In the

Supreme Court of the United States

Garland M. Fitzpatrick, et al.,

Petitioners,

v.

Frederick Bitzer, etc., et al.,

Respondents.

No. 75-251

- - - and - - - - - - - - - - - -

Frederick Bitzer, etc., et al.,

Petitioners,

v.

Donald Matthews, et al.,

Respondents.

No. 75-283

Washington, D. C.
April 20, 1976
April 21, 1976

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IN THE SUPREME COURT OF THE UNITED STATES

GARLAND M. FITZPATRICK, et al., Petitioners, v. FREDERICK BITZER, etc., et al., Respondents.	No. 75-251
- - - and - - - FREDERICK BITZER, etc., et al., Petitioners, v. DONALD MATTHEWS, et al., Respondents.	No. 75-283

Washington, D. C.,

Tuesday, April 20, 1976.

The above-entitled matters came on for argument at 2:32 o'clock, p.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:

PAUL W. ORTH, ESQ., Hoppin, Carey & Powell, 266 Pearl Street, Hartford, Connecticut 06103; on behalf of Petitioners in 75-251 and Respondents in 75-283.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae.

SIDNEY D. GIBER, ESQ., Assistant Attorney General of Connecticut, 30 Trinity Street, Hartford, Connecticut 06115; on behalf of Respondents in 75-251 and Petitioners in 75-283.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-251, Fitzpatrick against Bitzer, and 75-283, Bitzer against Matthews.

Mr. Orth, you may proceed whenever you're ready.

ORAL ARGUMENT OF PAUL W. ORTH, ESQ.,

ON BEHALF OF PETITIONERS IN 75-251 AND

RESPONDENTS IN 75-283

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

This case presents the question of whether the Eleventh Amendment prohibits a federal court from awarding back pay monetary relief against a State, in favor of employees of that State who established that they were victims of discrimination in violation of the 1964 Civil Rights Act, as amended in 1972 to include States.

In other words, does the Fourteenth Amendment empower Congress to authorize equitable monetary awards in private suits against the State for employment discrimination?

QUESTION: Do we know in this case, Mr. Orth, has any lower court ever opined on the question of whether the State's violation here would have been a violation of the Fourteenth Amendment itself; or was it simply a violation of Title VII?

MR. ORTH: This case did start out, Your Honor, as a

Fourteenth Amendment case, and was amended, then, to become a Title VII case.

QUESTION: And the only thing the district court ever found on, really,, was Title VII?

MR. ORTH: That is correct, Your Honor.

QUESTION: Well, don't we have quite a different question if the underlying offense of the State was a violation of the Fourteenth Amendment, or whether it wasn't? It seems to me then you get to the question of whether Congress, under Section 5 of the Fourteenth Amendment, can not only provide remedies, but can really expand the guarantees of the Fourteenth Amendment beyond where the Amendment's own language left them.

You see what I mean?

MR. ORTH: I believe I do, Your Honor. Essentially, of course, Title VII is an extension into the employment area of the Equal Protection Clause. Now, --

QUESTION: But it's something more than -- I mean, aren't there violations of Title VII, which would not be violations of the Equal Protection Clause by itself?

QUESTION: Well, Title VII is not a -- passed pursuant to Section 5 of the Fourteenth Amendment. It's a Commerce Clause statute.

MR. ORTH: Your Honor, I consider that the 1972 amendments to Title VII, as demonstrated clearly in the legislative history, were passed under Section 5 of the Four-

teenth Amendment.

Now, Title VII -- correctly, yes, that was passed pursuant to the Commerce Clause, and that was so held in the cases involving public accommodations. But -- and there is, of course reference in the statute to industries affecting commerce, and, as our brief indicates, the '72 amendments -- Title VII, anyway, and perhaps the '72 amendments, seem to be founded on both the Commerce Clause and Section 5 of the Fourteenth Amendment.

QUESTION: Well, it would be pretty hard to base those amendments on Section 5 of the Fourteenth Amendment in so far as the amendments apply to the federal government.

MR. ORTH: Oh, yes, Your Honor. Yes, but --

QUESTION: Well, what were they -- what power did the Congress exercise, the Due Process power?

MR. ORTH: As to the federal government? I would imagine that would have to be it, Your Honor.

QUESTION: Well, Congress has the right to --

QUESTION: the Commerce Clause.

QUESTION: Congress has a right to regulate the terms of federal employment, simply by its housekeeping function, doesn't it?

MR. ORTH: Yes. That's my understanding, Your Honor.

But here is an extension of the Civil Rights Act of

1964 from private industry to cover government employment. And, of course, in this case, particularly employment by the State of Connecticut, which had a discriminatory retirement system.

QUESTION: Do you take any position as to whether the flaw found in the State's retirement system was or was not a violation of the Fourteenth Amendment in the absence of Title VII?

MR. ORTH: Yes, Your Honor. This was brought originally as a Fourteenth Amendment case, and a few weeks later we filed the EEOC complaint; but had we pursued it on strictly Fourteenth Amendment grounds, our position would have been there was a violation of Equal Protection, on the face of Connecticut's retirement laws.

QUESTION: Neither the district court nor the Court of Appeals, however, addressed that question?

MR. ORTH: That is correct, Your Honor. This became, after the appropriate time and the appropriate notice to sue from the Attorney General, this became a Title VII case, and we won the Title VII case, and the State did not appeal. And it was, in effect, established by the district court in Connecticut that Connecticut's retirement laws did discriminate against men. In other words, the men did not get the benefits and they could not retire at the same age as women.

And that this not only of course violated Title VII,

but seemed to violate the EEOC guidelines, which were promulgated about two weeks after the 1972 Amendments. And I think it's somewhat important to establish a bit of the chronology here. These, of course, were laws of the State of Connecticut, which presumably should have been re-evaluated by the State after the passage of the 1972 Amendments.

This did not --

QUESTION: Well, it should have been evaluated by the State after the adoption of the Fourteenth Amendment, according to your theory. But they hadn't even been enacted then.

MR. ORTH: This would be so, too, Your Honor, but nobody had tested the question out.

QUESTION: Right.

MR. ORTH: What I'm getting at, though, is that about nine months after the law was changed, my clients, who are representatives of a class of active and retired male State employees, filed a complaint in the federal court and also filed the EEOC complaint, later amended.

Now, the --

QUESTION: The Appendix doesn't have those documents reproduced, does it?

MR. ORTH: No, it doesn't, Your Honor.

Those are, however, in the Stipulation of Facts, which are a part of the record, Your Honor.

QUESTION: In the Appendix?

QUESTION: No, not in the Appendix.

MR. ORTH: Not in the Appendix, no.

Basically there's no factual dispute any more in that, and that I think is the reason for that.

The State of Connecticut, in effect, spent two wasted years in terms of its legislative action, in which it did nothing to correct the discrimination that was apparent on the face of its laws.

And in October of '74 -- excuse me, September of '74, the district court enjoined the State, the State officials who were sued, from continuing to administer the law in a fashion discriminatory against men.

The problem, of course, and the reason why we're here is that in the process the court, relying on the Eleventh Amendment and Edelman v. Jordan, denied a recalculation of retroactive retirement benefits, which I am, for shorthand, referring to as back pay, and also denied attorneys' fees.

And in that, of course, we submit there is error. The Second Circuit said that the district court was wrong as to attorneys' fees only, and I will be addressing most of my argument to the back pay question.

I have, I believe, already mentioned that the '72 Amendments were adopted after extensive legislative hearings; there was a considerable background of discrimination in

government employment. Perhaps worse than in the private sector.

There seems to be no question, in language plus the intent of Congress, that Congress intended to make State employers subject to the same obligations as private employers, and give State employees access to all the remedies under Title VII that an employee in private industry would have.

Now, the effective nullification by the decision of the court below of the monetary remedial provisions of Title VII in the State context, to me cannot be squared with two recent decisions of this Court. Foremost is the Albemarle vs. Moody case, about a year ago; and then, less than a month ago, the case of Franks vs. Bowman.

These cases demonstrate in various forms, two forms primarily, first, the back pay and then seniority, the importance to the enforcement of Title VII of the private remedy of back pay, of seniority, and that this remedy -- these remedies are part of a complex equitable remedy. There is no cutoff point in the remedial section of Title VII between monetary damages or a cause of action from monetary damages on the one hand; and an injunction which was obtained here on the other.

As a matter of fact, the Albemarle case indicated that it would be inappropriate to open up a chasm between the injunctive and the monetary aspects.

Now, having said that, in the private context, and Congress having found that discrimination in governmental employment was perhaps more institutionalized, worse than in private employment, it seems that if the range of equitable remedies available against States are cut down, that private suits to enforce State employees' rights are likely to disappear.

It is certainly apparent, and it was Congress's intent that private suits would be a prime means of enforcing the law, and that the resources of the Attorney General were insufficient to take care of all these cases.

Furthermore, it was apparent that Congress was relying, as has had to be the case in the Civil Rights area, for a century, on the federal courts. And it gave the federal courts exclusive jurisdiction. And yet the court below suggested that Congress could, in both of these areas, have done things differently. In other words, that reliance could have been had on the Attorney General alone, or that State courts might be available.

In stressing, as both Albemarle and the Franks case have, the equitable remedy, a remedy that is not like damages, not subject to jury trial, that is part of a complex to try to solve, on a case-by-case basis, as the lower court, the trial court, sees fit, the Congress has, in effect, solved a problem of federalism.

I would suggest to the Court that in doing so, a couple of things have been accomplished. They are quite vital.

First of all, it is perhaps most appropriate that in this very difficult area of federalism, federal concern, that Congress, made up of the Representatives of the various States, is the most appropriate forum to determine what rights and remedies there should be; and, of course, here Congress has spoken very clearly.

And, in speaking very clearly, and in giving the district courts these full equitable powers, not only to issue the injunction but to order other affirmative relief, et cetera, as the recent decisions have pointed out, the Congress, I submit, has allowed the lower court to take into account one factor that might be an appropriate concern in the difficult federal equation in modern times; and that is this: that if, in a particular case, the impact on the federal treasury is too severe, it is perhaps something that could be taken into account by the court to allow payment over a period of time, not award full back pay, do something other than might be done in the private sector.

Now, just what would be done?

QUESTION: Mr. Orth, are you familiar with our case of Geduldig v. Iello, that was decided two years ago?

MR. ORTH: Yes, Your Honor, somewhat. Under the

Fourteenth Amendment, pregnancy.

QUESTION: You are probably as familiar with it as I am at this point.

Do you think that Congress could, under the Fourteenth Amendment, after our decision in Geduldig v. Iello, say that California can no longer have the kind of pension or health care program that it had in Geduldig under its Section 5 power, and give anyone who is deprived of pregnancy benefits, under such a program, a right of action against the State of California?

MR. ORTH: I would believe so, Your Honor, yes.

QUESTION: Well, what are the limits to Congress's power, then, to go outside of actual discrimination that would be barred by the Fourteenth Amendment itself, and enlarge that field under Section 5?

MR. ORTH: Well, the limits, Your Honor, are very hard to state with any precision; but I think what Iello would mean to state is that Congress cannot, in effect, impair the effectiveness of the administration of the State government, severely impact upon the State treasury, and various things that would substantially destroy the States and impinge, perhaps, on the Tenth Amendment areas of reserve rights to the States. But this --

QUESTION: Well, what is said under Section 5 that we think it's a Fourteenth Amendment right for every employee

of the State of California to receive a minimum wage of $10,000 a year, and any California employee who doesn't receive that wage has a cause of action in the federal courts to recover?

Can it do that under Section 5?

MR. ORTH: Well, can it do it under the Commerce Clause? I make one of the --

QUESTION: Well, that's another one, but they're not the same, I take it.

MR. ORTH: They're not the same. I would like to think that Congress can go further under Section 5 than under the Commerce Clause, particularly, Your Honor, if we are not talking minimum wages but something much more fundamental. Which is what we're talking here. We're talking equal protection, which happens to be, by statute, in the context of equal opportunity, equal protection in employment.

QUESTION: Yes, but that's on the hypothesis that this was a violation of the Fourteenth Amendment, which you say it was, but which certainly is, it seems to me, debatable, and which none of the lower courts held.

MR. ORTH: Excuse me, Your Honor, there are cited in the lower court's decision -- perhaps I was not clear on this before -- there are several cases indicating that retirement plans are violations of Title VII.

QUESTION: Yes,but --

MR. ORTH: They are not Fourteenth Amendment cases;

that's right.

QUESTION: -- not of the Equal Protection Clause.

MR. ORTH: Well, it -- I would submit, Your Honor, that that aspect is not debatable, really. The fringe benefits are part of Title VII, the guidelines are clear enough --

QUESTION: I'm not saying -- I'm not debating that with you at all. But I'm simply suggesting that the fact it may be a demonstrable violation of Title VII does not make it necessarily a violation of the Equal Protection Clause unimplemented by Title VII. Look at a case like Kahn v. Chevin?

MR. ORTH: I'll accept that, Your Honor.

Nevertheless, here Congress, acting with an abundance of evidence, in effect has implemented equal protection rights which needed protecting. And what is happening here and what can happen here, and what I suggest did happen here, is that the State of Connecticut -- and you cannot point to one individual official and charge bad faith on one official -- but for over two years the State of Connecticut did nothing about correcting this discrimination until a lower district court acted. And then the State of Connecticut didn't appeal.

Now, it would seem to me that if the State felt it had a strong legal position, it would have done what the

purpose of Title VII, the intent of Congress, and what I believe the recent cases of the Court state, it would promptly have, in view of the complaint filed by the plaintiffs -- petitioners here -- it would have promptly re-evaluated this aspect of its employment practices. And done something about it.

Or, at least, in view of the situation created by the Edelman decision, as read by some courts, we have the danger that a State faced with this sort of complaint will simply do nothing about it until a federal court is forced to act.

Had the State of Connecticut acted with any promptness here, we wouldn't be here. Our prime suit was to get this practice stopped. The back pay came in almost incidentally, because the matter went on for so long after the institution of the complaint. And, I would submit, unnecessarily so.

Now, the Edelman decision, which I just referred to, is one, I would submit, is not applicable, because it did not concern itself with the Eleventh Amendment; it did not have the situation which is so important in this case, that Congress specifically included States in the legislative pattern.

And in doing that, I think there was a recognition that this sort of problem is a problem that Congress can most

appropriately decide, and then Congress took the next step and said, Well, of course, we can only decide on a broad basis; we'll have to leave it, as has always been the case in discrimination situations, for the lower court, the trial court in the particular situation, to fashion the appropriate relief.

Which is, of course, an injunction and other relief.

Well now, that relief just doesn't appear by magic on the date of an injunctive decree. A lot of hard work, a lot of needed incentive -- this is totally aside from the deterrence upon the employer -- has to go into this sort of suit that is before you today.

And other suits. I might mention here, of course, that my clients at least had the benefit of some sponsorship in a class situation; but there are going to be lots of cases of individual employment discrimination, where a person who believes he or she is the victim of discrimination by a State employer is contemplating enforcing that claim, vindicating this interest that Congress has given the highest national priority to, and yet realizes that here she has the difficulty, the Eleventh Amendment problem, the Edelman v. Jordan problem of possibly not getting back pay, possibly not getting attorneys' fees.

Now, if enough State employees make enough noise and band together, maybe they'll interest the Attorney General;

but if they don't, a lot of valid claims are going to go wanting. And the State employer is going to be able to postpone -- as I submit was the case here -- postpone the day of reckoning. And this subverts the purpose of the 1972 Amendments, and it seems to me it undercuts everything this Court has said recently in Albemarle and cases like Franks v. Bowman.

Furthermore, in Edelman, there was a distinction drawn, which I hope will not be applicable to this situation between prospective and retrospective relief. I have just touched upon this by suggesting that if there is some cut-off point, it should not be at the time of the decree, but some point further back in time, when the employer, the employer State, has notice that something is amiss. And it should, at that point, re-evaluate its laws.

Essentially here -- and I have tried to reserve a few minutes for tomorrow -- essentially, if it please the Court, we are asking the Court to finally face up to a question that has remained unresolved for some time, and that is whether the Fourteenth Amendment does pro tanto limit or abrogate the earlier Eleventh Amendment in this vital area of civil rights, where the rights being enforced are incompatible with whatever the purposes of the Eleventh Amendment seem to be. Whether they are merely to protect the State from ordinary commercial debts, or to somehow preserve the State's sovereignty.

The post-Civil War history was that the -- that great inroads were made on that State sovereignty. This was the intent of all the Framers and proponents of the Reconstruction Amendments and the Reconstruction legislation; and there was a vast transformation worked, which gave much more power to Congress, and Congress, of course, then passed some of it on, most appropriately, to the federal judiciary.

And this situation now, if the lower court decision is to stand, is going to be, in effect, reversed.

Now, I think I would reserve the rest of my time, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Wallace, we'll take you up in the morning, and not ask you to go for two minutes today.

[Whereupon, at 2:58 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Wednesday, April 21, 1976.]

IN THE SUPREME COURT OF THE UNITED STATES

GARLAND M. FITZPATRICK, et al., Petitioners, v. FREDERICK BITZER, etc., et al., Respondents.	No. 75-251
and	
FREDERICK BITZER, etc., et al., Petitioners, v. DONALD MATTHEWS, et al., Respondents.	No. 75-283

Washington, D. C.,

Wednesday, April 21, 1976.

The above-entitled matters were resumed for argument at 10:14 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:

[Same as heretofore noted]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Wallace, we'll resume argument, where we left off last evening.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE.

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

The complaintants in this case are present and former male employees of the State of Connecticut. It was noted yesterday that the complaint is not reproduced in the Appendix, but it is well summarized by the district court in the district court opinion, which appears in the Appendix to the cross-petition, the State's petition in this case, the petition in 75-283; and the complaint is summarized there at pages 6a and especially 7a.

In essence, what the complaint was was an allegation that if these complainants had been females identically situated, they would be enabled to retire earlier, or they would receive larger retirement benefits than they were entitled to under the State law. Which, in our view, presents a classic case of discrimination, an allegation of discrimination on the basis of gender and on no other basis.

And fully comparable, for example, to the complaint that was before the Court in the preceding case argued yesterday, a complaint that "if I were a member of a different

race, I wouldn't have been fired.

And this complaint was upheld by the district court --

QUESTION: I'm sorry, Mr. Wallace, where did you say that was -- it's not in this Appendix --

MR. WALLACE: It's in the appendix to the State's petition, the petition in 75-283.

QUESTION: Thank you.

MR. WALLACE: And it's summarized on pages 6a and 7a.

In upholding the complaint, the district court specifically found, on page 12a, with respect to the portions of the complaint that are particularly pertinent to the claim for back payments, the sort of disparity that existed under the State law -- and I'll refer very briefly to this. The plaintiff Matthews is now entitled to a monthly retirement payment of $923.10, whereas an identically situated female employee's benefits would be $935.63.

QUESTION: When you say upholding a complaint, Mr. Wallace, you mean a ruling that it did constitute an invidious discrimination under the Fourteenth Amendment?

MR. WALLACE: Under Title VII.

QUESTION: Under Title VII.

MR. WALLACE: That it constituted a violation of Title VII. And the plaintiff Covert is getting a monthly benefit of $305.74, where an identically situated female

would get $328.66. This, incidentally, is the only indication before us of the magnitude of the back payments that would be involved. The difference between those monthly payments for a period going back certainly no further than the effective date of the 1972 Amendments, if that far.

Now, this type of complaint seems to us to be very dissimilar to the situation that was before the Court in the case adverted to yesterday, Geduldig v. Iello in 417 U.S. at page 484. There both males and femals had identical coverage for the disabilities that were covered by the insurance program, and the case presented the more complex question of whether the failure to include pregnancy among the disabilities covered constituted a discrimination on the basis of sex.

And in holding that it did not, the Court pointed out, in Footnote 20 of that opinion, the dissenting opinion to the contrary, this case is thus a far cry from cases like Reed v. Reed and Frontiero v. Richardson, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender, but merely removes one physical condition, pregnancy, from the list of compensable disabilities.

QUESTION: Mr. Wallace, do you think Congress could now say that, under Section 5 of the Fourteenth Amendment, California could not employ the type of health benefit program that was held to be constitutional in Geduldig?

MR. WALLACE: Well, possibly so, but that would present a Katzenbach v. Morgan type of question, which --

QUESTION: Or Oregon v. Mitchell?

MR. WALLACE: Or Oregon v. Mitchell, which, in my view, is not what's involved here. Because in order for Geduldig to be comparable to this case, you would have had to have a situation in Geduldig in which men and women were paid differently for appendicitis, even though they were, in all respects, identically situated with respect to the contributions they had made to the retirement program. And the cases adverted to in that Footnote 20 seem to me to be the comparable cases here.

The complaint and the finding here fully fit the test which this Court set forth in Reed v. Reed, by providing dissimilar treatment for men and women who are thuse similarly situated. The challenged section violates the Equal Protection Clause.

QUESTION: How about Kahn v. Chevin?

MR. WALLACE: Well, Kahn v. Chevin was a different situation. But the case that seems to me most closely in point is Frontiero v. Richardson, the next case I was about to advert to, in which the issue was a difference in the payment of dependency compensation, fringe benefit very comparable to retirement compensation.

And in that case, while there was some disagreement

expressed about whether it was an appropriate occasion for deciding whether sex is a suspect classification under the Fourteenth Amendment, eight members of the Court agreed that the disparity in the payment of the fringe benefit compensation, solely on the basis of gender, was a violation of the Equal Protection concept inherent in the Fifth Amendment's Due Process Clause.

And while that was, of course, a federal case, I see no basis for believing that that concept of equal protection is broader than the explicit guarantee of equal protection as well as due process in the Fourteenth Amendment.

QUESTION: If there's any difference, it would be in the other direction, wouldn't it?

MR. WALLACE: That is -- at least on the face of the Constitution.

QUESTION: Right.

MR. WALLACE: So it seems to us that at least a prima facie case of a violation of Section 1 of the Fourteenth Amendment had been shown here.

QUESTION: Before you proceed, Mr. Wallace, I didn't quite apprehend your answer to my brother Rehnquist's inquiry about Kahn v. Chevin.

MR. WALLACE: Well, I don't recall the facts of that case offhand. I just --

QUESTION: That gave a tax benefit to women, I think

it was in Florida, to widows vis-a-vis widowers.

MR. WALLACE: And there were distinctions drawn there on the basis of justifications put forward by the State. Which the State here failed to do. That was the point I was about to make.

QUESTION: But, wait a minute, Mr. Wallace. You say the State failed to do it, but under a Title VII claim there's no room for justification. Under a Fourteenth Amendment claim, there is; and presumably the Fourteenth Amendment claim has never really been tried in the lower courts.

MR. WALLACE: It has not been tried, as the Court of Appeals pointed out -- and I'm looking at page 38 of the same Appendix -- the defendants, the State here, did not appeal from the court's determination that the Retirement Act violates Title VII, nor from the injunction against future payments from the Retirement Fund or from other State moneys under the retirement system in a manner which would discriminate against men on the basis of sex.

Now, it was open to the State to argue that the Act, as applied, was unconstitutional on the ground that there the disparity in payments was justifiable and not a violation of Section 1 of the Fourteenth Amendment, that the Katzenbach --

QUESTION: Not a violation of the Fourteenth Amendment, but it could be a violation of Title VII.

MR. WALLACE: That is correct. But it was open --

QUESTION: And vice versa, I suppose.

MR. WALLACE: -- but it was open to the State to argue that Congress exceeded its powers under Title VII, that it was an improper application of Katzenbach v. Morgan, that Section 1 of the Fourteenth Amendment was not violated, that Congress could not reach this under the commerce power; an argument similar to that made in National League of Cities.

The State made none of these arguments, it is left standing here, a prima facie showing of a violation of the Fourteenth Amendment, as well as of Title VII. And it seems to us that in this procedural posture, the State has chosen to argue merely that Congress is without the power under Section 5 of the Fourteenth Amendment to enforce, through a back pay remedy, the provisions of Section 1 of the Fourteenth Amendment; a prima facie violation of Section 1. Since the State has given us no basis to question that prima facie showing in this case.

So for that reason, we think that in the present posture of the case, on the basis of the State's contentions, the case can be entirely answered as we have attempted to answer it in our brief, by reliance on the power of Congress to afford a remedy of this sort under the power to enforce the Fourteenth Amendment conferred upon it by Section 5.

QUESTION: Mr. Wallace, do you think the answer would be the same if the State conduct was not required by the

Fourteenth Amendment, but Congress, pursuant to its Fourteenth Amendment power, did require it and the Court upheld it as a -- on a Katzenbach v. Morgan theory?

MR. WALLACE: I think the answer would be the same. So long as Congress was within its powers under Section 5 to prohibit the substantive conduct as a violation of equal protection as interpreted under the statute; then, it seems to me, that the issue really is the same.

QUESTION: So we don't -- we wouldn't need, in this case, to go any further than to say that this, on its face, was a violation of Section VII.

MR. WALLACE: Well, I believe you would not, since Congress was purporting to act under the Fourteenth Amendment in the 1972 Amendments, which extended Section VII to the States.

There's always the alternative theory that it was exercising the commerce power, but Congress believed that it really had more direct authority to act against the States under the Fourteenth Amendment.

I don't think it's necessary to decide, even whether it was a prima facie showing of the violation of Section 1 of the Fourteenth Amendment. It does seem to me that in the present posture of the case, the case can be answered entirely by reliance on the congressional power under Section 5 of the Fourteenth Amendment, without facing

the very complex and difficult question that this Court has never answered, about whether the Eleventh Amendment or non-constitutional concepts of sovereign immunity prevent Congress from conferring a remedy against a State by citizens of that State. Not within the literal terms of the Elevanth Amendment.

That issue has been addressed in some penetrating historical analysis in an amicus brief filed in 75-251 by a group of Civil Rights organizations, and I commend that to the Court's attention, if any of the Justices feel a need to comment on that question. And I should add that two very interesting, very recently published Law Review articles on this subject, not cited in the briefs, should be called to the Court's attention.

One is in the December 1975 issue of Columbia Law Review, by John E. Nowack, called The Scope of Congressional Power to Create Causes of Action Against State Governments in the History of the Eleventh and Fourteenth Amendments. And this one does include some historical analysis of the power to enforce the Fourteenth Amendment, which, incidentally, is supportive of our position.

And the other recent publication is in the February 1976 Harvard Law Review, an article by Lawrence H. Tribe, called Intergovernmental Immunities in Litigation, Taxation and Regulation; separation of powers issues in controversies about federalism.

QUESTION: You don't know of any on the other side, I take it?

MR. WALLACE: No recent ones.

[Laughter.]

MR. WALLACE: Both of these articles, as well as the amicus brief, advocate a historical analysis which is essentially similar to the historical analysis set forth by Mr. Justice Brennan in his dissenting opinion in the Missouri employees case.

And that issue will, of course, be before the Court soon enough, undoubtedly, because the 1974 Amendments to the Fair Labor Standards Act did explicitly include an authorization of the kind of suit by employees against State and local government employers, that the Court held in the Missouri case was not authorized; but we see no need to reach it here.

Thank you.

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

Mr. Giber.

ORAL ARGUMENT OF SIDNEY D. GIBER, ESQ.,

ON BEHALF OF RESPONDENTS IN 75-251 AND

PETITIONERS IN 75-283

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

Yesterday my brother, Paul Orth, made reference to the fact that, as he expressed, that there was a two-year

inexplicable delay by the State to act. What he was referring to is that at the approximate time the plaintiffs instituted their action, the sponsor, or one of the sponsors of this case, the Connecticut State Employees Association, and others, sought to have the State Retirement Act amended.

It was not amended at that session or the following one.

I had, let's say, as an Assistant Attorney General, I have no, shall we say, cause to appear before the Legislature to advocate passage of bills. I believe that the State Retirement Commission presented the bill, and it would seem to me that you can't blame the STate or say that the State is acting in somewhat bad faith when the Legislature fails to pass a bill. That perhaps, among other things, we may say that those that were advocating the passage of the bill did not advocate it well; perhaps they weren't doing their jobs as lobbyists well.

However, the mere fact that the Legislature had the bill before it, or had a bill before it, doesn't constitute an action of bad faith.

Among other things that Mr. Orth said yesterday is that the plaintiffs -- or, excuse me, that the State should have promptly re-evaluated its employment practices upon the passage of the amendment to Title VII in 1972.

The illusions being that, I guess in the various

briefs, that the State will do nothing until it is forced to do so by a federal court.

Again, they don't take the practicalities of State government into existence. For example, let's say, at this approximate time, when they're saying that we were acting in bad faith, among other things that were going on is, for example, the State Police Department was trying to remove the minimum height requirements from its requirements for becoming a State Trooper. And we were opposed by the self-same organization that is sponsoring this action, and we had to go all the way to the State Supreme Court before we could accomplish a civil libertarian type of thing, such as removing the minimum educational and the minimum height requirements from the State Police requirements.

We feel that the awarding of attorneys' fees by the Court of Appeals is barred by the Eleventh Amendment. We understand that the courts may issue injunctions against State officers. But we also believe that in the process, the federal courts should not -- may not impose a monetary award against the State, against the State's own consent.

QUESTION: How about costs?

MR. GIBER: Well, I believe that this Court has already taken care of costs; but I don't believe that costs includes attorneys' fees.

QUESTION: Well, but you concede that costs can be

assessed against the State when it is enjoined, when it loses a lawsuit, despite the Eleventh Amendment?

MR. GIBER: I don't believe that -- I think that the only time when you could really apply costs against the State is, let's say, where the State is the plaintiff and the State then loses. I think that perhaps should be the time when the State would pay the costs.

Otherwise, we're reaching into the State treasury again.

QUESTION: Well, how about --

QUESTION: Well, you're reaching into the State treasury when the State is the plaintiff and loses, aren't you?

MR. GIBER: Well, if you --

QUESTION: For conventional costs. I'm talking about --

MR. GIBER: Yes, sir.

QUESTION: -- you know what I'm talking about.

MR. GIBER: Yes, sir. In other words, the $20 share of the entry costs and so forth.

And I believe that this Court has already said that costs were -- could be assessed against the State, and I'm trying to differentiate and to say that the costs should not include attorneys' fees.

I believe that, for example, in Edelman, that the

ancillary object would be, for example, in this case, the order was issued against the chairman of the State Retirement Commission, telling him to no longer pay in a discriminatory fashion, and that it was incidental to the order that it required -- that it requires payments from the State treasury.

However, because it's a future payment, and something that the Legislature can make provision for, it's something that can be handled. It's when we get things such as back pay that -- let's say, the State cannot very well handle it, or not in a practical fashion handle it.

In a small State such as Connecticut, where everything is, let's say, so tiny, for example, in our little office, I'm the unit of men that represents 85 State agencies, and we get an over-all view of the State government; and we see the difficulties that State agencies face in producing money at times that they need it.

In other words, there comes a time -- in this past year the State Police Department had to make the decision that it could not purchase a certain number of new cruisers, that it would have to make do with the older cruisers, because the money simply was not there.

Mr. Orth suggested yesterday that perhaps a remedy would be to provide for installment plans, or for payments to be made in the future. I think that Chief Judge Clarie, in the District Court opinion, very wisely said he was going to

leave the remedies to the Legislature, and that he would not attempt to enter into the field in which the Legislature had acted.

We have the delicate question of individual officers of the State who are being sued for damages and whether or not those should be paid by the State. For example, we have a statute in Connecticut that says, in effect, that no State officer employee will be personally liable for his actions unless willful or wanton.

Now, under those circumstances, it's obvious that if the action were brought against one of the Commissioners and his act were not willful or wanton, that payment would be coming from the State treasury, and obviously such an action would be indeed an action against the State.

QUESTION: Well, is it all that clear? He's being sued as a trustee, isn't he? Of a retirement fund.

MR. GIBER: Yes, sir.

QUESTION: And doesn't the retirement fund have a separate existence over and apart from the State treasury?

MR. GIBER: Yes, sir, it does, but it requires money from the State treasury in order to operate. For example, at the present moment, the State has agreed to pay additional funds over a period of forty years in order to make the fund actuarily sound. And for several years in the past, the money that the State has been compelled to pay in has not been large

enough to keep the fund actuarily sound.

QUESTION: Well, what if Connecticut were to have a Turnpike Authority, sell public bonds --

QUESTION: They do have one.

QUESTION: -- and trade on the bond market; and the State of Connecticut would pledge its full faith and credit behind those bonds. Does that mean that the Connecticut Turnpike Authority, if otherwise suable, could claim the Eleventh Amendment as a defense if it were sued by a private citizen?

MR. GIBER: I'm trying to compare that -- it happens that one of my client agencies is the Connecticut Development Authority and does issue bonds.

QUESTION: Let's substitute the Development Authority for the Turnpike Authority.

[Laughter.]

MR. GIBER: So that I -- into that area in there, I think that once the State guarantees the bonds, that perhaps we come to a conclusion that this is not really a separate authority. That this is some sort of a conglomerate existence.

For example, the Connecticut Development Authority has a curious statute which says that the -- the statute speaks of the Department of Commerce, and then it says: There is created within the Department of Commerce a Connecticut

Development Authority.

So very clearly, inside the Department of Commerce we have an Authority. Yet, it seems to me that this Authority is part of a State agency.

QUESTION: Then the guarantee can't be worth much. If it can't be enforced in a court.

MR. GIBER: Well, of course, let's say, the State, in its statute, has guaranteed that it would not change the statutes during the terms of the bond. So that they have made guarantees that are satisfactory to the bond purchasers. That the State actually stands behind them.

But we do have a rather curious situation going on with this Authority, and it bothers me at almost every Session.

I believe that State governments need sovereign immunity and the Eleventh Amendment for very practical reasons. And that is: In order to be able to handle our fiscal existence, the State must be in a position to decide when it is waiving sovereign immunity.

For example, the State has waived its sovereign immunity in automobile accident cases. The statute says that when the automobile is owned by the State of Connecticut and insured by the State, you may bring an action directly.

So that where we get time to get ourselves set to handle the problem, then we may safely look to the future and, let's say, waive sovereign immunity in those cases.

For example, we have waived sovereign immunity as concerns certain aspects of the State Department of Health, and the statute says that damages may be paid out of the general fund. So that again there is a way of paying once, let's say, the State has been found liable. But unless there is a way of paying, and somebody says "You must pay money", a court says to it, the Retirement Authority -- or to the Retirement Commission or to the Department of Commerce --

QUESTION: You object to the back pay, too?

MR. GIBER: Yes, sir, that's a retrospective effect, and it has been something that --

QUESTION: Well, suppose the retirement system in Connecticut said that all Negroes shall get one-half of the others, then Connecticut would not pay, would they?

MR. GIBER: Well, --

QUESTION: Under your theory.

MR. GIBER: -- let's say, --

QUESTION: Under your theory.

MR. GIBER: -- your theory is discriminatory, but I say that no back pay, because --

QUESTION: They couldn't get any back pay.

MR. GIBER: That's correct. But from this day forward --

QUESTION: And your reason is?

MR. GIBER: My reason is that, again, --

QUESTION: You don't have the money?

MR. GIBER: Well, let's say, we have to have -- we can get ourselves set for the future; but we can't handle liability for the past.

QUESTION: But the Eleventh Amendment overrides the Fourteenth.

MR. GIBER: What was that, sir?

QUESTION: The Eleventh Amendment overrides the Fourteenth.

MR. GIBER: Well, I believe that they both have their place and their existence in -- as we say in statutory construction, when you have --

QUESTION: All the way down to the point of whether you pay or not.

MR. GIBER: Ah, let's say --

QUESTION: Well, how can the -- do you agree that the Court could say you can't do it any more in the future?

MR. GIBER: Yes, sir.

QUESTION: Well, wouldn't that make you put out some money?

MR. GIBER: But it --

QUESTION: Wouldn't that make you put out money?

MR. GIBER: But in the future --

QUESTION: How could we make you put out that money?

MR. GIBER: We then have the power to, let's say,

make appropriations for it.

QUESTION: So the Eleventh Amendment requires -- permits this Court to say that in the future you shall pay equal money; but that we can't say that in the past you have to make up for it?

That's your point; right?

MR. GIBER: No, sir, that is, I believe, twisting --

QUESTION: I thought that was your point. I thought you said that's what the Edelman case held.

MR. GIBER: The Edelman case holds that you can order payments in the future --

QUESTION: Exactly. Just as by brother Marshall's question was given to you.

MR. GIBER: But the only way we can handle payments in the future is the fact that we have in the future the power to tax and the power to make appropriations.

Now, when you're giving it to us retrospective --

QUESTION: Well, you're going to pay the back pay in the future.

MR. GIBER: Granted that that is -- that we will be paying the back pay in the future; but you are giving us, let's say, untold -- let's say, a tremendous liability that perhaps can't be handled.

QUESTION: But Title VII gave you that, they put you on notice when Title VII was passed.

MR. GIBER: Well, --

QUESTION: You could have gone to the Legislature, you could have gotten the money.

MR. GIBER: Let me --

QUESTION: So you didn't, so you --

MR. GIBER: Let me express it this way: that where the State has not acted, it does not have the ability to produce the funds for so acting, and that the --

QUESTION: Do you allege that the State does not have the money?

MR. GIBER: For back payments?

QUESTION: Yes.

MR. GIBER: Well, I think it presents great difficulty --

QUESTION: Difficulty?

MR. GIBER: Yes, sir, because it requires extra funds --

QUESTION: It's difficult for these people to live on the money they're getting, too.

I don't think "difficulty" helps you.

MR. GIBER: Well, --

QUESTION: Do you say that Connecticut can raise this little bit of money -- what is it? Twenty dollars apiece, or something like that.

MR. GIBER: Sir, it's not a question of the twenty

dollars apiece, we don't know what the total amount is in this light, --

QUESTION: So you don't know whether you can raise it or not.

MR. GIBER: I believe that the principle is the same, though, be it one dollar or one million or one billion.

QUESTION: Don't you really say you don't want to raise it? Or you don't want to be required to raise it.

MR.GIBER: No. I say that this Court does not have the authority to force the State Legislature to raise it. You can issue an order to tell me to do something in the future, and that as an incidental of that order, and only as an incidental of that order, can it have a monetary effect.

QUESTION: Well, there are cases to equalize the pay between teachers' salaries in several States, like Maryland, costing the States around six million dollars. And the federal court said, That's it.

So it has been done.

MR. GIBER: I realize that --

QUESTION: And Maryland said they couldn't find the six million; but they did.

MR. GIBER: Well. I believe that the only way open to this Court is to issue an order to the State official, compelling him to comply or to do his duty in a constitutional sense, and that if, as an incident of that, it requires that

money be paid, then it can be -- it must be done in that fashion.

I believe that the ancillary aspects are really only very incidental, and that the intent of the order of the Court should not be to compel the States to pay money, but the intent of the order of the Court should be to compel the official to do his duty.

Charles Allen Wright wrote in Federal Courts, the Second Edition, the 1970 works, that he thought that the Court had decided that -- the Young court was fully aware of the possibility of holding that the Fourteenth Amendment had altered or limited the Eleventh Amendment and had expressly chosen not to do so.

And what Mr. Wright was trying to say is that each amendment must live and be given its validity within its own sphere. We must try to have them both living at the same time and giving effect to both of them. And it's a delicate balance that requires each case to be analyzed as we handle each one.

I don't believe that the mere, let's say, rewriting of the doctrine of the Young case would necessarily be a great blow for liberty. I believe that, among other things that could happen, would be that corporate giants, such as in the Great Northern Life v. Read case, might claim gigantic tax windfalls. So that all is not that clear.

As to the other aspects of attorneys' fees in there, many of the cases are, in effect, handled by the Attorney General's office in Connecticut. We, for example, handle all the cases that come before the Commission on Human Rights and Opportunities. And the fact that there, let's say -- I'm trying to compare the EEOC load to our load; and we do -- we do a great deal of the civil rights work ourselves under our own Commission on Human Rights and Opportunities, and therefore there is not the great need for, let's say, the payment of attorneys' fees that my opponents would make appear necessary.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Giber.

Mr. Orth, you have a few minutes left.

REBUTTAL ARGUMENT OF PAUL W. ORTH, ESQ.,
ON BEHALF OF PETITIONERS IN 75-251 AND
RESPONDENTS IN 75-283

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

Again, the Eleventh Amendment and what it appears to embody, sovereign immunity, seemed fundamentally to embody the idea that somewhere along the line the sovereign would do right.

Now, here the sovereign, the State of Connecticut, is saying, for one reason or another: We have engaged in

discriminatory conduct, and yet there is nothing we need do about it, as regards to the past.

I think the inaction regarding the failure of the Legislature to do anything about this de jure discrimination, the face of its retirement laws, illustrates the principle that perhaps it is harder in governmental employment to get at and root out discrimination than in private industry, because it's hard to point the finger. And Congress recognized this, and Congress tried to provide, under Section 5 of the Fourteenth Amendment, an appropriate exercise of its power; tried to provide what is so vital in the civil rights area. And that is effective remedies.

And these remedies go, and have an equitable aspect that not only concerns the future, but you have to get to the future. And you get to the future by attorneys' fees and back pay.

Those are the methods to eradicate discrimination. And the method that Congress has chosen, as I indicated yesterday, does not impinge unduly upon federalism, as we know it in a society, or as we should know it in a society committed to the elimination of discrimination.

The State is only saying, for one reason or another, We don't want to pay money for the past.

This is, in effect, a license to slow down on the anti-discrimination crusade. And it is a license to other

States to do nothing, in effect, when charged with a discriminatory employment practice until a federal court finally is forced, usually in a suit by a private litigant, to blow the whistle.

We ask the Court not to allow that license.

The impact of the, call it retroactive, the monetary relief here, which I say is not really retroactive because it has a prospective thrust; but that impact is relatively minimal in regard or in comparison with the impact of the change that took place in the retirement practices once the district court issued its injunction.

I thank the Court.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:55 o'clock, a.m., the case in the above-entitled matters was submitted.]

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