In the

Supreme Court of the United States

RICHARD W. VELDE, ET AL.,)
)
Petitioners)
)
v.) NO. 80-1074
)
NATIONAL BLACK POLICE)
ASSOCIATION, INC., ET AL.)

Washington, D. C.

December 9, 1981

Pages 1 thru 44

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400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

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ASSOCIATION, INC., ET AL. :

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Washington, D. C.

Wednesday, December 9, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:04 o'clock.

APPEARANCES:

KENNETH S. GELLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioners.

E. RICHARD LARSON, ESQ., New York, New York; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Velde against National Black Police Association.

Mr. Geller, I think you may proceed when you are ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GELLER: Thank you, Mr. Chief Justice. May it please the Court, this is a constitutional damages action, so-called Bivens action against former Attorney General Edward Levi, former head of the Law Enforcement Assistance Administration, Richard Velde, and two former subordinate LEAA officials, Charles Work and Herbert Rice.

The plaintiffs are six blacks and six women, and an organization that represents black police officers. Plaintiffs filed this lawsuit in September, 1975, claiming that a number of police organizations that received LEAA monetary grants were engaging in race and sex discrimination in employment. Plaintiffs allege that the defendants' failure to institute administrative proceedings under the LEAA statute to cut off federal funds to these organizations violated their rights under the due process clause of the Fifth Amendment.

For this alleged constitutional violation, Plaintiffs demanded that the four defendants pay them $20

million in compensatory and punitive damages. The district court dismissed the complaint on the ground that the defendants were entitled to official immunity from these personal damage claims. However, the District of Columbia circuit reversed by a two to one vote. The majority recognized that this Court in Butz versus Economou had held that administrative officials who perform functions analogous to that of a prosecutor are absolutely immune from personal damages liability, even when constitutional claims are involved.

The court of appeals concluded, however, that Attorney General Levi and the other defendants were not entitled to absolute immunity here, because under the LEAA statute as the court read it they had virtually no discretion in deciding whether to terminate LEAA funding to recipients who were alleged to have engaged in discrimination.

Now, the Department of Justice has brought this case to this Court because we believe that the court of appeals decision seriously misconstrues governing legal principles not only of absolute immunity for federal officials but also of what governmental action constitutes a violation of the Equal Protection Component of the due process clause.

QUESTION: Mr. Geller, are you also going to

address the Simon versus Eastern Kentucky standing problem?

MR. GELLER: We have not raised standing as a separate issue in this case, although we do think that the failure of these plaintiffs to show how the defendant's actions violated their constitutional rights shows that the complaint in this case does not allege violation of the due process clause, and we have raised that question. We have raised as our second question the failure of the complaint to state a claim.

QUESTION: Well, but standing is an Article 3 requirement in many cases, is it not?

MR. GELLER: Yes, yes, it is.

QUESTION: A jurisdictional thing which both counsel and the court are obliged to notice --

MR. GELLER: Yes. We have discussed Simon in our brief, in the section of the brief that is devoted to showing why the complaint does not state a cause of action.

QUESTION: All three judges below felt there was sufficient standing here on the motion to dismiss, I take it.

MR. GELLER: Well, we said that, I think, in our petition, but on further reading of the case, I am not sure that is correct. I think that Judge Tam did not find there was standing as to the claim that the plaintiffs now tell this Court they are raising. I think Judge Tam misconstrued plaintiffs' complaint as alleging that they were harmed by

the actions of the grantees, and what Judge Tam said was, well, he thinks under cases like Simon versus Eastern Kentucky the plaintiffs are at least entitled to a trial to show that if the federal government had not terminated -- had terminated funding, it would have had some effect on the actions of the grantees --

QUESTION: So you are -- off the statement in your brief then.

MR. GELLER: Yes, but as I reread the court of appeals opinion just the other day, it seems quite clear that Judge Tam is saying that as to the claimant, the plaintiffs now tell the court they are raising, which has nothing at all to do with the discrimination allegedly practiced by the grantees, but only focuses on the federal government's failure to enforce the laws, he says that is essentially a citizen standing suit, and he does not agree that these plaintiffs have standing.

I was explaining to the Court why the federal government thinks this case is so important.

QUESTION: Well, do you agree with him or not?

MR. GELLER: We think that the case should be analyzed in terms of whether the complaint states a cause of action under the Fifth Amendment. We think that is the proper analysis, if the Court decides that the conduct --

QUESTION: Well, if the reason doesn't state a

cause of action, there are no allegations of injury flowing from allegedly unconstitutional action, it is a standing question, isn't it?

MR. GELLER: It really depends upon how the Court analyzes the duties under the Fifth Amendment in this area. I agree. It can be stated in terms of standing, and as I --

QUESTION: Well, if it can be, and may just as well, don't you have to state it that way?

MR. GELLER: Well, I would like --

QUESTION: If it is a jurisdictional question?

QUESTION: Could it be a case or controversy issue?

MR. GELLER: I think, as Justice Rehnquist was alluding to, that if there is no standing here, then the Court does not have jurisdiction under Article 3 of the Constitution, because there is no case or controversy, and we have cited the relevant cases in the portion of our brief, and made, I think, the relevant arguments that would be addressed in a standing issue, but we have placed it in the section of our brief that is addressed to whether the complaint states a cause of action.

I think the analysis is very, very similar, and I think that the Court would have to find that there is no cause of action here.

QUESTION: And hence no standing?

MR. GELLER: And hence no standing, because the

actions of these defendants did not cause any harm to these plaintiffs --

QUESTION: No injury in fact.

MR. GELLER: Right. Now, we have presented three independent reasons why the decision below is wrong. First, we claim the defendants are entitled to the absolute immunity recognized in Butz versus Economou for administrative prosecutors. Second, as I just explained, we contend that the complaint in this case fails to state a cause of action against these defendants under the due process clause, the Fifth Amendment.

Finally, even if the complaint could be construed to state a due process claim, because the defendants acted in good faith and had no reason to know that their actions were unconstitutional, they are entitled to qualified immunity as a matter of law and should not be forced to undergo a trial.

The principal issue in this case is one of official immunity. In Butz against Economou, this Court held that government officials who must decide whether or when to initiate administrative proceedings play a role similar to that of a prosecutor who must decide whether or not to press criminal charges. For this reason, the Court held that administrative officials, like a prosecutor, are entitled to absolute immunity from personal damages claims,

even when constitutional claims are involved.

This immunity, the court said, is essential to ensure that agency officials may exercise their discretion in deciding whether to bring the weight of the federal government against some respondent for an alleged violation of the law, should be made free from the intimidation that is inevitably associated with the possibility of personal damages liability in the event that someone is unhappy with that decision to charge or not to charge.

There is no question here that the defendants collectively were charged with the responsibility for enforcing the LEAA statute, including the anti-discrimination provisions, and that when faced with an allegation of discrimination by a fund recipient, they had to decide whether or not to start administrative proceedings to cut off further federal funding. Defendants had to decide whether a charge of discrimination was likely to have merit, whether the discrimination alleged was sufficiently substantial to warrant the expenditure of LEAA's scarce investigative and prosecutorial resources, whether the ultimate sanction of partial or complete fund termination was the best way of achieving the goal of ending discrimination.

We submit that these are precisely the sort of decisions this Court had in mind in Economou when it

referred to agency officials performing functions analogous to that of a prosecutor.

Now, the only reason that the D. C. circuit offered for refusing to accord the defendants absolute immunity was that the defendants in the court's view had virtually no discretion under the LEAA statute in deciding whether to institute fund termination proceedings. I suppose Judge Basilon in his opinion for the D. C. circuit viewed the LEAA officials as essentially clerks. Once a charge of discrimination came in, they were supposed to follow each succeeding step until the end, and if in the end they determined there was substantial discrimination, they had no discretion other than to cut off funding, and I suppose this would be the case regardless of how many complaints were filed, and regardless of how scarce the prosecutor's resources were.

QUESTION: What was the cause of action that was attempted to be stated, a constitutional tort or complaint?

MR. GELLER: Well, the complaint raised a number of causes of action under Section 1981, under executive orders. The only cause of action that currently exists in this Court is the one directly under the Fifth Amendment and implied cause of action pursuant to this Court's decision in Bivens and Davis against Passman.

QUESTION: Has the government ever suggested that

there isn't a private cause of action in the context of this case?

MR. GELLER: Yes, the argument that was pushed in the court of appeals, although the court of appeals decision does not address it at all, is that using the analysis the court later adopted in Carlson against Green, that there should not be a cause of action implied here under the Fifth Amendment.

We have not presented that argument here because there is a threshold question before you reach the Carlson versus Green analysis, which is whether there is a constitutional violation at all. Cases like Bivens and Carlson --

QUESTION: Why do you think that is prior?

MR. GELLER: Excuse me?

QUESTION: If there is no private cause of action, you never get to the merits. You are talking about the merits.

MR. GELLER: Well, but this Court in Davis against Passman has held that under the due process clause of the Fifth Amendment there is an implied --

QUESTION: Yes, but not in the -- there you don't have the administrative detail, the administrative enforcement scheme.

MR. GELLER: No, I understand, and there is an

argument in --

QUESTION: Suppose that was a valid argument. You certainly would never reach the question of a constitutional violation. You would just say we don't have to adjudicate that.

MR. GELLER: Well, I understand that. I think it is more logical, though, to ask the question first whether the Constitution has been violated.

QUESTION: Why?

MR. GELLER: In this case we think there is a very easy answer to that question.

QUESTION: I know you would like it answered, but --

MR. GELLER: Well --

QUESTION: That is like saying, before you decide whether you can sue in this Court, we will decide the merits of your lawsuit.

MR. GELLER: No, I think cases like Bivens and Carlson against Green proceeded on the assumption that there had been a constitutional violation. The question in those cases was, should there be an implied damages action implied by this Court. The predicate for those decisions was that the Constitution had been violated. Here, we contest whether the Constitution has been violated, and we have raised that question in our petition. I agree with the

Court that there is a separate issue available in this case, whether, assuming the Constitution has been violated, an implied cause of action for damages should exist. That is an issue we raised in the court of appeals, and we have not chosen to raise it in this court.

QUESTION: Well, certainly that issue about implied cause of action, I would take it -- I would classify as a non-constitutional question, and you are just telling us that we have to reach a constitutional issue, although there very well may be a non-constitutional way of disposing of the case.

MR. GELLER: We think the court of appeals made a number of errors in its opinion. We think the court of appeals was wrong, for example, on the question of mootness. We have chosen to restrict the questions presented in our petition to the three I have previously expressed, and we do not disagree with the Court --

QUESTION: And you think that you can make us reach a constitutional issue.

MR. GELLER: I would be, I think, on behalf of the defendants, they would be delighted if this Court were to reverse on the ground that there is no Bivens action here.

QUESTION: What if the Court held there is no case or controversy? Isn't that the end of everything?

MR. GELLER: I think that would be the end of this

case as well.

QUESTION: You don't reach Bivens, you don't reach any other questions.

MR. GELLER: That's correct.

QUESTION: And you wouldn't reach Bivens if you said there wasn't a private cause of action at all. You wouldn't reach the issue of whether there is a violation of the Constitution.

MR. GELLER: I think, though, that in light of this Court's decision in cases like Carlson against Green, Davis against Passman, it is a more difficult analysis. We think the easier question in this case is that there is simply no constitutional violation at all.

Now, as I was saying, the only reason that the D. C. circuit found that these defendants were not entitled to absolute immunity is because, as the court read the statute, there was absolutely no discretion involved. We think that -- you know, Judge Tam dissented on this point, and we think his dissent is clearly correct. Under Section 518(c)(2) of the LEAA statute, defendants had to make an initial determination whether a recipient of federal funds "failed to comply with the non-discrimination provisions of the LEAA statute and regulations." This often involved difficult questions of law and allocation of LEAA resources, and if the defendants did decide to investigate a complaint

and found evidence of discrimination, then under the statute they had to notify the grantee state's governor and had to decide whether the grantee "within a reasonable time" had taken appropriate steps to comply with the statute voluntarily.

QUESTION: Mr. Geller, I am not sure, based on what has been said, that the Court will find that we reach the merits, but assuming that the Court were to do so, do you think that the complaint that was filed, the amended complaint can be read to incorporate allegations of action by at least some of the defendants that are not discretionary type actions, which poses additional probelms, of course, for the Court?

MR. GELLER: No, I don't think it can, for a number of reasons, Justice O'Connor. First of all, the complaint is very, very poorly drafted in the sense that it does not identify which of the defendants is alleged to have done what. It simply refers repeatedly to the defendants, but we think that in a Bivens action in which defendants may ultimately have to pay damages, it is essential that each defendant be identified and it would be clearly explained in the complaint what action that defendant took that violated the constitutional rights of the plaintiff.

Now, the plaintiffs have attempted to rewrite their complaint since this ligitation began, I think because

they realized the deficiencies of the complaint, but the only allegation alleged in this complaint that is claimed --

QUESTION: Where are you reading from?

MR. GELLER: I am reading from the joint appendix, where the complaint is reprinted, starting on Page 13. The only allegation of the defendant's conduct that is alleged to have violated the plaintiff's constitutional rights in this complaint is the failure to terminate federal funding. On Page 13, under the nature of the claim, the complaint says, plaintiffs allege that the defendants have awarded excess of a certain figure in dollars to law enforcement agencies, federal funding which has been used to discriminate on grounds of race and sex. That is the only allegation of harm.

And then, on Pages --

QUESTION: How about all those statements on Page 20, and so forth?

MR. GELLER: Well, on Pages --

QUESTION: Like a policy of not conducting any pre-award compliance --

MR. GELLER: I understand that there are a lot of allegations in the complaint about what collectively the defendants did, but I am trying to focus on what the plaintiffs have described as their constitutional harm, and on Pages 14 and 15 of the complaint, where each of the

plaintiffs is identified, and each of the plaintiffs specifically states how he or she was harmed, in every single instance the only harm that is identified is the refusal to terminate LEAA funding, and I might add that both the majority and the dissent in the court of appeals construed the complaint in that fashion.

In the appendix to the petition where the court of appeals decision is reprinted, the very beginning of the court of appeals' opinion on Page 2A, Judge Basilon says that the plaintiffs allege that federal agencies and officials unlawfully failed to terminate federal funding. That is the only allegation of what the constitutional violation was here, and Judge Tam agrees with --

QUESTION: It also said wilfull and malicious.

MR. GELLER: I understand that that is what they --

QUESTION: That was a quote.

MR. GELLER: That is how the plaintiffs have described the defendant's actions.

QUESTION: That is what they allege.

MR. GELLER: That is what they allege, but the only constitutional action that the defendants are alleged to have taken here that caused constitutional harm was the failure to terminate funding, and Judge Tam on Page 17A agrees with that description, and therefore we think that since that is clearly a discretionary determination under

the statute, that there is no reason for this Court to wade through the rest of the plaintiff's prolix complaint to see what other grievances they have stated. The only cause of action here is for a failure to terminate funding.

QUESTION: If in fact the case were to go off on standing, and the Court were to decide that even assuming that everything was true in plaintiff's complaint there was nothing but the most speculative sort of benefit that would result to them from any judicial relief that could be granted, wouldn't that also avoid going through the prolix allegations of the complaint?

MR. GELLER: I think it would, but I think it is important even for the purposes of determining whether the plainiffs have standing. I think we have to determine what it is they have alleged as their cause of action in order to determine whether these are people who can raise that sort of a cause of action against these defendants, and I think that therefore it is an important point, because the plaintiffs had tried to obscure the point in their briefs that the only constitutional violation alleged in this complaint is the failure to initiate fund termiation proceedings.

Now, we have raised two issues other than official absolute immunity in this court. They are described in the brief at some length. I don't want to spend too much time,

in light of the limited time I have available, discussing the cause of action argument, which we have already alluded to. I would like to turn, if I could, to the final point in our brief, which is in some ways perhaps the most important one, and that is the question of qualified immunity.

Assuming that the court of appeals was correct in holding that the defendant is not entitled to absolute immunity on this record, we think the court should have affirmed the dismissal of the complaint on the ground that the record clearly shows they are entitled to qualified immunity as a matter of law.

When this Court decided Butz against Economou, that federal officials ordinarily would have only qualified immunity from personal damages liability in Bivens actions, it did so on the expressed assumption that insubstantial Bivens suits would be quickly disposed of by the lower courts even without the protection of absolute immunity. The dissent in Economou stated that the majority's assurances in this regard reflected optimism rather than prescience.

In view of the federal government, based on experience, defending these cases over the last three or four years, the court's assurances in Economou unfortunately have not proven correct. This case is a prime example. The only allegation in the plaintiff's lengthy complaint or

affidavits that might suggest that the defendants are not entitled to qualified good faith immunity from damages liability is the boilerplate assertion at the very end of the complaint that the defendants acted "wilfully and maliciously". That assertion is not tied into any specific factual allegations in the complaint, or substantiated in any other way.

QUESTION: Was there a trial?

MR. GELLER: There was not a trial, but there were summary judgment motions.

QUESTION: Well, but on summary judgment motions all the well pleaded allegations are treated favorably to the plaintiffs, are they not?

MR. GELLER: I think that would be the case on a motion to dismiss. On summary judgment motions, the defendant is supposed to come in with affidavits and the plaintiff is supposed to counter those affidavits.

QUESTION: But qualified immunity always involves state of mind, and that is something that a defendant can't negate.

MR. GELLER: Well, that was one of the issues raised in Butz against Economou as an example of why absolute immunity was needed as a protection against lawsuits designed to intimidate or harass. In ruling against the government's argument that there should be

absolute immunity, the Court stated that "Insubstantial lawsuits against federal officials can be quickly terminated by federal courts alert to the possibilities of artful pleading," and the Court said, and again I quote, "Damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity."

QUESTION: By repealing the federal rules.

MR. GELLER: Well, I am reading from the Court's opinion, and my point is that that was a basic assumption.

QUESTION: He agrees with your reading.

MR. GELLER: I gather as much.

QUESTION: Is this qualified immunity raised?

MR. GELLER: Yes, it was. It was raised in both lower courts.

QUESTION: Well, if it goes back, couldn't it be raised again? It never was tried out, was it? Because you can't try out qualified immunity without some evidence, can you?

MR. GELLER: Well, there were -- voluminous evidence was submitted in this case both by the plaintiffs and by the defendants, although the district court did not dismiss this case on summary judgment grounds. It was dismissed for failure to -- it was dismissed, the injunctive

parts were dismissed for mootness --

QUESTION: Did it rule on qualified immunity? No, it didn't.

MR. GELLER: It was dismissed on immunity grounds. One of the problems in this case is that the district court decision was prior to Butz against Economou, and therefore the district court did not -- it merely said that the defendant is entitled to official immunity under Barr versus Mateo rather than --

QUESTION: Did the court of appeals rule on the qualified immunity point?

MR. GELLER: The court of appeals did not.

QUESTION: Did not. I thought so.

QUESTION: Suppose, Mr. Geller, that qualified immunity had only one inquiry, an objective inquiry, and had no good faith aspect to it.

MR. GELLER: I think that -- I think even under the good faith aspect qualified immunity should have been accorded here, but certainly if the only inquiry was whether the law was clearly established, where the defendants violated some clearly established rule of law, I think it is quite clear in this case that the motion for summary judgment based on those grounds should have been granted since I don't think even today it is clear that what the defendants did here violated the plaintiff's constitutional

rights. It certainly was not clear in 1974.

The government has argued, by the way, for just such a rule of only an objective test for qualified immunity in our brief last year in the Kissinger case. We are not suggesting here that Economou should be overruled. We do think, though, that the Court should give clear guidance to the lower courts that the liberal rules of noticed pleading that may apply generally in civil litigation do not apply with the same force in Bivens actions, and that federal officials should not be forced to undergo discovery or a trial without specific allegations of wrongdoing.

Allegations in this case do not even come close to meeting the appropriate standard. They suggest only that the plaintiffs had a disagreement with the defendants about how the LEAA statute ought to have been administered. We believe that these sorts of disagreements, if they are properly in court at all, should be litigated in injunctive actions such as those authorized by the Administrative Procedure Act, not in personal damages actions with their inevitable tendency to harass and intimidate public officials in the performance of their duties.

Yet, as I said earlier, this case was filed in September, 1975, and six years later these defendants are still trying to escape from under this lawsuit.

I would like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Mr. Larson.

ORAL ARGUMENT OF E. RICHARD LARSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. LARSON: Mr. Chief Justice, and may it please the Court, initially I will respond to the government's characterization of several of the facts in this case. Thereafter, unless this Court chooses otherwise, I would like to respond to the standing issue that was raised by the Court, and then to the three issues that have been raised by the government, the absolute immunity issue, which was ruled upon and rejected by the court below, and then the two other issues which were not ruled on by either court below.

First, as to the characterization, I wish to point out that respondents in this case charged the petitioners with refusing to take any enforcement action whatsoever against petitioners' discriminatory grantees. No enforcement action. More particularly, as to administrative fund termination proceedings, petitioners in this case exercised no discretionary enforcement functions. They did not function with discretion in initiating fund termination proceedings, and I will elaborate on all of these.

Specifically, I mean, under the regulations in effect at the time that this action was brought, indeed, as described by Petitioner Velde and set forth in the record in this case, the regulations required LEAA to pursue court

action and not administrative action to resolve matters of employment discrimination. Petitioners' deliberate decision to take away this enforcement discretion has deprived them of the discretionary function to enforce administratively their statute. This policy decision, this refusal to act, also meant that the petitioners in this case exceeded the statutory authority that had been placed upon them by Section 518(c)(3) of the Crime Control Act.

In this case, the respondents charge that petitioners' refusal to enforce, coupled with their affirmative provision of continuous funding to grantees which petitioners knew were discriminatory constituted a direct violation of petitioners' Fifth Amendment steer clear obligation, the obligation to steer clear of providing significant aid to discriminatory institutions.

This case, as counsel for the petitioners indicated, was dismissed on the pleadings.

QUESTION: Mr. Larson --

MR. LARSON: As we point out also, there was no discovery in this case whatsoever. We were denied discovery.

QUESTION: Just affidavits?

MR. LARSON: Just affidavits. We filed discovery in the trial court. The government moved for a stay and obtained a stay on the discovery. We moved to vacate the stay. The government opposed our stay. The trial court

never ruled.

QUESTION: Wouldn't a necessary element of your case to be pleaded and proved be that the plaintiffs' grievances be redressed if the action you sought to have taken by the court were taken, that is, that if funding were cut off, the police departments which you claim were discriminating would change their discriminatory policies?

MR. LARSON: Well, let me respond to that. There are two views of standing on this case, and you are discussing the view of standing that Judge Tam took, looked at in the court below, in the court of appeals, and indeed, he found that we had standing under that view with regard to redressability, with regard to the cutoff of funds. I mean, this is even apart from the Fifth Amendment obligation and the violation that we referred to with the federal petitioners.

But on redressability, simply focusing on the police departments, we think that there is more than a substantial likelihood that indeed the grantees would end their discrimination rather than lose their money. As we point out in our brief, three branches, the three coordinate branches of the federal government have already recognized the coercive power of fund termination. Two courts of appeals have held it. The executive has recognized it on occasion. And indeed Congress, in enacting Section 518(c),

did so because it recognized the coercive power of fund termination.

QUESTION: Did you plead it in your complaint?

MR. LARSON: Yes, with regard to injury, economic injury, on --

QUESTION: With regard to the substantial probability that the departments would change their policy?

MR. LARSON: It is generally in the complaint, yes. Now, it also is on the record, Justice Rehnquist. I should point out that one plaintiff in this case has already established standing as a matter of the record in this case. Plaintiff Shumacher is from New Orleans. In 1973, these petitioners had found the New Orleans Police Department to be discriminatory and in violation of Section 518(c), yet for two and a half years LEAA did nothing. In September of 1974 -- '75, we filed this lawsuit.

Immediately thereafter the LEAA petitioners in this case sent a letter to the superintendent of police in New Orleans stating -- not indicating they had just recently been sued, but indicating -- stating straight out, and this is in the record, that we now are going to compel you to come into compliance immediately or we are going to terminate your funds. Within weeks a letter comes back from the superintendent of police in New Orleans stating, we have now eliminated the discriminatory practice, under duress,

and only because of your threat to cancell our funding.

QUESTION: Well, that is fine as to New Orleans, but you are asking for relief against a great number of --

MR. LARSON: Well, as this Court held only last week in Watt v. Energy Action unanimously per Justice O'Connor, only one plaintiff need have standing in order to maintain the action that we maintain. Indeed, I mean Watt is instructive on another matter, too. Watt -- in Watt this Court recognized that the standing argument which is being raised here is based upon an improper assumption about government activity, the improper assumption being that local governments are going to look money in the face and then walk away from it. That is an improper assumption, and indeed, as we have already demonstrated conclusively on this record, with regard to Plaintiff Shumacher, the government, local grantees will not walk away from that money. They will stop their discrimination.

QUESTION: Well, I would agree with you that you can't say that they won't, but the fact that one police department has responded to the fund cutoff certainly doesn't prove that every police department that would be involved in this case would react the same way.

MR. LARSON: I certainly think we should have an opportunity on discovery to prove that, as Judge Tam held in his separate opinion in the court of appeals.

QUESTION: If you pleaded it, certainly.

MR. LARSON: Let's point out that before this complaint was filed, LEAA petitioners, these government officials never, never initiated fund termination proceedings. After this case was filed, as we pointed out in January of 1976, we filed a preliminary injunction asking LEAA to finally initiate fund termination proceedings against the Philadelphia police department, where LEAA two years earlier had made a determination of discrimination but had done nothing.

In response to our motion for a preliminary injunction, a letter went out to the governor of Pennsylvania to initiate indeed the fund termination proceedings.

I believe that if we were given the opportunity of discovery in this case we could show that after the filing of this lawsuit, that every time that fund termination was actually threatened, that indeed the local grantees rolled over and said, we will stop our discrimination.

QUESTION: Even if LEAA was supplying only one-half percent of their budget?

MR. LARSON: The assistance here is considered quite substantial by the grantee police departments. They keep coming back and asking for the money. Indeed, the assistance is considered to be so substantial by LEAA that

they have exceeded their statutory power just to continue the assistance going.

QUESTION: Well, but certainly it isn't the same in every case, is it? I mean, it isn't a uniform policy of funding 20 percent of the police departments across the country. It is specific grants.

MR. LARSON: It is a grant in aid program, and of course one of the conditions of this grant in aid program is that the grantee comply with LEAA regulations and with the non-discrimination requirement.

QUESTION: Well, what rights of your clients are you claiming?

MR. LARSON: We are claiming --

QUESTION: Not to be discriminated against by the LEAA officials?

MR. LARSON: Oh, absolutely. I mean, our complaint with regard to each plaintiff, it says, both with the short description of the plaintiffs and then in the statement of the case as to each plaintiff, we have claimed under the Fifth Amendment that we have been -- that each plaintiff has been discriminated against.

QUESTION: The equal protection component of the Fifth Amendment?

MR. LARSON: Component of the Fifth Amendment, yes.

QUESTION: So it is a constitutional Bivens sort

of thing you are asserting?

MR. LARSON: Yes, it is, absolutely.

QUESTION: Are you also claiming that you have a right under the statute?

MR. LARSON: Yes, we are, but that is an issue which was not presented or has not been presented by the government in its cert petition and it is not at issue in this case.

QUESTION: Did the government claim that you had no -- that in the circumstances of this case, there shouldn't be an implied constitutional cause of action?

MR. LARSON: That issue has never been raised prior to the supplemental brief in the court of appeals, the first time.

QUESTION: Yes, before judgment there?

MR. LARSON: Before judgment, yes.

QUESTION: But it wasn't adverted to by the court of appeals?

MR. LARSON: It was not, no. It was assumed that we have a Bivens cause of action. Indeed the government in its brief has stated that the action here -- they don't challenge our Bivens, Carlson-Green cause of action.

QUESTION: Well, I know they don't, but didn't the Congress at one point make more detailed provisions for administrative review and cutoff?

MR. LARSON: In 1976.

QUESTION: Because it was dissatisfied with what had been happening?

MR. LARSON: Yes. Much of the legislative history is set forth in our separate appendix in our brief.

QUESTION: Yes, yes.

MR. LARSON: There was tremendous frustration in Congress with the absolute refusal by petitioners to enforce the mandate that Congress had imposed on officials --

QUESTION: And so they provided a more -- they put more obligations, more details, procedures?

MR. LARSON: As one Member of Congress stated, even if LEAA continues to do nothing, we at least have added additional triggers that will initiate and require the fund cutoff that Congress had imposed in 1973.

QUESTION: Let me try this hypothetical on you. Suppose allegations of the complaint stated that the Secretary of Defense and all his subordinates in dealing with billions of dollars worth of government contracts were sending 98 percent of them in the sun belt region below the frost line, or however that is identified these days. Would you have an equal protection claim based on denial of equal protection in terms of damages against the Secretary of Defense?

MR. LARSON: There may be a claim. I don't think

there would be a very good damage claim on that. I mean, this is a race and sex discrimination claim with regard to invidious discrimination.

QUESTION: Well, no matter how good it is, is it good enough to sustain -- to survive summary judgment?

MR. LARSON: On those allegations, I am not sure, but where race and sex have been alleged, Mr. Chief Justice, I think the court --

QUESTION: Well, what is the difference that you see here? It isn't racial. I deliberately posed it as not racial and not based on gender.

MR. LARSON: But the difference is the nature of the invidious discrimination, the race and sex discrimination.

QUESTION: But it is denial of equal protection, isn't it, if they are sending it all south? Or sending it all north, all the contracts?

MR. LARSON: But certainly subject to a different standard of review under this Court's decisions.

QUESTION: But you are not claiming that the government officials invidiously discriminated, are you? You are claiming that they refused to set in motion fund cutoff procedures against local officials who were invidiously discriminatory.

MR. LARSON: We are claiming that they exceeded

their statutory powers, the statutory powers set out in Section 518(c), which make the initiation of fund termination procedures non-discretionary, and that by their refusal to cut off funds or have any civil rights enforcement program coupled with their affirmative, continuous funding of police departments that they knew to be discriminatory, yes, these petitioners have invidiously discriminated against the respondents in this case. That is the allegation in our complaint.

QUESTION: Mr. Larson, could I ask you a question? I was interested -- I am interested in the legislative history. Am I correct, you did not cite the conference report in your brief? I think I am correct in that, and I am curious as to why you didn't.

MR. LARSON: I know that legislative history fairly well, Justice Blackmun. I am not sure. With regard to the '76 conference report?

QUESTION: No, the earlier. I found the conference report rather remunerative to look at, but it is not cited in your brief, and I wondered if there was a reason for it.

MR. LARSON: No, I can't recall what it says right now.

With regard to the standing argument, to finish up, indeed, there are two perspectives on standing. We

believe under Judge Tam's perspective that we have already conclusively demonstrated on this record that we do have standing. Let me point out that these documents, these post-filing documents with regard to Plaintiff Shumacher appear in some of the attachments to the government's motion for summary judgment. We were not able, because we have never had discovery, to obtain this information, but I think it was inadvertently attached to the government's motion to dismiss, so that is how it got into the record.

We nonetheless maintain that with regard to the majority opinion below, that we also have standing directly against -- with regard to redress directly under the Fifth Amendment against the petitioners here. We have claimed that the respondents, the plaintiffs below, were harmed through pain and suffering and through violation of their constitutional rights, and we have sought both compensatory and punitive damages, and in our view those damages would indeed redress the past wrongs that have been committed by the LEAA officials in this case.

We also --

QUESTION: This would apply to some men who have been out of government for quite a while.

MR. LARSON: They are not in government any more, but as this Court has --

QUESTION: But they are still liable to the $100

million?

MR. LARSON: As this Court has repeatedly pointed out, awards of punitive damages pose a very strong deterrent effect to unconstitutional action by government officials, and we believe particularly --

QUESTION: So you don't care. You think this is just tough on them?

MR. LARSON: Yes, it is.

QUESTION: Thank you.

MR. LARSON: They violated the Constitution.

QUESTION: I just wanted your position.

MR. LARSON: They did so wilfully and maliciously in our view, and we are entitled to --

QUESTION: You said that in one phrase at one place in the complaint. Didn't you?

MR. LARSON: I think when you read the entire complaint -- I don't think we have to say wilful and malicious in every paragraph. What we do say in virtually every paragraph is that the petitioners refused, refused.

QUESTION: You said it once. You said it once.

MR. LARSON: Well, we did say it at least twice.

QUESTION: Well, twice. I stand corrected. Twice.

MR. LARSON: We don't have to say it in every paragraph. We have met the basic rules of pleading under Rule 8A of stating jurisdiction provided --

QUESTION: Don't lecture me on the rules of pleading, please. I took those before you were born.

MR. LARSON: Because of our two different claims on standing, we believe that we are entitled to survive a motion to dismiss as the court of appeals held below on either theory of standing.

The government's first argument in this case is an argument in which they contend that all of the petitioners are protected by an absolute prosecutorial immunity. We submit that this contention directly contravenes this Court's decision in Butz. Most important is the record in this case. As I pointed out at the outset, the government petitioners uniformly adhered to an unlawful regulation which Petitioner Velde stated in this record that that -- that those regulations require LEAA to pursue court action and not administrative action to resolve matters of employment discrimination.

Indeed, that regulation and the interpretation of that regulation were uniformly followed by the petitioners in this case. There never was an initiation of administrative fund termination proceedings until this case was filed. After this case was filed, the unlawful regulation was ultimately repealed, and pursuant to our motion for a preliminary injunction and the general deterrent effect of bringing a damage action, petitioners

began to enforce, but prior to this, they didn't.

In other words, they did not have any discretion that might even be described as prosecutorial discretion because they had deprived themselves of that discretion to go forward. Indeed, in their affidavits, their pre-Butz affidavits, the government petitioners in this case nowhere described their functions as prosecutorial. They described themeslves as administrators, and they described their policymaking functions.

Indeed, no petitioner in the affidavits any place claimed responsibility for not initiating administrative proceedings in this case. Of course, to do so would have been exactly what we have charged the petitioners with, and that is exceeding their statutory authority under Section 518(c). The legislative history, as Justice Blackmun points out, is as obvious and clear as the statute itself. The statute says that whenever the administration makes the determination, it shall move forward and initiate the administrative proceedings.

That was violated here, and accordingly not only did we allege that the petitioners, the government petitioners had violated the Fifth Amendment, but indeed they had exceeded the scope of their duty under their statute.

With regard to --

QUESTION: The LEAA determines there has been a non-compliance, and you say thereupon there was triggered the duty to institute proceedings to terminate?

MR. LARSON: Yes, Your Honor.

QUESTION: And you asked them to do that, and they say no, or they don't act, period.

MR. LARSON: Well, after we filed the motion for preliminary injunction with regard to Philadelphia, they did so.

QUESTION: Yes, but I am just wondering, is there judicial review of this action?

MR. LARSON: No, there is not. Of their refusal to follow their statute and initiate? No, there is not.

QUESTION: I know there is no particular provision for it, but wouldn't there be judicial review of it in the district court on an arbitrary and capricious standard?

MR. LARSON: No, not for an individual claimant. There is no procedure whatsoever under this statute. On the other hand, it is absolutely clear that with regard to a grantee, a grantee has under Section 509, 510, 511 of the Act, does have administrative review of the record on that particular action. There is a hearing. There can be a rehearing, and there also is judicial review.

The government's second argument which was not raised below or ruled on below is that the respondents here

do not have a Fifth Amendment cause of action. As this Court pointed out earlier, we believe that this is basically a statement of proof. It is a question going to proof, and in this case there was no discovery, and a proof argument simply cannot be turned into a pleading argument, and our pleadings are more than adequate to state a Fifth Amendment cause of action, as the government even concedes under Bivens and under Davis particularly, and also under Carlson.

Finally, the government argues that this case could have been decided on summary judgment, and that this Court for the first time in this case should act as a trier of fact and rule on a summary judgment motion that was not ruled on by either court below. We submit that it would have been wrong for the trial court to have ruled on the qualified immunity issue on summary judgment had it been filed in the trial court, and indeed, it would be improper for this Court to address this issue for the first time here.

But particularly disturbing, indeed, I found particularly astounding is the government's argument that the normal civil -- the rules that govern normal civil litigation do not apply with equal force in Bivens actions against federal officials. Indeed, in Butz v. Economou, this Court held that the standards that apply to state officials apply with equal import to federal officials, and indeed in Butz this Court specifically invoked the federal

rules of civil procedure, holding that a good faith immunity on summary judgment is subject to a properly supported motion for summary judgment.

Indeed, if there is any doubt about this issue with regard to the application of Rule 56 standards to the government, the advisory committee notes to Rule 56 expressly state in the very first sentence, this rule is applicable to all actions, including those against the United States, or an officer or agency thereof.

As we have pointed out quite extensively in our brief, it would have been wrong as a matter of law for the court below if it had been asked to rule on qualified immunity to have granted qualified immunity in favor of the petitioners on this record. Rule 56 was not complied with by the government.

For these reasons, Your Honors, we believe that the court of appeals decision below should be affirmed, and the government's arguments in this case rejected. We also believe for the reasons that I point out that there is standing in this case, that indeed one plaintiff has already conclusively demonstrated standing, and under many of this Court's decisions, including the unanimous decision last week, in Watt v. Energy Action, there is standing in this case.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Geller?

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. GELLER: Just a few things, Mr. Chief Justice.

Virtually all of the arguments that Mr. Larson just made are addressed in our reply brief, to which I would refer the Court, but there are a few things I do want to stress specifically.

One, in response to Justice White's question, of course there is APA review of these decisions, and plaintiffs have brought an APA suit which is pending.

QUESTION: In the district court?

MR. GELLER: They brought it in the district court. It was dismissed as being moot. The court of appeals reversed, and remanded for further proceedings, and those proceedings have been held in abeyance pending this Court's decision.

QUESTION: How do you get into court in such a case?

MR. GELLER: The Administrative Procedure Act was the cause of action.

QUESTION: But it doesn't give jurisdiction, does it?

MR. GELLER: No, jurisdiction would be under 28 USC 1331.

Second, it is important to realize, because so much focus has been on the 1973 and 1976 amendments, that those were just amendments to Section 518(c)(2) of the statute, which is the antidiscrimination provision. But there is a separate section which has been in the statute since the very beginning, Section 509, which is the fund termination provision. Section 518(c)(2) simply says if the administration makes a number of findings, then it should look to Section 509 for fund termination.

So, it is Section 509 that arguably is in the plaintiff's view non-discretionary. We would refer the Court to the House report on Section 509 which is quoted at Page 22 of our brief, which says that under Section 509, the Attorney General may terminate or suspend payments on a finding that there is a substantial failure to comply, and that he has broad discretionary power over the fund termination process.

Section 509 has not been amended at any time, and that is the fund termination provision.

Now, third, as I understand Mr. Larson, he has changed the theory of the plaintiff's case yet again in response to Justice Rehnquist's earlier questions, because as I understood the theory of plaintiff's case this morning, it was that it is irrelevant what the grantees would or would not have done if the funding had been terminated, and

that is found on Page 36 of their brief, when they explain why cases like Simon versus Eastern Kentucky are irrelevant here, but now we are told that that is their theory, and that they made allegations to that effect in their complaint.

The final point I want to make is that although there was no discovery in this case because a motion to dismiss was quickly filed, respondents did get massive discovery from LEAA under the Freedom of Information Act while this case was pending, and they submitted voluminous materials in response to the defendant's summary judgment motion.

Thank you.

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

(Whereupon, at 2:57 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

RICHARD W. VELDE, ET AL., v. NATIONAL BLACK POLICE ASSOCIATION, INC., ET AL. # 80-1074

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BY Diane Hammond