccuracy, by counsel that this is an Ex parte Young situation where you only have injunctive relief requested. There was actually a demand in this case for punitive damages and compensatory damages, and that claim was voluntarily dropped by the plaintiff.

Now, in response to Justice Kennedy's question --

QUESTION: May I just ask for a clarification? I thought that to the extent that the action was against the State, it couldn't be brought, you couldn't get damages. The only thing you could get against the State was injunctive relief.

MR. CLEEK: That's right. The damage claims would have been against the individuals in their personal capacities.

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QUESTION: And is -- that would be rather strange, wouldn't it, to say these officials, who were clearly acting in their official capacity in having a fire code and a cease and desist order, that they were doing something in their personal capacities?

MR. CLEEK: I believe, Your Honor, that that's the only way a damage claim could have been returned in this case, in view of the rule of the Eleventh Amendment, and nonetheless those claims were made, punitive and compensatory damage claims were made in the original complaint and the amended complaint.

I should also point out to the Court that, with regard to the issue of the --

QUESTION: And on what ground were they dismissed?

MR. CLEEK: They were dismissed by a voluntary action of the plaintiff. I don't know the motivation for that.

QUESTION: You hadn't put in a defense to it?

MR. CLEEK: To the damage claims?

QUESTION: Yes.

MR. CLEEK: Those had not been addressed, Your Honor. As a matter of fact, as I recall, with regard to the discovery in this case, the only people who had been deposed were two persons from the fire commission, the

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fire marshal and an assistant, and some experts.

QUESTION: I mean, an answer. I mean, you said they made a complaint that included a request for punitive damages and compensatory damages --

MR. CLEEK: Yes, Your Honor.

QUESTION: -- against the defendants. Defendants put an answer in --

MR. CLEEK: Yes, ma'am.

QUESTION: -- to that claim?

MR. CLEEK: Yes, Your Honor.

QUESTION: And what was the answer?

MR. CLEEK: We denied that there was -- it was a denial that there were any damages due.

QUESTION: On what ground, because this was a claim about State action.

MR. CLEEK: There was an Eleventh Amendment defense asserted, but with regard to those damage claims, I assumed, from reading the complaint, that they were against individuals in their personal capacity, otherwise they couldn't be returnable against the State.

QUESTION: I don't want to deflect you on this, but to the extent that they were seeking injunctive relief it was a pure Ex parte Young case?

MR. CLEEK: Yes, Your Honor, that's correct, and let me respond for a moment about the issue about the

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intrusion into legislative prerogative here that this catalyst theory may engender.

Mr. Arceneaux, the petitioner's counsel, on page 44 and 45 of the initial brief in this case, sets out that if he is entitled to review in front of the district court, some theory under the catalyst theory that he's -- he motivated by his lawsuit the State to take some voluntary action here, he suggests in his initial brief that the legislative enactment would be part of his inquiry.

In his reply brief, for the first time, he suggests that that's not going to happen, and that it's going to be an agency issue, and the legislature will not be addressed. For the first time in the reply brief we also find that petitioners have suggested that they prevailed because they got this agreed order. That's never been a demand to the district court for attorneys' fees in any case.

QUESTION: Mr. Cleek, Mr. Arceneaux was queried extensively about some of the practical problems with his position. What about the practical problems with yours? What do you do about the agency that is really guilty as sin, and they're going to lose this case. They know they're going to lose it, so after dancing the plaintiff around for several years, causing great expense in

attorneys' fees, when the case is about to come up for judgment, they just fold, and revise the regulation that's been under challenge -- don't enter a settlement, they just revise the regulation that's under challenge.

MR. CLEEK: There are two means --

QUESTION: Attorneys' fees payable? No.

MR. CLEEK: Two means to address that issue, Your Honor. Firstly, if the district court decides that the voluntary action that ceases whatever activity there is --

QUESTION: Yes.

MR. CLEEK: -- just enforcement of this regulation, or whatever, does not moot the case, then you can proceed to merits.

QUESTION: Oh, no, it moots the case. That's why they do it. They do it to moot the case.

MR. CLEEK: In that case, that is the one area in which it would appear that unless Congress has approved the catalyst theory, assuming the catalyst theory is the only means of addressing that mootness issue, unless Congress has approved the catalyst theory, there's no relief there.

QUESTION: Okay.

QUESTION: The problem goes one step further, doesn't it, because we have indicated that settlements may

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qualify, a settled case may have a prevailing party within the meaning of the rule, and I would suppose that if you prevail in any case in which the settlement would otherwise give the plaintiff the relief that the plaintiff was seeking, there just won't be any more settlements. There will simply be the voluntary provision of the relief, whether it be affirmative, or the cessation of something the plaintiff is objecting to, and we're not going to get any more settlement cases in instances in which the plaintiff ends up getting what the plaintiff wants.

MR. CLEEK: Your Honor, this Court has recognized in Maher and Farrar as well, and also it's indicated in the legislative history, that settlements constitute prevailing party status.

Now, if your question is, if the State or any governmental body can simply say, we're going to stop, and not enter into an enforceable agreement, is that going to prevent settlements? As a matter of judicial policy, of course, settlements are preferred. Would it cut down on them? There's the possibility, but I think --

QUESTION: Well, it's not going to cut down on settlements in which in effect they in some ways split the difference, but when, in fact, you have a case that traditionally would have resulted in a settlement, there

would be an orderly process, they'd sign a neither party docket marking, whatever, and give it to the judge, the judge would approve it, and the defendant agrees in that kind -- in a settled case to provide exactly what the plaintiff wants, there'll be no more settlements.

So it won't affect the split-the-difference settlement, but it will affect the give-them-what-they-ask-for settlement.

MR. CLEEK: It could affect, in candor, a settlement where a regulation is involved or where a policy is involved, because in that case it is arguable that the governmental body could simply stop the conduct and moot the case.

QUESTION: Well, how many settlements are you aware of that are not split-the-difference settlements? I mean, what advantage is there to entering into a settlement if you're coughing up everything that the plaintiff has asked for?

MR. CLEEK: Your Honor --

QUESTION: In my experience, at least, when you sign a settlement agreement you get something in exchange for that settlement agreement. If you're just going to cut and run, just cut and run and save the attorneys' fees in drafting the settlement agreement.

MR. CLEEK: I have been litigating these cases

for 27 years, even before the Attorneys' Fees Act, and I have not had the occasion to see any cases where they weren't --

QUESTION: Well, isn't this such a case?

QUESTION: You're in such a case.

QUESTION: Isn't this an example of that case?

MR. CLEEK: This is an example of it --

QUESTION: The State totally abandoned its position.

MR. CLEEK: Yes. It's an example of the worst that can happen under a circumstance where there's an argument, at least, to be made by someone who suggests that there was a but-for element of the Government's action that is related to the lawsuit.

This case that you have before you is the kind of case that suggests that there ought to be some other avenue to address a case where some voluntary action moots the case. However, if Congress hasn't provided for that, Justice Stevens, then it doesn't exist and, as the Court pointed out earlier, if you connect these fee-shifting statutes in any action a prevailing party may be entitled to fees, it has to be within the action. We're talking here, Your Honor, about a nonparty who takes the action.

QUESTION: Well, if you say -- if we're at that point, that is, if you agree -- given your answer to

Justice Scalia I think you do agree that if you look at the practicalities, for every bad thing you can find one side you can find a bad thing the other side. We can match example for example. Then you're back to the language.

All right, what about the language? Prevailing party covers their case literally. Then you have Farrar, which favors you. Then you have, I take it, Hewitt, which uses an example of where you could recover where there is, quote, a change in conduct that redresses the plaintiff's grievances, and then we have the statutory legislative history where they define in the House report, prevailing party, they say, a court should still award fees where, after a complaint is filed, a defendant might voluntarily cease the unlawful practice.

All right. Is that it? It seems to me we now have the whole case, and you have to balance the practicalities and decide whether you're going to give credit to that House report. Is that right?

MR. CLEEK: Your Honor, you're quite right. The House report refers to the voluntary cessation of an unlawful act. Obviously, if Government quits a lawful act, even if it's accused -- even if the allegation is it's an improper act, then attorneys' fees would not be appropriate. Where an unlawful act is used there, this

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Court has repeatedly, from Hanrahan, to Hewitt, to Farrar, said -- and Hewitt says this as well, by the use of ordinary language, prevailing party means that you must get some success on the merits. The catalyst theory doesn't provide for that.

QUESTION: What about the House report? I took it that Hewitt and the House report in particular are thinking of the case where a complaint is filed charging X as unlawful, and before there is an adjudication the defendant ceases the unlawful practice, and it says in that instance the Court should still award fees, even though it concludes that no formal relief is necessary.

Now, as I read that report, I thought it certainly favors your opponents, and then the question would be whether this Court should credit it. Now, I'm asking you that because I want to -- you know, I want you to point out why I'm wrong, if I'm wrong.

MR. CLEEK: Your Honor, I think that you're wrong for this reason. The whole background for 1988, and of course we're interpreting the two statutes here for prevailing party considerations based on 1988, the whole background for 1988 is Alyeska. The United States district courts don't have equity power to give attorneys' fees, so Congress must explicitly set out what the parameters of that power is and describe, pick who gets

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it. Congress decided in this case prevailing parties got it.

Now, the House report does refer to informal relief, but the informal relief, Your Honor, could be a settlement. The informal relief could be a consent decree.

QUESTION: Mr. Cleek, I'm not --

QUESTION: Well, in looking -- right in this, where it says voluntarily ceasing, I didn't think it was formal, but then I thought many of these statutes were passed at a time where civil rights violations all over the country were common, and many of the statutes were passed to end widespread violations of civil rights.

Now, with that in the back of my mind, would I think that Congress would want plaintiffs to get their attorneys' fees where they led to the cessation of civil rights violations? I would think yes. But that's a general comment, and I want you to respond to that, to correct me if I'm wrong about that.

MR. CLEEK: All right, sir. Let me respond in this manner. The Hewitt case does suggest, particularly in declaratory judgment case, that a voluntary change that affords the relief might make the person prevailing in that circumstance. I believe that Hewitt has to be read with the other cases that this Court has considered, from

Hanrahan to Hewitt, and including Hewitt, that say you must get success on the merits.

Now, that voluntary change, success on the merits, and then we have Texas Teachers v. Garland two years later that says there must be a material alteration of the legal relationship of the parties, and then Farrar, that says it must be formalized in some fashion, all those must be read together.

If you read Hewitt by itself, it does support an argument for the other side. I can't deny that. But Hewitt must be read with all of these other considerations, and when you read it with all those other considerations, it does not support the catalyst --

QUESTION: Mr. Cleek, I'm not a big fan of attributing a House report to the entire Congress. I would much rather look to the language of the statute, but isn't it -- if you look to the reports, isn't it possible that when whoever wrote it was speaking about voluntary cessation of the unlawful conduct, he was talking about voluntary cessation of conduct acknowledged to be unlawful, that there's a difference between ceasing it because oh, yeah, you got us, and we'll -- you know, I agree that this was wrong, and ceasing it because, my God, this lawsuit is going to cost us another $2 million, it is simply not worth it?

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By the way, I'm not sure whether that makes the lawsuit a catalyst or not. It probably does. You know, there's something to the claim, but it's just not worth fighting it for another 3 years and $2 million in fees. Let's throw in the towel, forget about it, even though I think what we're doing is lawful. I suppose that would be a catalyst.

But can't you read the House reports as meaning voluntary cessation of conduct acknowledged to be unlawful?

MR. CLEEK: Your Honor, I think that you can do that, and as a matter of fact it makes eminent good sense, because otherwise the use of unlawful would have been unnecessary.

QUESTION: But the dividing line that you put with a settlement -- now, a settlement, many of these settlements, am I not right, say, I don't admit that I did one thing wrong, but I'm settling this lawsuit, and the Congress would make a distinction between that kind of settlement just because it's on a piece of paper filed in court, where the defendant said, I am paying the plaintiff out of the goodness of my heart, but we were never any wrongdoers. We never violated any law. That counts for the catalyst, because it's a settlement, and then to say if the same exact thing happens, it doesn't count, that

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seems irrational to me.

MR. CLEEK: Your Honor, that argument has been made by the petitioners and their amici in this case, and what I think you're suggesting is, if you have a settlement that Congress has recognized and this Court has recognized grants prevailing party status, then if you have a voluntary act that affords the same sort of relief, how is that any different.

The difference is this. A settlement, of course, clearly, obviously, is tied to a litigation. We don't need to have district courts deciding whether 52 legislators met by their action --

QUESTION: Well, that means that the causation problem is not a problem. The causation problem is not a problem, but it doesn't strike it out if there is -- this case is difficult because of the legislative action, but there are other cases where it's just as clear that the plaintiff propelled this action on the part of defendant.

MR. CLEEK: Your Honor, the only way I can respond to that sensibly is that Congress had the right to choose. They chose settlement.

QUESTION: Why couldn't you respond to it by saying that where you have a written settlement you don't have to acknowledge liability because the written settlement is what ties it to the litigation? Where you

don't have that tie to litigation, the only thing that could possibly tie it to the litigation is the acknowledgement that the litigation was correct.

The acknowledgement, since you don't have a written settlement, that, indeed, our action was unlawful and therefore we're going to stop it, at least that ties it to the litigation somehow.

MR. CLEEK: That would be correct.

QUESTION: Whereas just stopping it, without any acknowledgement that what you were doing was wrong, you have no idea whether the litigation was what produced it, or whether the West Virginia legislature just decided this was a stupid law, which is frankly what I think it thought.

MR. CLEEK: Your Honor, and let me follow up that with this comment. If Congress, when it enacted 1988, understood the difficulties that the courts faced in controlling their dockets, and congested dockets, if they understood the difficulties that this catalyst theory might present in this kind of case, where you may be having the legislators' motives inquired into, and depositions of those officials, if Congress understood that, and if Congress appreciated those problems as well as what we have in circuit courts -- we have all sorts of different requirements for proving catalyst theory, from

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provocative in the First Circuit --

QUESTION: May I interrupt you, Mr. Cleek? Let's assume there's a special problem when you have to prove it through a legislature, but as I understand your position, you would take precisely the same position if the fire marshal had had the authority on his own to change the regulation and just not say anything about it. You'd still say there's no entitlement to fees.

MR. CLEEK: Yes, I would.

QUESTION: Isn't that right?

MR. CLEEK: Yes, I would, and the reason, Your Honor, is, that I believe --

QUESTION: So that it is not important for us to decide whether the legislature has to be involved, because your theory doesn't really depend on legislative action. It just happens to be what is true of this case.

MR. CLEEK: I think, Your Honor, that the only reason this Court should address the legislative difficulties and the concerns about intrusions into the motivations of legislators is that that is such an important issue that if the Court accepts the catalyst theory that if there's an exception to be made for that area, then it ought to be made, but with regard to your first question about whether or not, if the fire marshal had simply changed the rule and been motivated by the

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lawsuit there would have been recovery, the answer is still no, because the catalyst theory is not recognized, in our view, under the prevailing party designation in 1988 or any of the other fee-shifting statutes. It does not include --

QUESTION: No, I understand your position. I'm just suggesting your position really doesn't require a legislature to be involved in order to have a valid objection to the fees, but I don't really get, except you say we ought to read a lot of other cases, what is your response to the rather clear language in the Helms case that a monetary settlement or a change in conduct that redresses the plaintiff's grievances, when that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

I mean, it seems to me that reads on this case. There's a fact question, of course, but it certainly doesn't say there's got to be a settlement. It says, despite the absence of a formal judgment, and it doesn't require a settlement or a change in conduct that redresses the plaintiff's grievances. You just say we should abandon that language.

MR. CLEEK: No, Your Honor, I'm not suggesting that at all, and I think that I addressed that issue earlier with --

QUESTION: You say read a lot of other cases and read it in context, is what your answer is.

MR. CLEEK: That is the only means that I can address that language and explain it. That language suggests that you would prevail if there was a voluntary change by the defendant in the course of the litigation. The only way that I can respond to that is to suggest what I suggested to Justice Breyer's question, is that all these cases must be read in context. If you isolate that language out, then you have difficulty.

QUESTION: Wasn't that language dicta?

MR. CLEEK: It was, Your Honor. It was not necessary for the resolution of that case.

And let me say this about Hewitt, and Your Honor, of course, this is perhaps suggesting hypotheticals one ought to be entertaining from the Court, but if we took Hewitt out, let's assume that Hewitt never happened, and you read Hanrahan and Hensley and Rhodes and Texas Teachers and Farrar, there is no support in any of those cases for the catalyst theory. The only support --

QUESTION: Well, it wasn't at issue. It wasn't at issue in Farrar. There was a judgment. There was a judgment, but it was just for $1, so anything that Farrar said would have been the clearest dictum, because there was a prevailing party, not by much, and there were no

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fees, because the Court said, I'm not going to give you attorneys' fees for a $1 judgment.

MR. CLEEK: That's correct, Your Honor.

QUESTION: But there was no doubt that there was a prevailing party in that case.

MR. CLEEK: In fact, this Court found that they were a prevailing party because even the $1 caused a change in the legal relationship between the parties, because the defendant had to pay something to the plaintiff he otherwise wouldn't have had to pay, but Farrar still -- and you know, if we have dicta in Hewitt, and dicta in Farrar, both sides are arguing that they have some value, but if we look at Farrar just for the purpose of establishing what this Court said is a definition of the parameters of prevailing party, if we look at it just for that purpose alone, then I think that the argument that we made that it's not consistent with the catalyst theory is very easily made and very easily understood.

Now, if the Court was willing to say --

QUESTION: Well, I thought you accepted that this Court had said in Friends of the Earth that the catalyst theory remained an open question and that Farrar did not deal with it. That's what the Court said in Friends of the Earth, and I didn't think --

MR. CLEEK: Yes.

QUESTION: -- you were quarreling with that.

MR. CLEEK: I'm not quarreling with that. The language is clear in Friends of the Earth that Farrar was not a catalyst case, and I'm not arguing that Farrar was a catalyst case. What I'm arguing is that Farrar set out parameters for prevailing party which has to be utilized by this Court and analyzed in any sort of attorneys' fees matter before the Court.

So we have --

QUESTION: -- simply whether or not someone who received the nominal damages a prevailing party?

MR. CLEEK: That's correct, Your Honor.

QUESTION: Okay.

MR. CLEEK: And the Court found that they were a prevailing party --

QUESTION: And the holding below was that they were not a prevailing party?

MR. CLEEK: That's correct and, of course, the Court continued to say that under those circumstances, even to be given that designation was insufficient to award fees, because there were just some cases where there was no entitlement.

QUESTION: Refresh my memory. In Farrar, did they affirm or reverse the judgment?

MR. CLEEK: You reversed the lower court, I

believe, Your Honor.

QUESTION: We held there was a prevailing party, but didn't we say there were no fees that were due?

MR. CLEEK: That's correct, and I think what the lower court had said, that there wasn't prevailing party status, that's my recollection, and there was some difference there. We had -- essentially the lower court had found that there were no fees, no entitlement to fees and, of course, Farrar found that there were no entitlement to fees as well.

If there are no further questions --

QUESTION: The lower court found no entitlement, why? I don't recall that. Why did the lower court find no entitlement?

MR. CLEEK: It seems to me, Your Honor, in Farrar that --

QUESTION: Because not a prevailing party.

MR. CLEEK: Right, that it was just such a --

QUESTION: And we found no entitlement because why? We found it was a prevailing party, but no entitlement because of --

QUESTION: Didn't prevail enough.

(Laughter.)

QUESTION: No, we found that they were a prevailing party but there was nominal damages, so the

attorneys' fees were reduced. There were -- the court awarded $1 --

MR. CLEEK: It was a de minimis --

QUESTION: -- and we said it was not because they were not a prevailing party, but rather that it was nominal damages.

MR. CLEEK: That's correct.

QUESTION: Thank you, Mr. Cleek.

MR. CLEEK: Thank you, Your Honor.

Mr. Arceneaux, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF WEBSTER J. ARCENEAUX, III

ON BEHALF OF THE PETITIONERS

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

Mr. Cleek was assuming a hypothetical. I want to assume a hypothetical for the Court as well.

Let us assume this Court does not accept the catalyst theory. This Court is concerned with the issue of administration of justice, and I am concerned that if this Court does not accept the catalyst theory, then the game's been shifted we talked about that Justice Scalia pointed out, where a defendant that might be incredibly guilty on the eve of trial, after the plaintiff has incurred a lot of expenses, can moot the case out.

On the other hand, there may be motivation on the plaintiff's part to start engaging in gamesmanship.

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We recognize that once we had the consent or the agreed order, we did not have damages. The home wasn't shut down, the people weren't thrown out, we had no damages, so we stipulated to take damages out of it.

Had we known that this rule might have jumped up at us, we might have thought otherwise about the damages issue, so there can be gamesmanship on both sides if we don't have the catalyst theory.

We think -- and one of the points that seems to get lost, we often talk about this as if the catalyst theory doesn't exist, but the fact of the matter is, the catalyst theory has existed. It has been applied for 30 years, and the courts have not had trouble. When you look at the cases, the courts are able to apply the causation test. They are able to deal with these issues.

The district courts are equipped to make these decisions, and they have made these decisions for 30 years, and we think that the Fourth Circuit is wrong, and this Court should find, inasmuch as it did in the Laidlaw case, that Farrar had no catalytic effect, that the Fourth Circuit has misread Farrar, and that we should have our opportunity, our day in court to present the motion for attorneys' fees.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Arceneaux. The case is submitted.

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(Whereupon, at 11:12 a.m. the case in the above-entitled matter was submitted.)

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