In the

ORIGINAL

Supreme Court of the United States

GEORGIA PATSY, Petitioner	:	
v.	:	No. 80-1874
BOARD OF REGENTS OF THE STATE OF FLORIDA, ETC.	:	

Washington, D. C.

Tuesday, March 2, 1982

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:05 o'clock p.m.

APPEARANCES:

CHARLES S. SIMS, ESQ., American Civil Liberties Union Foundation, 132 West 43rd Street, New York, New York, on behalf of the Petitioner.

MITCHELL D. FRANKS, ESQ., Assistant Attorney General of Florida, Department of Legal Affairs, Suite 1501, The Capitol, Tallahassee, Florida 32301; 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 the case of Patsy against Florida Board of Regents. Mr. Sims, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHARLES S. SIMS, ESQ.

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether plaintiffs in 1983 actions can generally be required to exhaust administrative remedies, despite this Court's consistent and repeated holdings that such exhaustion is not required, despite clear congressional recognition of and reliance on those holdings, and despite the absence of any historical basis to support a change in this Court's longstanding construction of Section 1983.

Unlike most cases that come before the Court, this case pronounced not a new issue, but an old, previously settled one and respondents have not come near to making the sort of showing required to justify a change in settled statutory construction.

The case is here more than three years after petitioner first filed a complaint in the Federal District Court in Florida under Section 1983 alleging

unlawful employment discrimination in violation of the Equal Protection Clause of the 14th amendment.

The plaintiff has sought injunctive relief and damages. There have been no proceedings on the merits and no discovery. The district court granted defendant's motion to dismiss for failure to exhaust administrative remedies.

The Fifth Circuit initially reversed that decision, relying on this Court's cases, but the court of appeals reheard the case en banc and decided that 1983 plaintiffs would henceforward be required to exhaust administrative remedies under tradtitional exhaustion standards. This Court's holdings to the contrary were distinguished.

The court remanded for a hearing as to the adequacy of the particular remedies available to this plaintiff, and she thereupon sort certiorari here, and either summary reversal in light of recent legislation of which the Fifth Circuit had apparently not been aware, or plenary consideration which this Court granted.

QUESTION: Mr. Sims, the three judges on the original panel all joined the majority on the rerun, didn't they?

MR. SIMS: I had not noticed that, Your Honor. I think that the dissenting opinions in the

court of appeals plainly set forth the basis on which they thought the question had been foreclosed before this Court in any --

QUESTION: But none of the originals -- well, each of them switched sides. I wondered if you had an explanation for it.

MR. SIMS: I do not, Your Honor.

The rule against required exhaustion, which this Court has announced and adhered to as a matter of statutory construction, is, of course, not etched in stone. Our submission is that in light of congressional action in 1871 and more recently, that it is written into law.

The question here is not one of policy. Instead, it is what Congress has meant. The imposition of an exhaustion requirement onto Section 1983 would be a revision of that statute, and statutory revision is a matter for Congress, not for the court.

I plan to address here the three principal reasons why exhaustion cannot be required under Section 1983. First, because of this Court's cases in stare decisis. Second, because of recent congressional action; and third, because it is violative of the intention of the 42nd Congress.

Of course, this Court's non-exhaustion

precedents do not themselves prevent the court from changing its mind in deciding that it has misconstrued the statute. But neither can they simply be ignored, as respondents have ignored them. They form the background against which this case must be decided, and they impose a heavy burden of justification on those who would change the rule.

The Court has held in six cases, all either unanimous or eight to one, that exhaustion cannot be required under 1983 itself. It has repeated that holding in eight additional cases without qualification. Just this term, in Fair versus McNary, every member of the Court subscribed to that proposition. And two terms ago, in Board of Regents versus Tomanio, when the court held that state statutes of limitations would not be tolled pending exhaustion, the court reasoned that such tolling would be appropriate only where -- as was not the case under 1983 -- Congress itself had required resort to administrative remedies.

In short, the rule against required exhaustion has not just been frequently repeated and applied; it is part of the fabric of this Court's 1983 jurisprudence.

Moreover, their construction was not lightly reached. Pertinent history for the 1871 Congress was

before the court in McNeese, as it had been somewhat more fully before nearly the same court two terms before in Monroe.

The consequences of the rule were fully pointed out by Justice Harlan dissenting in McNeese and Damico. And Judge Friendly's famous attack on the rule in Eisen versus Eastman was squarely before this Court at least in Carter versus Stanton in 1972. The Indiana officials in that case relied squarely on Eisen. Arguments based on Eisen were before this Court at oral argument, and Eisen itself was being fully considered by the court in another case that term, its other principal holding being reversed in Lynch versus Household Finance.

Beyond their significance as precedent, however, McNeese and its progeny assume an overriding importance here, because Congress has accepted and relied on those cases. Even if the court's original construction in McNeese were dubious, congressional knowledge of that decision and acquiescence in it would require that further alterations be made by Congress.

Significantly, although Congress was plainly aware of that rule, it did not seek to alter it when it amendment 1983 in 1979 for the first time in a century to reverse this Court's somewhat restrictive decision in District of Columbia versus Carter, although Congress

did re-emphasize the vital role of 1983 -- and I quote from the Conference Report -- "in providing a neutral federal forum for resolution of civil rights complaints."

As this Court has held in United States versus Rutherford and in the Red Lion case, once an authoritative statutory construction has been brought to the attention of Congress and Congress has not sought to change that construction, although amending the statute in another respect, then presumably the legislative intention was correctly discerned.

But retention of the rule is required here for reasons far stronger than simple congressional acquiescence. Congress has not just acquiesced. It has built and relied upon the rule in a way that precludes its reversal.

Acting with the full knowledge that 1983 plaintiffs could not, under present law, be generally require to exhaust administrative remedies, Congress passed a law a year and a half ago authorizing exhaustion in certain 1983 actions under narrow and specified conditions.

In Section 7 of the Civil Rights for Institutionalized Persons Act, 42 USC 1997e, Congress authorized courts to defer consideration of some 1983 cases for a maximum of 90 days, in suits brought by

certain adults convicted of crime. The statute applies only to those who are in institutions which have adopted particular grievance resolution procedures in compliance with minimum procedures set forth by Congress and promulgated in somewhat greater detail by the attorney general.

Four important points stand out from the legislation history of 1997e, and from its design. First, the legislative history makes absolutely clear that Congress knew the non-exhaustion rule was settled law. Sponsors repeatedly called it settled law. Representative Kastenmeier said that the statute was necessary to permit -- that was his word -- exhaustion which was not allowed under current law. And the Conference Report used similar language.

Representative Wiggins, one of the Republic sponsors of the bill, indicated that some in Congress would have preferred a broader rule, but he acknowledged the impossibility of mustering a majority in Congress to do so.

Second, Congress was not just looking at a small portion of a problem without attention to 1983 generally. The general problem of 1983 filings in federal courts was a major focus of congressional concern. Congress knew that prison filings which this

Court had held and were wording, were subject to the same standards as all other 1983 cases under current law with the largest, single category of 1983 cases burdening the federal courts, and by far the most burdensome because of their generally pro se nature. Aware of that entire problem, Congress decided to deal with it piecemeal, one step at a time, by attacking its major source.

Third, Congress was extremely and deliberately selective. It did not require exhaustion for all 1983 cases, or even for all 1983 cases that generally fell within the purview of the Civil Rights for Institutionalized Persons Act. Instead, only certain claims, those of adults convicted of crime, or in particular institutions which had adopted particular demanding grievance resolution procedures, were subject to exhaustion. And even as to them, only those complaints having to do with conditions of confinement were subject to exhaustion.

Congress was thus not hostile to the rule generally. Instead, it made a small exception to the rule because it decided that prisoner cases posed a unique problem warranting a unique solution.

Finally, and most importantly, Congress built on the non-exhaustion rule for its own special

purposes. Congress rejected a proposal to subject prisoners to general exhaustion requirements such as those imposed on 1983 by the Fifth Circuit below, and last year by the Seventh Circuit in a case which was vacated by this Court, Jenkins versus Brewer.

The motivating concern was not federalism, or even having as many 1983 cases as possible efficiently resolved at the local administrative level. Traditional exhaustion, which Congress rejected, would have accomplished that. Instead, Congress used this new exhaustion requirement for some 1983 cases, as an inducement, a carrot if you will, to achieve particular substantive goals as a matter of national policy.

The non-exhaustion rule is thus not just the background against which this case must be decided. It was the principal justification for 1997e, and indispensable for its effectiveness. Congress would not have passed 1997e if exhaustion was already permitted under 1983.

More importantly, reading a general exhaustion requirement into 1983 would render the statute a dead letter. Only on the premise that 1983 cases cannot already be subject to exhaustion does the inducement mechanism that Congress created make sense. The states have no reason to adopt the particular procedures

Congress meant to foster if their 1983 prison cases are already subject to exhaustion.

In short, we think that 1997e makes this case even easier than its predecessors. The legislative history shows far more than passivity and silence. Instead, it shows that Congress has accepted the rule and built on it. Congress has put itself directly in the business of deciding when and to what extent and under what conditions exhaustion will be required.

In these circumstances, further alteration of the rule is plainly a matter for Congress. As the court held in the Alyeska Pipeline case, when Congress begins making an exception to a general rule, even a general rule which is completely judiciously created, further adjustments should be left to Congress.

Whatever the needs for courts to engage in interstitial adjustment with a hundred-year old statute untouched by Congress and uncontrued by the courts, surely the courts need not and should not intervene once Congress has placed a problem on its agenda and begun addressing it. By adopting an exhaustion requirement in reliance on the very policy considerations that Congress is in the current business of weighing, the Fifth Circuit usurped the legislative rule.

QUESTION: Well, carried out to your logical

conclusion in your argument, Younger against Harris should be overturned.

MR. SIMS: No, that is not our position, Your Honor.

QUESTION: I know it is not -- but I would think it is the logical extension of your argument.

MR. SIMS: No. The court in Younger and its progeny has made plain that it did not think that what it was doing was inconsistent with what Congress generally wanted. And the equity practice which Younger adopted has been part of this Court's jurisprudence dating back to the 1790's.

QUESTION: Well, I don't know. Younger is rather recent.

MR. SIMS: Younger is rather recent, but it relied on a series of cases dating a long way back. And the questions as to --

QUESTION: Yes, but Younger just says you have to go exhaust your judicial remedies that are already started.

MR. SIMS: Younger says that if the state has already brought a case against you and that case is before a court, then the federal court should defer to the court that already has that case.

That is a very different matter than 1983 in

this particular action when there is no proceeding pending either in court --

QUESTION: Well, he brings a 1983 suit and he gets it dismissed because the plaintiff should take his complaints into the state court, where he already is.

MR. SIMS: In the Younger case and every other case which followed Younger, there has been a pending judicial proceeding.

QUESTION: Yes, exactly.

MR. SIMS: Here, there is not only not a judicial proceeding, there is no pending administrative proceeding.

QUESTION: I understand that. But there might be.

MR. SIMS: Well, there might be, but Congress has plainly --

QUESTION: You certainly would not come out any different if there was an administrative proceeding pending.

MR. SIMS: Well, it depends on the sort of --

QUESTION: Suppose he started to exhaust his administrative remedies and got tired of it and went to the federal court.

MR. SIMS: I think under Section 1983 he would have a right to go to the federal court.

QUESTION: Yes, exactly.

MR. SIMS: Of course, Congress could change --

QUESTION: Pending or not.

MR. SIMS: I think Congress could change that rule if it wanted to.

QUESTION: On the other hand, they might get a complete and adequate remedy at the first administrative level.

MR. SIMS: I think there are many plaintiffs who have 1983 actions who find that that is so with the particular agencies they are dealing with. And those people, I am sure, are well advised to go through their administrative remedies. There is no indication that people do not do that.

But this plaintiff did not think that the administrative remedies were adequate. And we think that Congress gave her a right to make that choice.

A few words about the legislative history. Read against the background of this Court's cases, we think that 1997e is controlling because even if the court got 1983 completely wrong in McNeese, the fact is that Congress has relied on it.

As the court said in similar circumstances in Cannon against University of Chicago, when Congress acts in reliance on one of this court's statutory

constructions, the question is no longer whether Congress misperceived the law, but rather, what its perception was. But this is not a case where the court needs to perpetuate its own mistakes to give effect to more current legislation. The fact is that the court got 1983 right the first six times around, as the lopsided decisions in those cases should suggest.

Respondents argue only that the 42nd Congress could not have said anything on the matter one way or the other because in their view, there was no law concerning exhaustion in the federal courts as of 1871. Their argument misconceives both the state of the law in 1871 and the principal themes of the legislative debate.

First, the notion of exhaustion was not unknown to the 42nd Congress. The very year that Congress passed 1983 in United States against Clyde, this Court had held that federal courts were without any power to require exhaustion unless Congress had expressly done so.

In another case that year, the Collector against Hubbard, the court there applied a statutory exhaustion requirement, but indicated that if Congress had not expressly provided that requirement by statute, the court would have been powerless to impose it. In fact, Congress had imposed exhaustion requirements in

1857, 1866, 1868 and 1871. In short, there was clear exhaustion law in 1871, and the law was no exhaustion unless Congress had expressly provided for it.

As with the question of immunities and res judicata --

QUESTION: Well, that law changed some as we come down closer to the 20th century --

MR. SIMS: It did, Your Honor.

QUESTION: -- in cases like Myers versus Bethlehem Shipbuilding --

MR. SIMS: It did, Your Honor, but the question here is what the intention of the 42nd Congress was. And for that purpose, I think the court needs to focus on what the law was in 1871, and not what it later became.

QUESTION: Well, in Myers, I do not know that the court focused unduly on the intent of Congress in passing the National Labor Relations Act. It just focused on general principles which the judiciary had established by then governing exhaustion.

MR. SIMS: With respect, Your Honor, the court in the Bethlehem versus Myer case paid very close attention to the particular administrative proceeding that Congress had established. And as one of its principal justifications for applying the exhaustion

rule in that case, it said that it was obviously consistent with what Congress did, and an aid to the accomplishment of Congress's purpose; that is, that Congress had set up deliberately a particular administrative proceeding, and the court was only helping Congress along by making sure that it was not bypassed. That is plainly not the case here.

As with immunities and the res judicata questions which this Court has focused on in previous years, Congress in 1871 should be understood to have acted against the background of the settled law at the time.

Second, as to the debates themselves, not only is the conclusion of McNeese not plainly wrong, as would be required to reverse the non-exhaustion rule, it was plainly right. The debates in 1871 strongly suggest that if an exhaustion requirement had been placed before Congress, it would have been squarely rejected.

The debates' responses have repeatedly described their goal as providing a prompt federal judicial remedy in federal court. Representative Elliot explained that 1983 provided for, quote, "the immediate jurisdiction" of the federal courts without, and I quote, "the appeal or agency of the state.

Opponents like Representative Storm opposed

1983 precisely because it takes the whole question away from the states in the beginning. Senator Blair explained that Section 1 superseded state officials. Representtive Kerr complained that it transferred jurisdiction from state tribunals to those of the United States. Representative Arthur complained that it swallowed up state institutions, tribunals and functions. Representative Swan, another opponent, focused on precisely this point. He complained that it ignored state tribunals.

Section 1 was the centerpiece of a vast transformation of power and of federalism enacted by Congress after the Civil War that this Court has frequently reviewed. The very model that Congress relied on, Prigg versus Pennsylvania, as Justice Stevens pointed out in Monell, makes clear how inconsistent required exhaustion would be with what Congress was doing.

Under Prigg, critical federal rights -- in that case, the rights of southern slaveholders -- could be enforced directly in federal court without the interference of state officials. After the Civil War, of course, Congress was interested in a very different set of rights. But for safety's sake, and to make sure that its meaning would not be lost, it relied on the

Prigg model with its direct enforcement of federal constitutional rights free from any opportunity of state interference, obstruction, hindrance of delay.

Justice Story's opinion for the Court in Prigg said that it would make impermissible even state laws that would complement congressional legislation by auxiliary provisions for the same purpose.

The 42nd Congress intended to provide for the prompt federal judicial protection of constitutional rights. Subsequent congresses have not waivered from that goal. The Court should give effect to that choice, to its own decisions and to the subsequently expressed will of Congress -- the rule 1983 itself does not generally require exhaustion -- and reverse the judgment below.

If there are no further question I will reserve the balance of my time.

QUESTION: I have just one question. Can you tell me what the Florida statute of limitations is applicable to a case like this?

MR. SIMS: I cannot, Your Honor.

QUESTION: May I ask, is there any 11th amendment issue in this case?

MR. SIMS: I do not believe so, Your Honor. It has not been briefed before this Court, although it

was raised at the petition for certiorari stage. The court has entertained cases against state universities and board of regents many times over the past few years -- the Tomanio case --

QUESTION: The only party is the Board of Regents of the state of Florida, and you ask for half a million dollars of damages. I would wonder --

MR. SIMS: Well, the plaintiff, of course, asked for both injunctive relief and damages. The Board of Regents is a body corporate. I think that makes some difference. In addition, --

QUESTION: If you sued the members of the board individually you could have had injunctive relief, but can you have it against the board itself, officially, if it is an agency of the state?

MR. SIMS: Well, this board is a body corporate. I would believe that would make some difference, Your Honor.

In addition, with regard to the damages question, as we pointed out in our reply brief in support of the petition for certiorari, there are substantial funds that the university has which are neither derived from the state nor placeable by the university with the state. And as the Edelman case makes clear, that leaves at least the question of fact

regarding whether or not the judgment here would come from the state, within the meaning of the Edelman case.

QUESTION: If there is an 11th amendment problem, it would be jurisdictional if it were decided against you, would it not?

MR. SIMS: If there were an 11th amendment problem it would be jurisdictional, although since there have been no proceedings, the plaintiff would, I believe, be free to refile and amend the complaint.

QUESTION: Amend the complaint at this time?

MR. SIMS: Well, there have been no proceedings. I mean, she tried to move forward with all deliberate speed.

Thank you.

CHIEF JUSTICE BURGER: Mr. Franks?

ORAL ARGUMENT OF MITCHELL D. FRANKS, ESQ.

ON BEHALF OF THE RESPONDENTS

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

We are here asking this Court to affirm the decision of the Fifth Circuit below and its adoption of a flexible exhaustion rule. We contend that this is a procedure with a relief oriented result without substantial denial of anyone's rights.

Let me state what some of the things that

flexible exhaustion does not do as annunciated below. One, it does not displace 1983 as a basis of jurisdiction or federl review. It does not prevent federal judicial review.

It does not diminish ultimate relief, if necessary, in the federal court. It does not thwart, in our opinion, the intent of Congress in enacting 1983 back in 1871. It does --

QUESTION: What significance does the act of Congress have, giving limited exhaustion requirement for persons in institutions, which was passed recently?

MR. FRANKS: I think that that was a recognition of Congress that the courts needed some assistance in providing for a means of addressing those grievances --

QUESTION: Is it some indication, in your view, that at least Congress thought there was not an administrative exhaustion requirement which the courts had imposed?

MR. FRANKS: No. To the contrary, I think it is an indication or a possible indication of Congress's reliance on the plain language of the statute that provides for other proper proceedings. In this case, they provided for them statutorily. But at least they recognize that there is the deferral to the states. And

I think there is an indication there of their desire to require exhaustion in these circumstances and to provide a mechanism by which the courts -- I mean, the states, and the agencies that are concerned to address those particular problems.

I do not see it as being dispositive or the final word that only Congress can address the non-exhaustion rule. I do not feel that that is substantial support for the ironclad no exhaustion rule.

QUESTION: Do you think there is an 11th amendment problem in this case?

MR. FRANKS: Yes. It was raised below in the district court, it was not addressed by the district court, it was not addressed in the Fifth Circuit, and the case was not briefed here. The issue that we responded to was -- on the certiorari -- as to whether or not the exhaustion rule should be reversed.

But yes, there is an 11th amendment issue. However, we feel that this particular issue of exhaustion transcends the Patsy case and the state of Florida, and is one that should be addressed by this Court.

And it does not -- the adoption of a flexible exhaustion remedy does not require the overruling of prior decisions. I will not bore you with a recitation

of those, but they are outlined in both the amicus brief that we filed -- or that was filed on behalf of respondent, as well as an analysis of the case law and the opinions of this Court and the Fifth Circuit below.

And to respond to Justice Blackmun's question as to why the members of the original panel may have reversed themselves, I would suggest that a possible reason is that there was an opportunity for them to be persuaded that exhaustion or no exhaustion is not required, and it is not an ironclad rule. And that by analyzing the previous decisions of this case, you can come to the conclusion that exhaustion may be a procedural rule that can be adopted by this Court and is consistent with the plain language of the statute itself.

QUESTION: Going back to the 11th amendment -- a state can waive the 11th amendment, I suppose.

MR. FRANKS: No, Your Honor. Only the state legislature --

QUESTION: Legislature?

MR. FRANKS: -- may waive the 11th amendment.

QUESTION: If it is applicable.

MR. FRANKS: They have waived the 11th amendment only in selected tort cases under our statute.

QUESTION: But I take it the district court dismissed the case for failure to exhaust, right?

MR. FRANKS: That is correct, Your Honor.

QUESTION: That the court of appeals reversed.

MR. FRANKS: That issue was never addressed as to -- the 11th amendment was never addressed --

QUESTION: They did not address it, but if you were on the down side, you were an appellee in the court of appeals?

MR. FRANKS: No, we were -- yes, we were the appellees. The appellee the first time, before the original panel, but we were --

QUESTION: Yes, I understand. But you were supporting, trying to support, the district court's judgment.

MR. FRANKS: That is correct, Your Honor.

QUESTION: And you could have supported it by pressing the 11th amendment.

MR. FRANKS: Well, as I indicated, --

QUESTION: Did you press it in the court of appeals?

MR. FRANKS: Well, it was briefed, --

QUESTION: On your side.

MR. FRANKS: Yes, Your Honor. It was not briefed or argued en banc. Only at the original -- briefed at the original panel.

QUESTION: So, if the issue was properly

before the court of appeals, they must have rejected your submission.

MR. FRANKS: I cannot subscribe to that, Your Honor, because I do not believe that that issue was considered by that court. And certainly, the record is clear that the district court did not address it.

QUESTION: You have not raised it here? You have not argued it here.

MR. FRANKS: No, Your Honor, we have not, because of the grant of certiorari.

QUESTION: Well, you could have --

QUESTION: Well, do you want us to decide the 11th amendment point or not?

MR. FRANKS: Well, the Fifth Circuit --

QUESTION: Because I just want to remind you you are asking us to decide something without any briefing by anybody.

MR. FRANKS: That is correct, Your Honor.

QUESTION: So, for once we will earn our money.

MR. FRANKS: We are asking you to affirm the Fifth Circuit for the reasons that they stated in their opinion, which we feel are supportable by --

QUESTION: But I thought you said the 11th amendment was still here.

MR. FRANKS: There is still an 11th amendment

issue that somewhere will have to be briefed and will have to be litigated because the Board of Regents is indeed an agency or an instrumentality or entity of the state of Florida.

QUESTION: If we decide in your favor, how will it get litigated?

MR. FRANKS: We need not reach that issue, Your Honor, because we need not reach --

QUESTION: It will not get litigated.

MR. FRANKS: It will not get litigated at least in this lawsuit, and it need not, because we feel that that is a constitutional --

QUESTION: But it is jurisdictional.

MR. FRANKS: Yes.

QUESTION: So how can we decide the case on the merits if we have not got any jurisdiction to hear it?

MR. FRANKS: Well, there is the issue of --

QUESTION: How could the court of appeals have decided it without --

MR. FRANKS: I am sorry, Your Honor, I did not hear?

QUESTION: And could the court of appeals or the district court have decided it if there is a jurisdictional barrier to even entertaining the suit?

MR. FRANKS: Well, the Fifth Circuit and the court below obviously interpreted the non-exhaustion as a jurisdictional basis as well, and the Fifth Circuit has, at least in the Roach case --

QUESTION: Yes, but the Fifth Circuit en banc overturned the district court.

MR. FRANKS: No, Your Honor, they did not.

QUESTION: Oh, that is right. They affirmed.

MR. FRANKS: They affirmed the district court in its ruling as to no exhaustion, flexible exhaustion, is required.

QUESTION: That is right.

MR. FRANKS: But it did not overrule the -- remanded it back to determine whether or not the remedies that were available in the state of Florida were adequate, and that still has not been determined as far as this record is concerned.

QUESTION: As a matter of curiosity, before the panel decision, which is a very brief two or three pages, was there oral argument then, or was there only oral argument before the en banc decision?

MR. FRANKS: There was oral argument in both.

QUESTION: Both cases.

MR. FRANKS: No, no.

QUESTION: This was one of their summary

actions.

MR. FRANKS: It was summary action that was argued en banc.

This Court has stated that you only retreat or displace 1983 for compelling, persuasive reasons. Some of the things that the flexible exhaustion rule has annunciated below does -- first of all, it does permit the court to determine how it is to exercise the jurisdiction given to it by Congress. It exercises its Article III analysis to determine whether or not it is ripe for adjudication or whether the case is complete as far as an injury is concerned.

QUESTION: On this question of ripeness, could you tell me in your view when does the statute of limitations start to run for the 1983 client?

MR. FRANKS: Florida has a variable statute of limitations, but for back pay and termination and so on, the general statute of limitations is two years.

QUESTION: And does it begin to run before or after the exhaustion process takes place?

MR. FRANKS: Well, I would submit that under the rationale of Tomanio, that the -- if exhaustion is required as a jurisdictional prerequisite, that it would toll the statute of limitations --

QUESTION: Are you asking us to reconsider

Tomanio, as that is really what --

MR. FRANKS: I do not know that you need to do that, Your Honor. I think the language is there that would -- we are not talking about two separate proceedings running concurrently along; we are talking about an action that may originally go to the district court and if the rule is that you need to exhaust before coming here, you go to exhaust, but I think that Tomanio rationale would support an equitable tolling so that the statute of limitations would be --

QUESTION: You said Tomanio would support an equitable tolling?

MR. FRANKS: I believe there is language to that effect, Your Honor.

The flexible exhaustion remedy, if adopted, would --

QUESTION: Excuse me. Did I understand you to suggest earlier that really by flexible exhaustion, you are only talking about ripeness?

MR. FRANKS: I am sorry, Your Honor?

QUESTION: Only talking about ripeness?

MR. FRANKS: No, Your Honor.

QUESTION: They are different things. Flexible exhaustion rule and ripeness?

MR. FRANKS: That is correct. I think what it

does --

QUESTION: You made a reference to ripeness, and I just --

MR. FRANKS: It helps determine whether or not the case is ripe for adjudication, is my point on that. In that way, it assists in the --

QUESTION: Well, ripeness would mean, I take it, that if the case is not ripe because something had not been completed, then there would be no way into the federal court under 1983 until the case became ripe. Isn't that what ripeness means?

MR. FRANKS: In this case, for example, it may very well be that there has been no final state action by the Board of Regents which would trigger a 1983 action.

QUESTION: Is that what you mean by ripeness?

MR. FRANKS: Well, that is one of the ways in which flexible exhaustion would help the court determine whether or not an issue is ripe, is whether or not there has been a completed action which would indicate that there has either been a denial of due process or denial of equal protection or other constitutional right which has been violated.

QUESTION: Well, what would happen to the petitioner in this case if instead of going into the

federal court at the time she did, everyone had simply done nothing? She would still be fired, wouldn't she?

MR. FRANKS: This is not a termination case, Your Honor. It is a non-promotion case. It is a reverse discrimination action brought by a white woman who alleges that she was not promoted because of the affirmative action plan that the university is under because of a court order, quite frankly. And that is the basis of her complaint.

QUESTION: If everyone had done nothing after the initial decision not to promote her, I take it that decision would have stood, would it not?

MR. FRANKS: Well, she had applied for various positions and had not been selected for those positions. Had she done nothing and had the university done nothing, it is presumed that she would still be in her old job as a secretary 3 or 4, or whatever her level was. She would still be employed and still be working.

Another reason for adopting the flexible exhaustion remedy is that it enhances federalism, it sharpens the issues -- and that is the point, Justice Brennan, that I indicated helps determine and makes the record determine whether or not it is right for adjudication. It may possibly moot constitutional claims.

If this lady has a constitutional right to be promoted to a position and she exhausts her available and adequate administrative remedies, she may very well get that relief. And accordingly, there would be no basis to go into federal court and there would be no constitutional deprivation, or the remedy would have been provided for her.

QUESTION: Counsel, was the question about Congress's most recent enactment for institutional defendants presented to the en banc court of appeals and argued by the parties?

MR. FRANKS: I do not believe that was the case, Your Honor, because I think that enactment came after the case was argued. But I do recall that -- I seem to recall that that point was discussed in one of the dissents.

QUESTION: Do you think that Act helps you or hurts you?

MR. FRANKS: I think it helps us, Your Honor. I think it is as consistent with the plain language in 1983 of other proper proceedings -- there have been no interpretation of that particular phrase of 1983, and it is an indication, along with numerous others on the part of Congress, to defer to the states and to give the states the opportunity to correct any wrongs that may

have been made or may have been perceived to have been made.

I also think that Congress has indicated a willingness to defer to the state by their enactment in 1988. I am not talking about the attorney's fees portion, but that portion which states that you will decide the issues on the basis of state law.

Certainly, 1988 is contrary to the position of appellant that we have got one rule, when if we are applying the statute of limitations in 50 jurisdictions plus, and we are applying the substantive and procedural -- not procedural, but law -- of 50 plus states, it certainly does not necessarily bring for a single, orderly body of law for the federal judiciary to consider.

There is another reason for adopting the flexible exhaustion remedy, and that is the plain language of -- as I indicated, the plain language. Monroe tells us that there are three bases of -- for Congress to have adopted the 1871 Civil Rights Act to overrule existing state law, and they were not particularly concerned with that. It is to provide a remedy where one was available, and it is to provide a remedy where one is available in theory but not in practice.

We have come a long way since 1871. Times have changed to the point where Congress, I think, is recognizing, along with the Administration, that states can and should handle these matters. The plain language provides for other proper proceedings. The federal courts are supplementary to those remedies that are available in the states, whether they are administrative -- particularly administrative -- but that does no mean that they are predominant. And if these issues can be addressed in the context of federalism, then they should be done so.

One other point on 1997. I indicated that this was a response to the crisis that Congress perceived, and as I indicated, it does permit the deferral of action to the states. And as noted by the case below, there is certainly no displacement of 1983. It is a deferral, and it does permit administrative agencies to address those.

I indicated that it does not require overruling prior decisions, and I think that the commentaries in Chicago and Harvard Law Review articles that we have cited in our brief are indications of how the Fifth Circuit reached the result that they did below.

And finally, this requiring the exhaustion of administrative remedies and basing it upon the plain

language of the statute and upon federalism and all of the other compelling persuasive reasons I have listed provides for speedy relief. For example, Professor Clark, in 55 South Cal Law Review, has done a statistical analysis of the decisions of the federal courts in the 20th century, and it turns out that the average case, including all of those that are dismissed, is settled in 1.16 years.

Now, this case has been on --

QUESTION: You say settled. Disposed of.

MR. FRANKS: Disposed of. Excuse me, Your Honor. Disposed of in 1.16 years.

Now, this case has already been in litigation for over three years and we still have not gotten to the merits. Any case -- it is our experience and opinion that any case that is going to go to trial takes an enormous --

QUESTION: Mr. Attorney General, how in the world can this case get to the merits without the state surrendering its sovereignty?

MR. FRANKS: I do not believe that it can, Your Honor.

QUESTION: Well, what are we doing? Just going through motions?

MR. FRANKS: Certiorari was granted on the

issue of whether or not the Fifth Circuit was --

QUESTION: But now the 10th amendment has been raised in argument. It is here.

MR. FRANKS: It is a cloud hanging over this particular --

QUESTION: A cloud? If we rule with you, fine. If we rule against you, then we litigate it.

MR. FRANKS: Well, if you rule -- if you rule with me, it has still got to go back to the district court to determine whether or not the remedies that were available are adequate. Even if you affirm the Fifth Circuit. And I am urging that upon you because the case still has to go back at least on that portion.

QUESTION: You were quite content with the Fifth Circuit opinion, I take it.

MR. FRANKS: That is correct, Your Honor. I think that it provides for a rule, and it is a procedural rule, that this Court can adopt based upon the statutory guidance given by the Congress.

QUESTION: And when you lose, then you will raise the sovereign immunity point.

MR. FRANKS: That issue was raised below --

QUESTION: You know, it is tempting to accomodate you.

MR. FRANKS: I have no authority, Your Honor,

to stand here and waive the --

QUESTION: Why didn't you get the authority? You were there, you represent the state.

MR. FRANKS: That is correct, Your Honor.

QUESTION: You could have asked for it. Don't you represent the state?

MR. FRANKS: I am representing the state in this litigation, but I have no authority under the laws --

QUESTION: Doesn't the attorney general have the right to --

MR. FRANKS: No, Your Honor --

QUESTION: -- ask for legislation?

MR. FRANKS: No, Your Honor, he does not. I am sorry, does he have --

QUESTION: Doesn't he have the right to ask the legislature?

MR. FRANKS: Oh, that is correct, yes, sir. But he has no authority to waive the sovereign immunity of the state. That is clear.

Unless there are other questions, that is all I have, Your Honor.

CHIEF JUSTICE BURGER: Very well. Do you have anything further, Mr. Sims?

MR. SIMS: Just briefly, Your Honor.

ORAL ARGUMENT OF CHARLES S. SIMS, ESQ.

ON BEHALF OF THE PETITIONER - Rebuttal

MR. SIMS: A brief point on the 11th amendment point that has concerned some members of the Court. I would agree with my colleague that the question would probably be open on remand. And if this Court hold that exhaustion is not permitted, the case then goes back down to the district court for further proceedings, and they have raised the question already, and it could at that point be decided by the district court.

Because there are some particular aspects about the way this case is framed -- that is, this Board of Regents is a body corporate rather than a state agency, and in addition, the fact that it may stand in the same position as the universities or boards in Delaware State College versus Ricks, Tomanio case, the Horrowitz case, the Roth case, Bacci case and others. I would think that since that question has not been raised here, and a judgment need not be -- a final judgment entered against the state here -- that the Court could decide the exhaustion question before it and leave the 11th amendment question for the lower court to address.

In addition, with regard to damages, there is a recent decision of the Fifth Circuit, or the Eleventh Circuit, at 666 Fed 2d, 505, that bears on the question

of whether the particular finances of this university, the fact that they have extensive funds which are not derived from the state or required to be kept in a state treasury, unlike their other funds, is relevant. And the Eleventh Circuit suggested that that was --

QUESTION: As I understand it, you are requesting some equitable relief, aren't you?

MR. SIMS: We are seeking on the merits equitable relief and damages, that is correct.

QUESTION: And the 11th amendment would not be a bar to your prayer for --

MR. SIMS: Under Korn versus Jordan I would not think so, Your Honor.

With regard to the other points raised, I think they were all policy questions, and as we have indicated, we think those are for Congress, not for the courts.

Unless there are further questions?

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

(Whereupon, at 2:55 p.m., the oral argument in the above-entitled matter was concluded.)

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:

Georgia Patsy, Petitioner V. Board of Regents of the State of Florida, Etc. - No. 80-1874

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Suzanne Young