ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2101

TITLE PENNHURST STATE SCHOOL AND HOSPITAL, ET AL., PETITIONERS v. TERRI LEE HALDERMAN, ET AL.

PLACE Washington, D. C.

DATE October 3, 1983

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WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

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PENNHURST STATE SCHOOL AND :
HOSPITAL, ET AL., :
Petitioners :
v. : No. 81-2101
TERRI LEE HALDERMAN, ET AL. :

- -x

Washington, D.C.

Monday, October 3, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

H. BARTOW FARR, III, ESQ., Washington, D.C.; on behalf of the Petitioners.

ALLEN C. WARSHAW, ESQ., Harrisburg, Pa.; on behalf of Petitioners.

THOMAS K. GILHOOL, ESQ., Philadelphia, Pa.; on behalf of Respondents.

DAVID FERLEGER, ESQ., Philadelphia, Pa.; on behalf of Respondents.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Farrow, you may proceed whenever you are ready.

ORAL ARGUMENT OF H. BARTOW FARR, III, ESQ.,

ON BEHALF OF PETITIONERS

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

This case as it now stands before this Court is essentially a dispute between citizens of the State of Pennsylvania and the state itself over how to run a state mental retardation program pursuant to state law. The federal court saw fit to decide this dispute imposing upon the state a mandatory presumption in favor of certain types of programs and requiring the state to create and pay for new facilities in accordance with its preference.

In our view this federal interference in purely state matters is barred by the Eleventh Amendment and by principles of comity. Now this afternoon I will discuss the Eleventh Amendment and Allen Warshaw will discuss the issue of comity.

Before getting into the details of our Eleventh Amendment argument I think it might be useful to the Court if we state as straightforwardly as possible just what our overall possition is. In short,

we believe first that this claim is in fact a claim against the state and not just against state officials; second, that the state is not prevented from claiming its Eleventh Amendment immunity by the doctrine of Ex Parte Young which by its terms and logic applies only to federal claims; and third, that the state may invoke its immunity against a pendent claim like the one here just as it may invoke its immunity against primary claims.

Now as the statement of this position makes clear proper Eleventh Amendment analysis requires the asking of several separate though related questions. Is it a claim against the state? Is it within the doctrine of Ex Parte Young? Is the Eleventh Amendment somehow inapplicable to pendent claims?

In addressing the first of these questions, whether the claim is in fact one against the state, it is not dispositive that the complaint only names state officials as defendants. This Court has said on numerous occasions that the courts must look to the nature of the claim and the nature of the relief sought to determine whether it is in effect one against the state.

There is no bright line to define this inquiry, but the basic test derived from Larson in 1949, a federal case but followed in subsequent cases, is

whether the state officials can make a nonfrivolous claim that they are acting even if mistakenly within the general ambit of their colorable authority under state law.

QUESTION: Mr. Farr, you refer to Larson as being a federal case, but the plurality there in Treasure Salvors pretty much adopted that as an Eleventh Amendment rule, too.

MR. FARR: That is correct, yes, sir.

Now in this case despite all of Respondents' allegations about lawless behavior, we think it control that defendants or the persons charged by state law with making the numerous almost day-to-day discretionary decisions about operation of the state mental retardation program including the very decisions that are at issue in this case, what kind of facilities to create, what kinds of persons to put in those kinds of facilities, what kinds of services and programs to provide.

Furthermore, it is clear that these defendants must make those decisions within the limits of the funding provided by the state legislature. Respondents simply wanted to make different decisions and to exact from the State Treasury the money to pay for those decisions.

But under the tests set down by this Court that is the very essence of a suit against the state itself. Now the second question is whether even though the claim is functionally one against the state itself it is within the venerable doctrine of Ex Parte Young for if the claim were that the state officials were violating the federal constitution or federal law then Ex Parte Young says that the state cannot give them its immunity from the Eleventh Amendment.

They are required to be obedient to the superior authority of federal law, but Young has never been thought to apply to state law claims like the ones here not should it be. The practical need for the so-called fiction of Ex Parte Young that the state officials are stripped of their representative character is necessary to be able to enforce the Fourteenth Amendment and other federal laws.

The language of this Court in Edelman to turn the Civil Rights Amendments from a shield into a sword but that need is not present when you are dealing with only a state law claim. In fact, the proper balance between the local and the national government is much better preserved with important state issues by having those questions decided by a state court.

QUESTION: Mr. Farr, let me just be sure I

understand one point. You do agree if it were a federal statutory claim then you would say that would be covered by Ex Parte Young?

MR. FARR: I do. Yes, I do.

The third inquiry and one by its terms which is an odd one to be asking at all is whether the Eleventh Amendment is somehow inapplicable to pendent claims. Although some earlier cases concedingly seem to incline in that direction without we think very much consideration of the issue, we think that the decision in Edelman v. Jordan settled and settled correctly that issue for once and for all.

In Edelman --

QUESTION: Let me see if I understand your response to Justice Stevens. Suppose the complaint asserts a federal question. Does that end the matter?

MR. FARR: As far as that particular claim goes the Court would have to, of course, see whether it had Article III jurisdiction over it. But if it seeks injunctive relief under a federal claim that is permitted by Ex Parte Young.

QUESTION: You mean a statutory claim that would preclude the official doing what he is doing.

MR. FARR: That is correct.

For example, in --

QUESTION: That was preemption, for example.

MR. FARR: Ray v. Atlantic Richfield is the example I was going to give where the Court said that the state officials by carrying out the state law in that case were preempted by federal law and were willing to give an injunction against the carrying out of state law. That does not extend to retroactive relief but other than that the federal claims are within Ex Parte Young.

Turning back to Edelman and the question of pendent claims, in Edelman the situation was that there was a primary claim which was an equal protection claim under the Fourteenth Amendment, a claim which in and of itself would be permitted by Ex Parte Young. There were in effect two pendent claims under federal law.

The Court examined each of these claims, determined that one claim was permitted because it was under federal law and it sought injunctive relief as I was saying to the Chief Justice and decided that the other claim was barred by the Eleventh Amendment because it was a federal claim but sought retroactive relief. The same analysis applies here.

This pendent claim is barred by the Eleventh Amendment not because it seeks retroactive relief but because it is a state claim to which Ex Parte Young does

not apply at all.

QUESTION: It would help if you let us know what you are calling a state claim. The kind of a state claim you are talking about I take it is a claim that the official is acting outside the scope of his authority.

MR. FARR: That is correct. The state --

QUESTION: Just in terms of state law he should not be doing what he is doing.

MR. FARR: That is correct.

QUESTION: You concede that if there was an allegation, would you or would you not, that he is acting completely outside the -- He has even no colorable authority under state law. Would the Eleventh Amendment still --

MR. FARR: In that situation if the allegation was that he was so outside of his authority that he effectively was acting without any authority at all then I think it would not be a claim against the state.

QUESTION: I guess we do not have to decide that. In this case nobody is claiming -- They are just claiming that state officials were misapplying state law.

MR. FARR: I think if they get up on their feet they will claim that it is lawless and horrible and

all of that, but I think basically the claim is that they are simply not making the right decision under state law.

QUESTION: Misconstruing state law.

MR. FARR: That is correct.

QUESTION: What you are saying is you cannot convert a dispute over the applicability of the state law into a claim of "lawlessness" or totally without authority.

MR. FARR: Absolutely. I think what you have to look at is whether the defendants can make a nonfrivolous defense that they are acting within state law. I think once you have got that then the inquiry stops. Otherwise you are going to have a situation where the Eleventh Amendment means something only if you actually go through and decide the merits of the state law which is not much help.

QUESTION: Rationally should you be able for Eleventh Amendment purposes to distinguish between some official who is acting totally outside of his authority and some official who is just misconstruing state law?

MR. FARR: I think --

QUESTION: Maybe Larson did, but does it make a whole lot of sense?

MR. FARR: I think there are two points about

that, Mr. Justice White. One is that I think that it makes sense only at the very outer boundary which is the mere fact that somebody happens to be employed by the state, of course, does not mean that he can go around and do whatever he wants and claim an Eleventh Amendment immunity in a federal court.

QUESTION: Why should that not --

QUESTION: If you are only making a state law claim why should -- As you say the rationale of Ex Parte Young should not reach that either, should not reach any state claim.

MR. FARR: Well, I think you do not need the -- What I am saying is that there are points at which the behavior is so far outside the boundary that it really is just personal behavior that someone is committing an assault on his own time.

QUESTION: Why do you conclude from that that the Eleventh Amendment does not bar the suit?

MR. FARR: Because then I would say that there is really no statement involvement at all and it is somebody who is just acting on his individual -- If somebody is driving his car for pleasure or something and he is sued in a diversity suit, that might be a situation where he just cannot say because I incidentally happen to have a job some of the rest of

the time with the state I am covered by the Eleventh Amendment.

But I think it is a very, very narrow limitation and particularly because Larson, of course, is a federal case. In Larson the situation is if you do not give some leeway for allowing those kinds of suits they are effectively barred completely by sovereign immunity.

But in the context of a claim against a state official the only question we are addressing here is whether these claims can be brought in federal court. They can still be brought in state court and, therefore, there is an alternative way to get those cases resolved.

QUESTION: Mr. Farr, supposing a Pennsylvania statute said in so many words none of these people shall be institutionalized in Pennhurst. Would the Eleventh Amendment be a claim against someone who says I am being wrongfully institutionalized at Pennhurst?

MR. FARR: I think there is a level at which the statutes or the state law might be so absolutely clear that all the state officials had where they effectively had no discretion it was simply a ministerial carrying out. I think under the cases of this Court that sort of case might be allowed in.

QUESTION: What is your answer to my specific case?

MR. FARR: Whether that case is clear enough? If they say absolutely --

QUESTION: The statute says no one shall be placed in Pennhurst.

MR. FARR: And the state appropriates no money to support Pennhurst and they just do it on their own.

QUESTION: No, they still pay the bills at Pennhurst. They do exactly what they are doing now, but the statute says no one shall be institutionalized at Pennhurst during 1983.

MR. FARR: Well, the reason that I raised the funding is if you are saying that nobody shall be admitted to Pennhurst and there is a flat prohibition I would think under the cases of this Court that nondiscretionary matter might be within the Treasure Salvors notion that somebody is proceeding outside the scope.

QUESTION: So then the question I gather the way you present the argument is whether the holding in the Pennsylvania case on which the Third Circuit relied is that clear or not that clear.

MR. FARR: Well, I certainly think it is not that clear.

QUESTION: So then the question, I gather, as the way you present the argument is whether the holding in the Pennsylvania case on which the Third Circuit relied is that clear or not that clear.

MR. FARR: Well, I certainly think it's not that clear.

QUESTION: But if it were that clear, then you'd say well, then the Eleventh Amendment would be no defense.

MR. FARR: It is possible to me that a judicial decision could be as clear as a statute. I certainly would concede that. But I would in no way concede that Joseph Schmidt is that clear. He went to an institution.

QUESTION: Mr. Farr?

MR. FARR: Yes, sir.

QUESTION: Did the court of appeals make any finding that these officials had acted beyond the scope of their authority?

MR. FARR: They did not address the question at all in those terms, Justice Powell. They simply took --

QUESTION: Did the district court make any finding in that respect?

MR. FARR: No, they did not. The district

court, in fact, to the extent they made any finding at all, indicated, although they found a violation of state law as such, indicated that the officials were acting in good faith and within the scope of their authority for purposes of giving them a qualified immunity on the damage claim.

QUESTION: Is the Department of Public Welfare a party to this case? I've understood it was.

MR. FARR: Yes. I guess I believe it is.

QUESTION: It's a state agency.

MR. FARR: It is a state agency.

QUESTION: And it's the agency that oversees the operation of Pennhurst and other mental hospitals.

MR. FARR: That's correct. Now, the claim is certainly barred, I believe, against any state agency in fact. Of course, what we're saying is that even though there are individual state officials named as well, the claim is barred with respect to them, too, because it is still --

QUESTION: Well, the agency can operate only through officials and its other personnel.

MR. FARR: That's correct.

QUESTION: Mr. Farr, what about actions of city or county officials under your theory?

MR. FARR: The actions of the city and county

officials are typically not subject to the same Eleventh Amendment analysis, but the situation you have here is that their activities essentially are to carry out the state law. The state provides all of the funding, and therefore, if the presumption is in effect and the new community facilities must be created, and people must be moved into those facilities, the state bears 100 percent of the cost of that. And we think, therefore, in these circumstances you can't get around that by simply naming the counties who have no fiscal responsibility separate from that of the state.

Mr. Chief Justice, I'd like to save the remainder of my time for rebuttal, if I may.

CHIEF JUSTICE BURGER: Very well.

Mr. Warshaw.

ORAL ARGUMENT OF ALLEN C. WARSHAW, ESQ.,
ON BEHALF OF THE PETITIONERS

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

Even if the Eleventh Amendment prohibits a federal court decision on the state law issues in this case, principles of comity do not. Rather, those principles prohibit federal courts as a matter of self-restraint from interfering with the operation of complex state programs except when it's absolutely

necessary to protect federal rights.

Indeed, this Court has applied this rule to prevent the exercise of federal jurisdiction over federal claims when state forums were available to consider those claims. The rule is based in large on principles of federalism which require federal courts to respect the independence of local governments, state and county, in matters of local concern, especially when those matters involve the expenditure, as in this case, or the collection of monies.

However, it is a rule which is also based on the very practical consideration that even the most simple and obvious principle of state law will involve incalculable legal and nonlegal complexities in its application to ongoing state programs.

QUESTION: Mr. Warshaw, would you tell me when this issue was first brought into this case?

MR. WARSHAW: It has been raised in various ways at various times in the litigation. It was raised in this form for the first time in the Third Circuit on the remand when it was first suggested that the lower court order could be justified solely on state law. That was the first time when the respondents argued that the court should ignore the federal court issues and go directly to the state law issues.

It was argued in the district court when the remedy was based on four federal theories and one state theory and then only in part on the state theory as a limitation on this bill for relief, and again in the Third Circuit on appeal from those four federal theories and one state finding as a limitation on relief. But it was raised -- and let me add to that that we think it is the kind of issue that has to evolve during the course of the litigation depending upon the state of the litigation. And in this case it is one that was raised in the form appropriate at every stage of the litigation.

In this regard as to the practical considerations, this Court has recognized the federal courts are limited in their competence to decide the nonlegal issues involved in operating state programs. Instead it has required that federal courts give substantial deference to the professional judgments of state officials involved in operating those programs, even in cases involving constitutional issues where the federal courts can give a definitive and authoritative answer to the legal issues.

When only state law is involved, federal courts are unable to even give that kind of a resolution of legal issues, and there is, frankly, just no justification for their involvement in the state

decisionmaking process. For example, in this case the lower courts have taken a vague right to treatment from a case, In re: Schmidt, in which the Pennsylvania Supreme Court approved placement in an institution, and the lower courts created a presumption from that case in favor of placement in the community. As importantly, they took that right from a case involving one person where funding was no issue whatsoever and have created a presumption which applies regardless of cost and available funding to thousands of people.

To say that that rule is less than definitive and less than authoritative is at the least a severe understatement. Nonetheless, in this case, acting to avoid rather than to vindicate federal claims, the Third Circuit sanctioned a massive and ongoing intrusion into Pennsylvania's program for the mentally retarded. In so doing the Third Circuit, we believe, was deluded by the apparent simplicity of the right to treatment in the least restrictive environment which it believed it had found in state law, and ignored the complexities of its application to even a single person, let alone the thousands of class members in this case.

The extent of the resulting intrusion is fully reflected in the district court orders in this case. For example, under those orders state and county

officials are required to prepare and subsequently implement habilitation plans for every one of the class members. The manner in which those plans and programs are to be implemented, prepared and monitored is strictly governed by the district court's latest 100-page order which dictates the precise form such a plan shall take, the procedure by which it shall be prepared, who shall participate in its preparation and how long it shall take to prepare it and subsequently to implement it.

CHIEF JUSTICE BURGER: Was this order based on expert testimony of record?

MR. WARSHAW: It was developed after the original trial based on testimony at record of the trial, I assume. It's never been exactly clear what it's basis was at any given point.

CHIEF JUSTICE BURGER: Well, are you suggesting the district judge just thought these things up on his own?

MR. WARSHAW: There was various -- various testimony at trial and in subsequent hearings as to how best to prepare habilitation programs and how best to implement them. I don't want to say he acted without a record, no. That's -- certainly there was a record created. I will say that he has taken it upon himself

to control the manner in which state officials exercise their, might excercise their discretion in this reccrd -- in this way.

QUESTION: Does the record show the number of people in the class?

MR. WARSHAW: There -- at the time of trial there were -- at the time of decision there were over 1100 people at Pennhurst and I believe several thousand more on the waiting list at Pennhurst, which was how the class was defined. By waiting list at Pennhurst that means people who had applied for admission to Pennhurst and therefore had become eligible for other services in the community. They were all part of the class, and the class exceeded at least several thousand.

But once again, I should note, and this is the next point I would make and perhaps best illustrates the intrusive nature of the lower court's order and the broad gap between it and the judgment of state officials, and that is that it necessarily imposes upon thousands of other people who might otherwise be eligible for services in Pennsylvania, because the court has given absolute priority to its order over all other competing needs. It has on at least one occasion condemned state officials for moving residents out of another facility in Pennsylvania where conditions were

clearly deteriorating badly -- and this was a matter of record -- where it was about to lose substantial funding, and said that that was unacceptable in light of his orders in Pennhurst, notwithstanding the fact that at that point Pennhurst, and today, was fully certified by the federal government as meeting minimum standards and was receiving substantial federal funding.

The intrusive nature of the lower court's orders it seems to me is fairly obvious. State officials must conform their conduct to those orders regardless of their own professional judgments and regardless of the legitimacy of competing demands for limited state resources. If they do not, they risk contempt, and in this case that has been a very real risk.

Less obvious are the invidious effects of the court proceedings themselves regardless of the orders which are issued. Since the entry of judgment in 1978 there have been over 50 days of hearings held in the district court. There have been hundreds more before a hearing master appointed by the court to decide individual placement, make individual placement decisions.

Each of these hearings must be attended by a state or county official, professional who must spend

time educating the judge so that the judge can make professional judgments, or at least explaining and justifying their own judgments to the court or the hearing master. In either case the effect is that limited and precious professional resources are wasted for the sole purpose of allowing a court and its master to substitute their own professional judgments for those of qualified state officials.

This Court has found this kind of judicial interference with professional decisionmakers to be unacceptable even in cases involving constitutional rights. When that interference involves the operation of a wholly state program solely for the purpose of enforcing state law is a totally unacceptable exercise of the federal judicial power, and we suggest this Court should stop it.

Thank you. And if I may, I'd like to reserve the remainder of my time.

CHIEF JUSTICE BURGER: Mr. Gilhool.

ORAL ARGUMENT OF THOMAS K. GILHOOL, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GILHOOL: Chief Justice Burger, and may it please the Court:

I will address jurisdiction; my colleague, comity.

First, let me try briefly to put the case in perspective. This case went back to the circuit two and a half years ago in its eighth year carrying the express instruction of this court to consider the state law issue in light of the recent state supreme court decision in Schmidt.

The circuit en banc did so. In light of the state supreme court decision, all eight circuit justices unanimously ruled that state law is clear, and that it was clearly violated, including Judge Eldersell who didn't like the state law, who would not have chosen it, who thought it unwise, but nonetheless clearly the state law.

The state legislature sets state policy. The state legislative policy here, the preference for community facilities and the obligation to create them if they do not exist arises from the state legislature and the state law.

The circuit below, all eight justices followed settled pendant jurisdiction principles, settled since Siler and Green. That the Fourteenth Amendment claims in this case are substantial is undisputed here, and in light of this Court's unanimous decision in Romeo, are indisputable. The same conditions, the same institution. Nicholas Romeo indeed a member of the

class in this case.

So far there is nothing extraordinary about this case. What is extraordinary is petitioners' claim that principles of federalism as they understand them require a new Eleventh Amendment jurisprudence and a new pendant jurisdiction jurisprudence.

But on the facts of this case, the result below serves both interests. The settled pendant jurisdiction doctrine is preserved, and federalism is served since the state remains free to change its policy.

QUESTION: Mr. Gilhool, is it your position that the state officers here were acting without any authority whatever in the Larson and Treasure Salvors sense?

MR. GILHOOL: Your Honor, I believe that is the necessary consequence of the circuit court's unanimous holding as to the clarity of state law. We argued the ultra veries argument last time, and I would rest upon that and upon this Court's decision earlier in colloquy with petitioners.

Parsing that Younglike fiction as to when it's the state officers and when its negligence and when it's outrageous is something of a judicial optical illusion. We would prefer, Your Honor, and it is the argument I will seek to make in a moment, to rest upon the real

ground of Young, which is the Fourteenth Amendment pendant jurisdiction. Fourteenth Amendment presence overcomes the Eleventh Amendment.

QUESTION: Well, then, is it your position that you don't have to show here that the state officers were acting without any authority whatever?

MR. GILHOOL: Yes, Your Honor, we don't have to show that.

QUESTION: How do you reconcile it with Treasure Salvors?

MR. GILHOOL: Well, Treasure Salvors, Your Honor, was not a Fourteenth Amendment case.

QUESTION: Why is this a Fourteenth Amendment case? I thought it turned on state law.

MR. GILHOOL: No, Your Honor. It does not turn on state law, and -- and -- and that precisely the nub of the case.

Here the substantial Fourteenth Amendment claim -- Your Honor, if I may, may I step back from it just a moment, and I will return directly to your question.

The settled principle of pendant jurisdiction is that once a federal court has jurisdiction by virtue of a federal question, it has it to decide the whole case, including the state issue, of which, if it stood

alone, the state issue, it would not have jurisdiction.

Now, it was Siler which first applied this doctrine 70 years ago precisely in the context of defendant state officials.

QUESTION: Did it consider the Eleventh Amendment issue?

MR. GILHOOL: Well, Your Honor, Siler was decided a year and a week after Young. It was decided in the midst of a storm of controversy which --

QUESTION: Is that a yes or a no answer?

MR. GILHOOL: The answer is yes, Your Honor.

QUESTION: It did consider the Eleventh --

MR. GILHOOL: Yes, Your Honor. Ex parte Young was argued to the Siler court. That court, with the opinion written by Justice Peckham in Siler, as in Young, could not have forgotten the Eleventh Amendment. To the contrary --

QUESTION: Did Siler consider the Eleventh Amendment argumet in so many words?

MR. GILHOOL: No, sir, it did not in so many words.

QUESTION: Well, I thought just a minute ago you answered me yes, that it did.

MR. GILHOOL: No, Your Honor. I answered yes, it did consider the Eleventh Amendment, Your Honor, and

I say that because --

QUESTION: Was it argued?

MR. GILHOOL: Ex parte Young was argued, Your Honor.

QUESTION: Well, how can you --

QUESTION: Was the Eleventh Amendment mentioned by counsel in argument?

MR. GILHOOL: Your Honor, I have not had access to the transcript of the argument.

QUESTION: But the United States reports at that date summarize the arguments.

MR. GILHOOL: Yes, Your Honor. And the summary shows no mention of the Eleventh Amendment.

QUESTION: Is there a word in those summaries about the Eleventh Amendment?

MR. GILHOOL: No, Your Honor, not the Eleventh Amendment.

QUESTION: When was the last time Siler was cited in an Eleventh Amendment case? I'll make it easier --

MR. GILHOOL: My recollection, Your Honor --

QUESTION: I'll make it easier for you. Has it been cited since Larson?

MR. GILHOOL: Oh, yes, Your Honor.

QUESTION: In what case?

MR. GILHOOL: My recollection, Your Honor --

QUESTION: Was actually cited as an Eleventh Amendment case.

MR. GILHOOL: Your Honor, my recollection is, and it may be in error, that it was cited in Edelman. In any event, it was cited that day in Hagans.

QUESTION: Not for your proposition. It was cited for the opposite.

MR. GILHOOL: I think not, Your Honor, if I may spell out what it is my proposition is that I think Siler stands for.

It is agreed, surely, that there was a substantial Fourteenth Amendment question in Siler.

QUESTION: May I ask you another question? What is the origin, the constitutional origin of the doctrine of pendant jurisdiction?

MR. GILHOOL: Well, Your Honor, it is Osborn.

QUESTION: It's -- it's what?

MR. GILHOOL: It is Osborn.

QUESTION: It's argument?

MR. GILHOOL: Osborn, Your Honor. John Marshall's opinion for the Court in Osborn.

QUESTION: What is the constitutional provision on which it relies?

MR. GILHOOL: Your Honor, it is derivative, is

it not, of Article III?

QUESTION: Exactly.

MR. GILHOOL: Exactly.

QUESTION: And was the Eleventh Amendment adopted after Article III?

MR. GILHOOL: Yes, Your Honor. And it is Article III which it amends.

QUESTION: And the Eleventh Amendment is quite -- quite specific, isn't it?

MR. GILHOOL: Yes, sir. There's no question that the Eleventh Amendment is a jurisdictional --

QUESTION: And isn't that a general principle that a specific constitutional or statutory provision is to be favored over some general language that didn't mention a particular point at all? That's a -- you would agree with that as a principle, wouldn't you?

MR. GILHOOL: Yes, sir. I think that is so, though the decisions of this Court, I believe, demonstrate the jursidictional limitations of Article III to be even more sacrosanct than the jurisdictional limitations of the Eleventh Amendment.

QUESTION: Which -- which cases?

MR. GILHOOL: Well, Your Honor, Siler itself, and Young.

QUESTION: Siler? Siler didn't mention the

Eleventh Amendment.

MR. GILHOOL: Well, my point, Your Honor, is, as this Court has held in many cases, that the Congress may overcome the jurisdictional limitations of the Eleventh Amendment as they may not those of Article III.

My point is that in many cases this Court has held the jurisdictional limitations of the Eleventh Amendment may be waived. That is not so with respect tc those of Article III. And, of course, there is the Young fiction with respect tc the Eleventh Amendment, and there is no such with respect to Article III.

Siler articulated and it itself is one of the significant early articulations of pendant jurisdiction. That -- that such existed not only for the reasons articulated in Gibbs and its predecessors, namely the Article III jurisdiction over whole cases, the convenience-judicial economy-fairness to the parties considerations, but also to avoid premature and unnecessarily binding constitutional decisions and orders.

Three years ago in Mayer and Gagne you unanimously held that a Fourteenth -- a substantial Fourteenth Amendment question once in a case remains in the case until the entire dispute is settled. There there was a substantial Fourteenth Amendment claim, and

the case had settled with injunctive relief on the pendant Social Security Act ground. The question was whether attorneys' fees against state officials violated the Eleventh Amendment.

In what the opinion of the Court and the concurring opinion alike called the narrow ground, you held unanimously that respondent alleged substantial Fourteenth Amendment claims resolves the Eleventh Amendment question.

The same result, as I suggested at argument last time, obtains in Edelman. There the Court improved an injunction on pendant grcunds, requiring state officials to timely decide public assistance claims. In Edelman there was a Fourteenth Amendment claim and pendant jurisdiction. The injunction rested upon the pendant federal statute under Hagans.

The pendant injunction here is and can be on no different jurisdictional basis from the pendant injunction in Edelman, for this Court has never held that a spending power statute such as the Social Security Act in Edelman itself overrides the Eleventh Amendment.

QUESTION: But you know, of course, that Edelman was a federal case, not a state law case.

MR. GILHOOI: Your Honor, the pendant statute

was a federal statute. The pendant statute here is a state statute. I think that makes no difference. I think the controlling matter is the presence of the Fourteenth Amendment. Indeed, when petitioners argue, as they did again here, that the Eleventh Amendment would not bar relief if it had rested in a pendant federal statute, they are curiously incorrect. That is not so. Any old federal interest, no matter how significant, bar one, in any old federal statute does not defeat the Eleventh Amendment and has never been held by this Court to do so. Only Section 5 Fourteenth Amendment statutes do so.

QUESTION: Are you saying the Fourteenth Amendment issue remains in this case --

MR. GILHOOL: Yes, sir.

QUESTION: -- As it comes to us?

MR. GILHOOL: And that was the unanimous holding of this Court in Gagne v. Mayer. It remains in the case to the end, and confers the jurisdiction, and in light of Young and all that has followed, provides the basis for affirmance below.

What petitioners' arguments --

QUESTION: So it's irrelevant, as you said earlier, I think, whether and to what extent these state officers are acting within their authority.

MR. GILHOOL: You could reach the same result on that ground, Your Honor.

QUESTION: But you -- you -- you say that as long as it's a pendant to a federal constitutional claim --

MR. GILHOOL: Yes.

QUESTION: -- That gets rid of the Eleventh Amendment --

MR. GILHOOL: Yes, Your Honor.

QUESTION: -- Right at the outset of the case.

MR. GILHOOL: Yes, Your Honor. As I believe Edelman holds, as Gagne holds, and the same situation was presented in Hagans, though again the Eleventh Amendment was not raised. But there again, this Court, based on a substantial -- the presence of a substantial Fourteenth Amendment question upheld injunctions based in pendant federal statutes which of themselves, a spending power statute, did not pierce the Fourteenth Amendment.

Any contrary holding in this case, I suggest, brings down all of pendant jurisdiction.

As I urged earlier, Mr. Justice Powell, the jurisdictional limits of Article III are even more sacrosanct than those of the Eleventh Amendment. The source of the law arguments presented by petitioners

here are precisely those made for 150 years against pendant jurisdiction in any federal question case.

Those arguments --

QUESTION: But Article III did not use the word "pendant jurisdiction."

MR. GILHOOL: Forgive me, Your Honor. What did not use the word "pendant jurisdiction?"

QUESTION: Article III, or no article's act --

MR. GILHOOL: Quite right. Quite right.

QUESTION: It's judge-made law, isn't it?

MR. GILHOOL: It is judge-made --

QUESTION: Well, why don't you face up to that? You keep running back --

MR. GILHOOL: Oh, I face it, Your Honor. I face it. I suppose it comes from the case provision, the case word of Article III. My point is that pendant jurisdiction is settled doctrine since Marshall, and indeed, its continuing vitality and importance has been recognized and urged by this court in Aldinger, in Hagans and in Edelman itself. And indeed --

QUESTION: Well, why do you say that one of the petitioners argues, as I understand it, that if you have a case with federal Constitution and the state constitution involved, and the federal constitutional point is dropped, you can't have pendant jurisdiction

for the state --

MR. GILHOOL: That may be the case, Your Honor.

QUESTION: Is that what the argument is?

MR. GILHOOL: That may be the case, and Gibbs seems to suggest --

QUESTION: Well, would you answer that for me?

MR. GILHOOL: -- That if the federal ground is dropped or is found insubstantial, it may be that the jurisdiction over the state ground disappears. That is not this case. Here the Fourteenth Amendment claim is clearly substantial. There is no contest of that here. It has not been withdrawn. It remains in the case. And, therefore, the power of the Court to rest its injunction in that sense on the Fourteenth Amendment pending state statute.

QUESTION: But did -- did -- did the court rest its injunction on the Fourteenth Amendment in the case before us?

MR. GILHOOL: No, sir. It rested its injunction --

QUESTION: Solely on state law.

MR. GILHOOL: Absolutely, Your Honor. Absolutely.

QUESTION: Well, may I ask you this question? Can you cite some examples of when the Eleventh

Amendment would ever apply on your formulation if counsel simply --

MR. GILHOOL: Certainly, Your Honor.

QUESTION: -- Alleges a Fourteenth Amendment claim?

MR. GILHOOL: When the Fourteenth Amendment claim is not substantial, Your Honor, the Eleventh Amendment --

QUESTION: So you have to have a trial to decide that.

MR. GILHOOL: Absolutely.

QUESTION: You do.

MR. GILHOOL: When the state claim is presented purely and barely by itself, clearly the Eleventh Amendment would bar it. If the state statutory claim were pendant to diversity jurisdiction, for example, we admit it would be barred by the Eleventh Amendment.

QUESTION: Well, under Young -- under Young, all counsel has to do is to allege a federal constitutional violation. You don't have to go to trial.

MR. GILHOOL: But, Your Honor, under accepted substantiality doctrine, that Fourteenth Amendment claim must be substantiated.

QUESTION: So you have to -- you have to try

that issue first, and if you lose on that, then you go to state -- go back to state court.

MR. GILHOOL: Oh, no, Your Honor. To do that would be to turn Ashwander as well as Siler upside down. The decision of substantiality is, of course, a continuing one, but under accepted substantiality doctrine it is made initially --

QUESTION: Even if the court finds it's not substantial.

MR. GILHOOL: Yes, Your Honor. Though in this case, the substantiality of the Fourteenth Amendment question I think cannot be gainsaid.

CHIEF JUSTICE BURGER: Mr. Ferleger.

ORAL ARGUMENT OF DAVID FERLEGER, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

In this tenth year since the complaint was filed I will discuss the comity issue raised by petitioners for the first time on appeal after the 1981 remand.

Before I do that, I'd like to answer Justice Powell's earlier question regarding the number of plaintiff class members. There were 1,230 Pennhurst residents as of the time of trial, and the evidence at

trial showed 2,200 persons on the waiting list.

And, Justice O'Connor, the counties do have an independent obligation to provide community services. At page 28 of my brief there is a typo where I have the word "no independent" rather than "an independent," and I wanted to take that opportunity to correct that.

Respectful and deferential relations between federal courts and state governments are embodied, of course, in the principle of comity. Where federal action would leave state interests free of undue interference, that action serves comity, and on the other hand, where a federal court needlessly intrudes on state prerogatives, nonaction or abstention serves the interest of comity.

And Judge Elbersell below still adhered in his words to the view that the least restrictive obligation should not be imposed on the hospital authorities, and then concluded that he and the court is bound by Pennsylvania courts' interpretation of state law issues, even if they adopt what to him was the disagreeable least restrictive test.

While they are sometimes in tension, the two principal themes of comity we believe are in harmony in this case. The first theme if federal judicial nonintervention with state determinations, and the

second is sensitivity to the consequences of abstention.

The state policy is one which has been adopted fully and the practices adopted fully by the federal court below. The development of individual habilitation plans was not made up by the lower court, nor was the process of assessment of people and placement in accordance with a state's preference for community services. All those rules, all those procedures were in existence before the trial of this case began.

And, Justice Stevens, your hypothetical is no hypothetical. The state legislature in 1970 did decree and appropriate money to remove 900 people from Pennhurst, and that money, unspent, most of it, at the time of the trial, was specifically for the dispersal, in the words of the statute, of Pennhurst residents to the community. The --

QUESTION: Are you saying that these officials then had a duty to find the least restrictive alternative --

MR. FERLEGER: Absolutely.

QUESTION: -- For each class member.

MR. FERLEGER: Absolutely. For the seven years before the trial of this case the state had concluded that, in the words of the secretarial memorandum of 1972, Pennhurst was a total loss as a

mental retardation service facility, and in the words of the defendant executive officials themselves, "To fix up Pennhurst would be prohibitively expensive in comparison with logical dispersal into the community."

QUESTION: Well, if that's correct, would it not follow that the state agents were acting outside their state authority, and you don't need to rely on pendant jurisdiction?

MR. FERLEGER: Well, definitely. And we -- I argued that point at the last argument.

The state hired experts to prepare for this trial, as the plaintiffs did. The experts testified called by the plaintiffs, and their conclusion was, their advice to the state was confirming what the state itself had decided earlier. The experts testified: "We came to the conclusion there is no way Pennhurst could be made into an adequate facility. The whole way of operating out there is simply too far gone." And, in fact, at the trial the opening words of the Commonwealth's attorney as, "We are not here to defend Pennhurst."

This Court accepts state appellate decisions about what state law is. Petitioners don't ask for an end to that practice. And where state law is settled, as we believe it is here, this Court does not require

abstention.

This is not a Younger case, a Huffman case where there are pending proceedings in the state court, nor is this a case where some federal interest is plucked from the air to interfere with what the state interests and policies are. Here the federal courts have adopted state interests and followed them to the T.

QUESTION: Had there been any decision by the Supreme Court of Pennsylvania prior to Schmidt that settled state law?

MR. FERLEGER: We believe that the statute was clear before Schmidt, and there --

QUESTION: But my question was had there been a decision by your supreme court?

MR. FERLEGER: There had been lower court decisions but not one by the Pennsylvania Supreme Court.

QUESTION: Not by the supreme court. And your supreme court decided Schmidt in 1981, as I recall.

MR. FERLEGER: That's correct. There had been decisions by lower appellate courts in Pennsylvania, but Schmidt was the first analysis of that issue by the Supreme Court of Pennsylvania.

QUESTION: Did Schmidt hold that the State Department of Public Welfare had been acting beyond its authority in all of these prior years that Pennhurst had

been operated?

MR. FERLEGER: No. That issue was not raised or decided in Schmidt. It was not addressed at all.

QUESTION: Has that ever been decided by the Supreme Court of Pennsylvania?

MR. FERLEGER: No. No, it hasn't. The Supreme Court of Pennsylvania -- excuse me -- the Commonwealth Court of Pennsylvania, a court of statewide jurisdiction, has held that funding is not an issue when it comes to community services. In the In re: Sauers case decided after Schmidt, the Commonwealth Court held that the state must pay for community services and that the statute contemplates unanticipated, even unbudgeted for demands on the state treasury.

Now, you don't have to reach that issue here, of course, because as the court of appeals held -- the footnote is a page and a half long -- the judgment below does not involve funding, does not raise any issue of funding because the state funding adjustment mechanisms remain in effect, and there has been no problem in all these years that we've had with funding questions.

We believe that the deference that a federal court must pay to state law makes sense in light of the requirement that federal courts avoid adjudication of constitutional questions whenever possible, even when

they are difficult state law questions.

What are the consequences of this approach? Well, in this case as this Court recalls very well, I'm sure, the federal court was faced with serious, irreparable injury to many hundreds of people: psychological harm, physical harm, regression, abominable conditions, so abominable that even at this point and in the court of appeals the petitioners don't ask this Court to leave them free to run Pennhurst and to injure people as they were doing previously.

In the court of appeals they told the court of appeals we're not talking at all about the part of the order that relates to the operation of Pennhurst.

Even Younger v. Harris, which enunciated the principles embodied in our federalism, made it clear that irreparable injury is a reason for a federal court not to stay its equitable hand.

The seven-year delay in raising the comity issue points to the second consequence that's considered by federal courts in evaluating abstention comity application, and that is, the delay and expense that would be caused. If this Court determines that the court of appeals was wrong in following state law after the remand, we will be back in the court of appeals for a constitutional decision. If this Court determines

that somehow Judge Broderick was wrong in deciding the constitutional issues or any issue back in the early 1970s and late 1970s, we will be in state court for many more years of litigation, and people will remain at Pennhurst and continue to have their state and federal rights violated.

QUESTION: You could have started out in state court and obtained an adjudication of all the rights of which you seek to adjudicate here.

MR. FERLEGER: We could have, Your Honor, and the federal law does not require people raising federal claims to start out in state court.

QUESTION: I realize that, but you were complaining about the delay. Perhaps you would have had less delay if you'd have gone into state court.

MR. FERLEGER: Well, in Davis v. Gray in 1872, the Court pointed to the local influences which sometimes disturb the even flow of justice as one reason for people having the option of going to federal court.

QUESTION: Haven't we made a little progress --

MR. FERLEGER: Excuse me?

QUESTION: Haven't we made a tiny bit of progress since 1872?

MR. FERLEGER: Not -- not -- well, we've made some progress, and, in fact, we've made progress

regarding the Pennhurst institution itself. According to plans filed by the state just this past Friday, within a year and a half there will only be about 200 people left at Pennhurst, and it's no secret that like King Nebuchadnezzar I think we see the handwriting on the wall. And Pennhurst, as the lower court was told at trial, will be closed. There is no dispute that the relief chosen and selected by the state for the problems at Pennhurst is the replacement of Pennhurst with community services.

The delay and expense at this point, having been sent back to the court of appeals for the state law decision by this Court, means that there will be more difficulties for the plaintiff class members and a waste of federal and state court energy if the state courts must become involved.

Comity considerations apply in civil rights cases, of course, but they counsel against abstention. As the Court in Fair Assessment noted and in Mayer v. Educational Equality League said, "There is substantial authority for the proposition that abstention is not favored in an equal protection civil rights case brought under 1983 and 28 U.S.C. 1343."

We believe that it makes sense that federal courts in civil rights cases should use state law

remedies. Nothing could interfere with state determinations less, and nothing could serve both Pennhurst residents and our federalism more.

It is no blow to comity or federalism where the result in the federal court is the same as that decreed by the legislature, by the state courts and by the state executive.

The rule is not a new one. In fact, in preparing I noticed the case Clark v. Smith, 38 United States Courts 195, where the court said, and it is the rule today, that if the remedy in state court is substantially consistent with the chancery side of the federal court, with those remedies, no reason exists why it shouldn't be pursued in the same form as it is in the state courts.

Justice Brandeis in Dawson, other courts since then, 1968, Stern v. Chester Tube, have reiterated that --

QUESTION: Wasn't that a Fourteenth Amendment case?

MR. FERLEGER: Excuse me? The Clark v. Smith involved relief under state law, and it wasn't a Fourteenth Amendment case. It involved rights to land in Kentucky in Clark v. Smith.

QUESTION: I have a hard -- I have a hard time

understanding how that applies to this case.

MR. FERLEGER: Well, it applies because in this case the Court doesn't need to decide the Fourteenth Amendment question, the Fourteenth Amendment question being substantial. Having defined and recognized the state law right, the Court has to decide what remedy should be applied. And the remedy here is a remedy that is accepted in state law. It is the typical remedy in state law. At the time of the last argument here, 20 courts of common pleas in Pennsylvania had ordered community services created for individuals.

It is no news to Pennsylvania officials that courts can require the development of services for people. What Schmidt decided, although the Supreme Court of Pennsylvania had not said it before, was perfectly consistent with everything that had happened in the lower courts.

Comity, in fact, would be repudiated if a federal court was required to follow state law for the basis of its decision but then was forbidden to use state law remedies in order to execute that decision.

In conclusion, may it please the Court, community services for people with retardation are older than institutions. The district court noted in its opinion that specialized services for the retarded began

not as institutions but as small, short-term community facilities. Pennhurst grew from the corruption of that origin.

Pennsylvania no doubt will close Pennhurst like it's already closed, the record shows, post-judgment, three other institutions for the retarded in Pennsylvania no matter what this Court decides. But that is as it should be, because a federal court's preferences for a particular result should bow and have to bow, as in this case to the social judgment and decisions and determinations of the state courts and the state legislatures. Such deference is the demand both of federalism and the right of my clients, the few people remaining at Pennhurst, and those who have left Pennhurst and are blossoming in the community.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Farr? You have about three minutes remaining.

ORAL ARGUMENT OF H. BARTON FARR, III, ESQ.,
ON BEHALF OF THE PETITIONERS -- REBUTTAL

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

I would just like to address briefly the pendant jurisdiction argument that Mr. Gilhool was making.

As I understand his argument, all that a plaintiff needs to do in order to bring the state into federal court under state law and obtain whatever injunctive relief it wants is to plead a not wholly insubstantial Fourteenth Amendment claim.

Now, this Court recently in Aldinger and Owen Equipment has made clear --

QUESTION: A Fourteenth Amendment claim against state officers.

MR. FARR: Against state officers. They have to characterize it as against state officers.

The Court in Aldinger and Owen Equipment has made clear, however, that the Article III inquiry is not the full extent of an inquiry into federal jurisdiction. And the Court in Owen Equipment said quite plainly the limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.

Now, in Edelman that is exactly what the Court did. In Edelman there was a not wholly insubstantial Fourteenth Amendment claim, just as Mr. Gilhool says there is here. However, the Court did not then say that the Eleventh Amendment was overridden. It went on to look at pendant claims and in fact determined that a pendant claim was barred by the Eleventh Amendment. And

that's precisely the correct level of analysis to apply in this case.

This claim is a claim against the state. It is not a federal claim within the doctrine of Ex parte Young, and it is barred by the Eleventh Amendment, whether as a pendant claim or not.

The other point --

CHIEF JUSTICE BURGER: Excuse me. I misinformed you. You have seven minutes, not three minutes remaining.

MR. FARR: Well, I will use the three nonetheless.

Thank you, Mr. Chief Justice.

Furthermore, in the same argument about the Eleventh Amendment counsel suggested that the Court has never held that a federal statute can override the Eleventh Amendment as applied by Ex parte Young. But I think if the Court will look at Ray v. Atlantic Richfield, that's exactly as I was discussing earlier what the Court did. That was not a Fourteenth Amendment claim. It was an issue whether certain federal statutes could be enforced against state officials under the supremacy clause. That is permitted by Ex parte Young.

QUESTION: Would you -- would you expand on that for just a moment, because the theory of Ex parte

Young, I understand, is when there's unconstitutional conduct that's sort of ultra veries. They cannot act that way.

You say the same thing about a federal statute when there's an allegation of a violation of a federal statute, that that's like an allegation that the official act is beyond his state authority?

MR. FARR: Well, what I understand Ex parte Young to say -- and, of course, exactly what the fiction is has been a subject of some substantial debate -- but what I understand it to say is that where a state official comes in conflict with the superior authority of federal law, then the Eleventh Amendment cannot confer on him an immunity from obedience to that supreme law. And that would be true under the supremacy clause, or it would be true under the Fourteenth Amendment.

QUESTION: Well, but if you're applying a federal statutory claim, that would mean that to determine whether or not the Eleventh Amendment defense is a good defense, you'd have to decide the merits of the federal statutory claim, is that right?

MR. FARR: In a situation of Ex parte Young, of course, that's the situation you have on a federal constitutional claim as well. If you have a Fourteenth Amendment claim against a state official, the court has

to look at the claim itself to determine whether he is stripped of his conduct. So that's an inevitable result if you were going to have federal law be supreme in federal courts against state officials, if you want to enforce the federal law. But when you have a situation where you're dealing solely with state law, that is not necessary. The state courts are fully available to provide the relief there.

QUESTION: But then the question, as I understand you here, the question for the federal court is whether there was any authority whatsoever for what the state official was --

MR. FARR: That -- that is the question. As I indicated earlier, I think that is the question that comes out of cases such as Treasure Salvors. And as I said to Justice White, I think that is an inquiry, though, that has to be very carefully limited, because you're really trying to --

QUESTION: But it's an inquiry that requires some examination of state law to decide whether there is any state law authority --

MR. FARR: That's right. I believe a very threshold --

QUESTION: So you don't deny the duty of the federal court to at least take a peek at state law.

MR. FARR: I think the federal court has to look at state law to see if in fact the state official is really just acting as an individual or is at least doing something more than that by saying that he works for the state when he's doing what he's doing.

QUESTION: See if it's a case such as my hypothetical: nobody can be put in Pennhurst. If it's in that category --

MR. FARR: If it's that clear, that ministerial so that it's -- that he is acting completely outside, I would think perhaps under the Treasure Salvors notion that that would be permissible. But I think that kind of inquiry is very different from what we have here.

QUESTION: Well, that's how you distinguish Siler, in fact, as I understand you.

MR. FARR: Well --

QUESTION: In Siler the people didn't have any authority to make rates.

MR. FARR: Siler never addressed the Eleventh Amendment question. But, however --

QUESTION: No, but Green did.

MR. FARR: Pardon me?

QUESTION: But Green did, which is very similar.

MR. FARR: Well, I think what happens in Green is that you have a statement of two principles: the basic principle of Ex parte Young and the basic principle of pendant jurisdiction. I think in themselves they're innocent. I think they're only combustible when you mix them. And I think that's what the Court in Edelman has finally gotten around to. After Larson and looking at this again they've said just because you have a pendant claim doesn't mean we're not going to look at the Eleventh Amendment. We're still going to do that and apply traditional Eleventh Amendment principles.

QUESTION: But the converse of that is that even though there were no pendant claim, and if there is a state law claim, you still have to make some analysis of state law to decide whether an Eleventh Amendment plea is good.

MR. FARR: If it's an original claim against the state, yes. I'm not --

QUESTION: The Treasure Salvors situation, for example.

MR. FARR: The Treasure Salvors.

QUESTION: That didn't rely on pendant jurisdiction at all.

MR. FARR: That's right. You have to make

some inquiry. But as I say, I think because of the federalism concerns, it has to be a very limited inquiry so that you don't suck in the cases that in fact are better in state court.

Thank you very much.

CHIEF JUSTICE BURGER: The case is submitted.

We'll hear arguments next in Norfolk Redevelopment against Chesapeake and Potomac Telephone Company.

(Whereupon, at 2:00 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:

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BY Diane Hammond

(REPORTER)