OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-6270

TITLE JOHNNY GREEN, ET AL., ETC., Petitioners V. AGNES MARY MANSOUR, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES

PLACE Washington, D. C.

DATE October 7, 1985

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BEFORE THE SUPREME COURT OF THE UNITED STATES

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JOHNNY GREEN, ET AL., ETC., :

Petitioners, :

V. :

AGNES MARY MANSOUR, DIRECTOR, :

MICHIGAN DEPARTMENT OF :

SOCIAL SERVICES :

- -x

Washington, D.C.

Monday, October 7, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:41 o'clock p.m.

APPEARANCES:

WILLIAM BURNHAM, ESQ., Detroit, Michigan; on behalf of the petitioners.

LOUIS J. CARUSO, ESQ., Solicitor General of Michigan, Lansing, Michigan; on behalf of the respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Green against the Michigan Department of Social Services.

Mr. Burnham, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM BURNHAM, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. BURNHAM: Thank you, Mr. Chief Justice, and may it please the Court, I would like to reserve five minutes of my time for rebuttal.

This case is actually comprised of two Section 1983 class actions. The claims in the cases are essentially that the defendant state official violated the plaintiff's statutory rights under Title 4(d) of the Social Security Act, thereby depriving them of AFDC benefits to which they were entitled.

The two cases factually parallel each other. However, I will indicate briefly what those were. The cases were filed in 1980 and 1981. The first case, denominated Michigan Welfare Rights Organization versus Dempsey originally, is the child care expense case, in which Michigan in concluding an AFDC budget refused to allow a deduction for the expenses of child care which were necessary to be paid for the recipient to go to

work.

This, petitioners believe, violated clear pre-October, 1981, federal law. This Court has decided a case on that very issue, Shea versus Vialpando. The Department of Health and Human Services, which is charged with administration of the Act, wrote Michigan several letters telling them essentially that, and they nonetheless did not change the policy.

However, in October, 1981, federal law changed, and federal law continued the requirement that there be deductions allowed. However, Michigan changed its regulation to comply with the new federal law. The reason for that presumably was because the new federal law imposed a limitation of $160 a month, and Michigan believed, I suppose, that it could live with that, and therefore changed its policy to comply with the new federal law.

The other case, Banas versus Dempsey --

QUESTION: What remains of that first case now, the one that you have just described, after the change?

MR. BURNHAM: After the change, the defendants, we would submit, are currently in compliance with the new federal law. Consequently, what remains is our request for summary judgment as to the defendant's

compliance with federal law before October of 1981, and the issue, but relief may be granted based upon that determination.

QUESTION: And are you seeking damages for the period before 1981?

MR. BURNHAM: We are not seeking any monetary relief at all. We are not seeking damages. All we are seeking is a declaratory judgment or some other substantive federal question determination, and an injunctive order requiring the defendant to send notice relief as was done in the case of Quern versus Jordan, which this Court decided in 1979.

QUESTION: Why isn't the case moot or very close to it?

MR. BURNHAM: Well, the case is not moot. It is our position the case is not moot. First of all, the Sixth Circuit found that it was not moot, and we believe that that analysis is in fact correct, although they decided against us on the Eleventh Amendment issue.

In order to be moot, of course, under Garrity, there must be a lack of any cognizable legal interest, and the issues are no longer live. Under this circumstance, the issues are clearly live.

QUESTION: You want the notice.

MR. BURNHAM: We want the notice, and there is

an interest in --

QUESTION: And you want the notice so that these people could apply for relief in state courts.

MR. BURNHAM: Well, probably in the state administrative tribunal.

QUESTION: Yes, to get -- to get what you think they are entitled to prior to the amendment of the federal law.

MR. BURNHAM: To state it more specifically, we believe that the interest is in being given the opportunity to do that. In other words, class members may decide that they do not want to pursue that remedy, or they may decide that they do. If they do pursue that remedy, they may not be able to actually get an award of retroactive benefits because of state law.

QUESTION: But it takes more than just a very tiny thing to keep a case alive. For instance, an award of costs, the outstanding issue of costs won't keep a case from being moot.

MR. BURNHAM: I understand.

QUESTION: It strikes me that this is really awfully far down the line so far as any live controversy about federal issues is concerned.

MR. BURNHAM: Well, petitioners would respectfully disagree. This case is in no different

position than the case of Quern versus Jordan was in 1979. In Quern versus Jordan, the issue involved was a question of whether or not notice really could be ordered.

And in that case, the entire program to which the relief could have related had been abolished for over a year by the time the District Court considered notice of relief and had been abolished for approximately four years by the time that this Court approved the notice of relief.

However, in that case, and I think it is an indication of how that case was still alive, in that case this Court affirmed an en banc Seventh Circuit decision saying that notice really should be ordered, and after notice of relief was ordered, in fact, the class members, some of them, filed for administrative hearings, and then after they had exhausted their administrative remedies, went to the Illinois Court of Claims, and in fact were able to get an award of benefits.

Now, that award of benefits, of course, was under state law as a result of actions taken by the state courts.

QUESTION: There were no damage claims in Quern?

MR. BURNHAM: There were no -- well, Quern was Edelman versus Jordan revisited. Consequently there was originally a request for equitable restitution, in other words, a direct award that the state pay those benefits. This Court in Edelman versus Jordan, of course, held that that violated the Eleventh Amendment.

On remand to the District Court in Quern, the District Court and the Seventh Circuit agreed that no such order, of course, direct order to pay benefits would be entered. However, limited injunctive relief requiring that a notice be provided of the availability of state administrative remedies could in fact be ordered, and that was the context in which it arose.

In other words, this case is just like Quern in the sense that there is no current live claim for an injunction against future violations. However, there are live claims for past violations and for notice relief to allow the claims the opportunity to seek redress for those past violations.

QUESTION: Mr. Burnham, as I understand it, you make no claim for prospective relief.

MR. BURNHAM: That depends on how one interprets the term "prospective."

QUESTION: Well, identify what you claim as possibly being prospective if the court below thought

you had advanced any claim for prospective relief.

MR. BURNHAM: Well, Justice Powell, the understanding of prospective relief, if I understand the question correctly, prospective injunctive relief against future violations, there is no claim for that. That is correct.

QUESTION: And no claim for damages.

MR. BURNHAM: And no claim for damages.

QUESTION: And I understand you want notice relief, but what would that relief lead to? Would it lead to a damage claim against the state for alleged violation of law prior to 1981?

MR. BURNHAM: It may if the individual class member who received that notice decided that they wanted to take advantage of it and at that point to request an administrative hearing, and then to get judicial review of that administrative hearing decision. Under Michigan law, administrative hearings are available in the circumstance. They are, of course, compelled by federal law. In other words, Michigan may not have an AFDC program unless it has a system of hearings.

QUESTION: In Quern, my recollection is that the notice relief was ancillary to some prospective relief. If that is correct, do you have an analogy here?

MR. BURNHAM: I believe -- Your Honor, I believe, is referring to the statement in Quern about the notice being ancillary to prospective relief already ordered.

QUESTION: Yes.

MR. BURNHAM: The defendant's and the Sixth Circuit's interpretation of that is that that referred to the permanent injunction, which of course had in the intervening time become moot because of the abolition of the program to which it related. It is our view that that phrase simply refers to the way that the word "ancillary" is used in Eleventh Amendment jurisprudence.

In other words, a full statement distinguishes between the notice that was approved by the en banc Court of Appeals and the notice that was approved by the District Court. And the court was in essence saying the notice approved by the District Court was not ancillary, but the notice of proof by the Court of Appeals was ancillary.

Well, if in fact the Sixth Circuit's reading of ancillary is correct, that would make no sense, because those notices, the only difference in the notices was the form of the notice, and the fact that it could be ordered was the same in both situations, both

in the District Court and in the Court of Appeals.

Consequently, taking that data, it is quite clear that it could not have referred to ancillary power to enter that kind of relief. It could only refer to the usual meaning of ancillary, which is that the effect of that relief was ancillary to a proper substantive federal question determination.

QUESTION: Why was a declaratory judgment proper?

MR. BURNHAM: Under the facts of Jordan?

QUESTION: This case. This case.

MR. BURNHAM: In this case, the declaratory judgment is proper --

QUESTION: The only purpose of it would be to effect -- to declare whether the federal law had been violated in the past.

MR. BURNHAM: Yes, that would be the purpose of the declaratory judgment.

QUESTION: And the only purpose of it would be to give somebody a basis for making a claim in state adminstrative proceedings.

MR. BURNHAM: Well, the purpose would be to settle the rights of the parties.

QUESTION: Certainly you wouldn't say that notice would have been properly ordered except for a

declaratory judgment.

MR. BURNHAM: Well, no. I would say that the notice of relief may be ordered without any formal declaratory judgment.

QUESTION: Why? Why?

MR. BURNHAM: Well, in the same --

QUESTION: -- that there is --

MR. BURNHAM: Well, in the sense that any injunction is ordered based upon a determination that the law was violated, there was no need for separate declaratory relief. In other words, a federal court may enter an injunction, an affirmative injunction, without necessarily entering declaratory relief.

QUESTION: I know, but the injunction is moot, in this case. I mean, wasn't the law changed?

MR. BURNHAM: That's correct, and consequently one has to at that point separate the determinative federal -- substantive federal question determination from the issue of the injunction.

QUESTION: So you have to say you are entitled to a declaratory judgment about whether the state had been violating the federal law.

MR. BURNHAM: At least in effect one would have to do that, yes. But this is no different than any other --

QUESTION: Why is that prospective? That seems to me that is --

QUESTION: Looking back.

QUESTION: -- looking backward.

MR. BURNHAM: Well, it is prospective in the sense that -- in the sense that the federal determination, the federal question of determination determines how it is that in the future the state will have to deal with past claims.

QUESTION: Well, I know, on the basis -- that would be the same if you ordered money be paid. It is always paid in the future. And the Eleventh Amendment wouldn't --

MR. BURNHAM: Of course. I am not saying that the money would necessarily be -- in other words, I am not saying that just because actions are going to be taken in the future, that it is prospective.

QUESTION: What are you saying?

MR. BURNHAM: What I am saying is that in order to be prospective, the relief must be based upon some ongoing federal duty, and if there is an ongoing federal duty to take action with respect to past claims, which there is in the federal statute and the federal regulations, then an order enforcing that ongoing duty can in fact be prospective.

QUESTION: You could say the same thing about money.

QUESTION: Yes.

MR. BURNHAM: That could be, but this case does not involve --

QUESTION: It could be, but it would still --

QUESTION: Edelman against Jordan rejected that as to money.

MR. BURNHAM: That's correct, and we are not dealing with monetary relief, and for that reason --

QUESTION: But you are dealing with something that is just almost identical. Why shouldn't it be rejected for the same reason?

MR. BURNHAM: Well, that was precisely the argument that was made to this Court in Quern, that in fact this, the Quern case, after it came back with notice relief, was no different than Edelman, and this Court made the distinction between an order which propels the state to pay money and an order which simply determines illegality and orders some nonmonetary relief.

QUESTION: I know, but whether the Court was right or wrong in Quern, it said that it was ancillary to prospective relief, didn't it?

MR. BURNHAM: Yes, it did. I --

QUESTION: Well, stop right there. What is the prospective relief again in this case?

MR. BURNHAM: Okay. The prospective relief, if in fact this comment means something beyond what the court had said in the previous paragraph, that in fact the prospective relief is a substantive federal question determination that in this case Michigan violated federal law before October 1st.

QUESTION: It is hard to swallow that.

QUESTION: Really, it is cutting it awfully thin. Just quite apart from mootness, is that, giving prudential consideration in some way, is that a sound use of declaratory judgments, to render a totally abstract decision on something where the federal court cannot give injunctive relief because it is not applicable?

It can't give damages because of the Eleventh Amendment, but nonetheless adjudicate the merits in a declaratory judgment, and then take that into state court where you are going to plead it is res judicata on liability?

MR. BURNHAM: Well, this Court made clear in Quern that whatever the class members were going to do with the notice, and going to do with the substantive federal question determination necessary for it did not

really affect the issue of whether or not the notice relief order should be entered. It is our --

QUESTION: Well, but that doesn't really answer my question. I asked you if you thought it was a sound use of declaratory judgments to use it in that manner.

MR. BURNHAM: Yes, I believe it is, because otherwise what is going to happen in this case is that without that declaratory judgment, the state may treat any action that it took in the past as valid.

QUESTION: But the state would have to defend the action in state courts. You know, maybe the state courts would come to precisely the same conclusion.

MR. BURNHAM: That is, of course, possible, but in this case we have in fact, we would have a delay between the time that a state court will render a decision, and we have in fact persons who received benefits under preliminary injunction. If no final judgment is entered saying that they in essence directly receive those benefits under the preliminary injunction, then the state is open to -- those benefits, because they may treat the actions that they had taken as having been legal during that time, despite the fact that there was a preliminary injunction. This Court in Edgar versus White rejected the idea that in fact there is

some immunity because of that, and the state is certainly open to do that.

Now, they have, to grant them, they have disclaimed any interest in doing that. I would submit that that is solely for the purpose of saying, well, this matter is really completely moot.

QUESTION: You want us to give you some relief that you might or might not use ancillary in the Michigan state court?

MR. BURNHAM: I am asking the Court to give us relief, and that the relief is complete upon its being given, because the relief, the interest the class members have is an interest in the opportunity to apply for that hearing.

QUESTION: It only can be used in the Michigan state court.

MR. BURNHAM: It may be used in the Michigan state court.

QUESTION: That is the only place. That isthe only place it can be used.

MR. BURNHAM: No, it could be used in the Michigan administrative tribunal. If they win there, they don't have to go to the Michigan state court, no.

QUESTION: And they don't have to follow it.

MR. BURNHAM: They would have to -- I would

think that the usual rules of collateral estoppel would apply to issues that are actually adjudicated. That would not prevent the state from interposing some other defense, for example, its own sovereign immunity. It coud in fact say that the claim are time barred, as it has claimed in this case. Any number of ways that in fact the plaintiffs would be -- would not be able to get a final judgment actually awarding them money.

But what is important in the case is that in fact they have an adjudication which settles the rights of the parties, and they get the opportunity. If they want to avail themselves of that opportunity, they have the opportunity to have a readjudication of whether or not they were entitled to those benefits if they seek that readjudication.

QUESTION: We are sort of pendent jurisdiction to Michigan.

MR. BURNHAM: I don't believe it is pendent jurisdiction simply because I believe that notice relief stands on its own -- in other words, notice relief should be no different than any other kind of injunctive relief which is nonmonetary.

An example would be a state university student who is expelled for a period, or a public employee who is dismissed. It could well be that that dismissal

period is over, and in fact they are back on the job by the time that they start their -- by the time that their lawsuit is filed.

In that case, it would be very injust to have the District Court say that it can't do anything. The disciplinary record might be disseminated to other employers. It may in fact follow the person throughout their tenure there. Consequently, the District Court should have the power to enter nonmonetary relief --

QUESTION: You know, there are some federal statutes that restrict the power of the federal courts to issue injunctions.

MR. BURNHAM: Yes.

QUESTION: And although the statutes don't say so, the courts have said the same rule applies to declaratory judgments.

MR. BURNHAM: If Your Honor is referring to the Younger versus Harris, Samuels versus McKell sort of --

QUESTION: I am not talking about those. There are statutes, for example, that keep the federal courts from enjoining the collection of taxes.

MR. BURNHAM: Yes.

QUESTION: Well, those have been interpreted to apply to declaratory judgments, too.

MR. BURNHAM: Yes, in the McNary case.

QUESTION: Yes, and that is the argument here. When you enter a declaratory judgment, you have tied the state's hands.

MR. BURNHAM: Well, I believe that there are distinctions between the anti-injunction statutes on the one hand and the Eleventh Amendment on the other. It is petitioners' view that the Eleventh Amendment does not bar a determination of past misconduct, but in fact the Eleventh Amendment only bars certain kinds of relief based upon that, and in fact a violation of federalism or a violation of the statute that might occur occurs just because of the determination, and in the Eleventh Amendment case that is not the case. There are numerous situations were the federal court adjudicates the legality of past misconduct, but so long as relief is entered that does not violate the Eleventh Amendment, that is okay.

QUESTION: Suppose the statute hadn't been amended at all. Then the Court could probably have said, determined what the federal statute required, and if the statute was being violated, it could have entered an injunction.

MR. BURNHAM: Yes.

QUESTION: The Eleventh Amendment would permit

prospective relief.

MR. BURNHAM: Prospective relief, even though it cost money.

QUESTION: Then I suppose -- I would suppose the same objection could be raised in those circumstances to giving them notice that they are being here.

MR. BURNHAM: That is true.

QUESTION: Because -- on the grounds that it is really ancillary to retrospective relief.

MR. BURNHAM: Something along that line could be argued. In other words, it should make no difference whether or not the notice relief is sought by itself or sought in conjunction with a future looking injunction. As a matter of fact, the facts of Quern versus Jordan illustrate that beautifully.

In fact, there were two separate groups of persons involved, the persons who were going to apply after the final judgment and the group of people of which Mr. Jordan was a member who had already applied before judgment, and as a matter of fact Mr. Jordan had litigated for some eight years, and had gotten no relief. As a matter of fact, he was not covered by any of the relief in that case until notice relief was entered.

QUESTION: But the determination of illegality in Quern was originally made in the context of the Edelman pleas, where the Court determined illegality and awarded damages, thinking that it could do that.

MR. BURNHAM: That's correct. That is one difference in that case. It was in fact originally ordered --

QUESTION: The determination of illegality served a purpose in the federal court. That is, it was the basis for awarding damages, albeit later held to be improperly awarded, but your determination here by declaratory judgment doesn't serve any purpose other than to take it into another court system and say, look, it is res judicata.

MR. BURNHAM: Well, if that logic were applied, then there would be no situations that one could think of where notice relief would be appropriate. For example, the appropriate substantive federal question determination to support notice relief would have to be that the defendants had violated the plaintiff's rights in the past.

QUESTION: In the past.

MR. BURNHAM: Now, that -- if a prospective injunction is entered, that is not a necessary basis for that prospective injunction. Consequently, one -- award

of it even where there is a prospective injunction, you can't order notice relief because there has been no relevant finding of past misconduct. So, the only situation that notice relief would apply would be the peculiar facts of Edelman, where the District Court makes a mistake and enters the wrong kind of order first, gets reversed, and then says, okay, now I will enter a notice relief. That would be the only situation.

QUESTION: Perhaps it would apply if there were a finding of a continuing violation, which is not the case here.

MR. BURNHAM: If there were a finding of a continuing violation, one could argue that that only determines that from that date of judgment forward the defendant is violating federal law. Again, that doesn't give us any determination as to what the status of that conduct was in the past.

It is always necessary to --

QUESTION: Well, the point being that perhaps there could be continuing violations and prospective relief as to those to which notice could properly be given.

MR. BURNHAM: That is correct, and this case presents a very unusual situation that way, because I

just found out as of last Friday the state is in fact violating current federal law on stepparent asset assumption. And --

QUESTION: Well, we don't take it on that record, of course, I assume, do we?

MR. BURNHAM: No, we don't, but I would -- I believe that that -- that indicates just how illogical it is to somehow tie notice relief, if in fact, if in fact we were able to show that, if we tie notice relief to an injunction that is based upon a violation of a totally different federal law or a totally different class of people and somehow say that just becasee we can say that is ancillary to that it is okay, that is not a very firm basis on which to base a belief.

QUESTION: Well, conceivably, that could explain or distinguish the Quern decision in any event.

MR. BURNHAM: On the facts of this case?

QUESTION: That the finding there was with relation to a continuing violation --

MR. BURNHAM: Yes, the --

QUESTION: -- under the notice.

MR. BURNHAM: Yes, that would be one distinction. We would argue that it should make no difference because in fact that injunction had been totally moot for some four years.

QUESTION: This case does cause one to wonder whether the declaratory judgment isn't being sought in effect to determine liability, and just leave enforceability to state courts to determine statutory time bars or that sort of thing.

MR. BURNHAM: Well, that is an important point. I believe it is important to emphasize that a declaratory judgment does not establish any state liability for payment of anything. It simply establishes that the state through its regulation violated federal law in the past, but the consequences are of that determination --

QUESTION: Well, that is the point. If the state has violated federal law and the declaratory judgment reveals that payment should have been made under federal law, then that in effect determines state liability, and what is left is really a determination in state court of enforceability, and that might turn on what the statute of limitations might provide or what remedial limitations there might be at the state level.

MR. BURNHAM: Yes, that's true, and that would be the situation on the Quern case as well.

QUESTION: Well, if that is the case, then it does seem to be very close to Edelman, when you are really providing a form of financial relief, in effect

retroactively.

MR. BURNHAM: It would be petitioners' position that the same description of the effect of notice relief applied in Quern would apply in this case, and that would be that the chain of causation is clearly severed, and that it is in fact up to the state as to whether or not -- what they do with this substantive federal question determination, that they may in fact not have to pay any benefits.

QUESTION: Maybe this has already been covered, but did the Court of Appeals hold that both the notice relief and the request for a declaratory judgment were barred by the Eleventh Amendment?

MR. BURNHAM: I am not entirely clear about the declaratory relief. I believe what they said was, the notice of relief was barred.

QUESTION: Right.

MR. BURNHAM: And that to the extent that we sought declaratory relief, I think the clear implication of that is that declaratory relief is barred. I don't think that they --

QUESTION: In other words, their position was that I guess the declaratory judgment went to a question of federal law. In effect they were saying the Eleventh Amendment requires that that question of federal law

must be decided by a state court.

MR. BURNHAM: In essence that would be the only place that the plaintiffs could go. That is correct. Under the circumstances of this case, plaintiffs believe that the District Court, that the Sixth Circuit decision is completely contrary to the rule of Ex Parte Young and the rule of Edelman versus Jordan.

Ex Parte Young in essence held that a suit against a state officer is in fact not a suit against a state, but Ford Motor Company and Edelman, of course, make it clear that if in fact monetary relief is sought, then that pierces the fiction of Ex Parte Young, and it again may become a suit against the state.

Under the circumstances here, the Court in Quern has quite clearly held that notice relief, this kind of relief, is not a money judgment, and consequently the Ford Motor Company exception does not apply to that. Consequently, it should be treated no differently than any other kind of injunctive relief, and after all, it is an injunction. It is an order to the state that they in fact provide certain kinds of notices to the plaintiff class members.

And under the circumstances, it should not be deemed to violate the Eleventh Amendment. Indeed, the

Ex Parte Young Court mentions the situation of habeas corpus relief, which is a situation where obviously there is a determination that in the past the state officials violated the federal rights of the plaintiff.

However, the Court indicated that that was not a violation of the Eleventh Amendment. That is a clear indication to petitioners that Ex Parte Young was not as narrow as the Sixth Circuit would say it was. In other words, it did not just provide for prospective injunction against ongoing violations.

In fact, it contemplated explicitly a determination of past misconduct, and of course that in modern Eleventh Amendment parlance, the habeas corpus writ would not violate the Eleventh Amendment simply because there was no impact on the state treasury in that situation. That is like the expunction case. That is like the public employee record expunction situation. It is non-monetary relief, albeit based upon a past determination of misconduct, and that is permitted by the Eleventh Amendment.

The final point I would like to mention is that the reading of the Sixth Circuit in this case of Ex Parte Young gives the state a virtually limitless power to control the jurisdiction of the District Court. There was a great deal of delay in these cases, and of

course the federal court dockets are very crowded.

The state can quite easily have an incentive to look to delay because they can simply avoid any determination of past misconduct by at the eleventh hour complying with future -- with ongoing federal law. If they do that, then they wipe out any past claim for the back benefits.

That sort of control over the court's jurisdiction quite clearly should not be allowed. The facts of this case, in fact the stepparent viclation that we believe is -- the state is engaged in right now, quite clearly the state could render that issue quite moot by saying, okay, we know the stakes are high in this case because an order could be ancillary to that ongoing injunction.

Consequently, we will decide that we will comply. That would then divest the District Court of jurisdiction, and under the ancillary theory of Quern there would be no basis for ordering a notice relief remedy.

That sort of power should not be allowed, and it doesn't make any sense, simply because the issue of future violations and the issue of past violations are two rather distinct things.

Thank you.

CHIEF JUSTICE BURGER: Mr. Caruso.

ORAL ARGUMENT OF LOUIS J. CARUSO, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CARUSO: Mr. Chief Justice, and may it please the Court, the Court of Appeals decision in this case that is on review was compelled by law principles that were previously established by decisions of this Court, and the purpose of the Eleventh Amendment requires adherence to those principles.

In this case, the petitioners could have availed themselves of a state forum. Instead, they chose the federal forum to deal with two cases in which the judicial power was constitutionally limited, and now are strenuously attempting to override that limitations.

They contend that they are not after money relief by way of a judgment. A declaratory ruling of past actions coupled with a notice as an invitation to class members to seek state administrative relief as to those past actions as requested here, I suggest, is designed to obtain retroactive payment of an accrued monetary liability through the force of a federal judicial power in contravention of the Eleventh Amendment.

And it certainly becomes quite evident that

that would be the case when you consider the nature of a declaratory judgment. A declaratory judgment under the Act is a final judgment, and it adjudicates the rights of the parties involved, and it is an actual case in controversy, and it would cover a period here when the respondent was not under a final court imposed obligation to comport her conduct with different standards.

Now, this becomes quite evident when you consider the ancillary notices that were considered in Quern and in Edelman and in Trainor v. Jordan. The first notice was rejected by the court. After rejecting the first notice, they approved a notice that merely advised the class that the court described as one that simply informed the class that the federal suit is at an end and the federal court can provide no further relief, and if they may wish to pursue state administrative remedies, they may do this.

But this kind of notice, the Court said, didn't impose any retroactive liability. It was in no way handicapped by a federal court determination of state liability, and in that case, in the case, in the Quern case, there was an adjudication by the court of misconduct, and there was a prospective compliance order entered in that court, and we don't have that situation

here.

The Court, however, found the first notice offered in Quern to be infirm. It expressed a finding of past liability. That notice stated, you are denied public assistance to which you were entitled. Respondent submits that if the Court were to allow that kind of notice that was found acceptable by the Court in Quern to be coupled, predicated on a declaratory judgment of past actions as requested by petitioners, the Quern notice would be changed in its import because it would become indistinguishable from a substantive federal question determination by a federal court of past action. It would import the same degree of finality that the first notice that was proposed in Quern that was found to be, that was found by the Court to be infirm.

It would permit, as the Court said in Colbeth, to do indirectly what is prohibited to be done directly. Insofar as Ex Parte Young is concerned, Ex Parte Young was cast by the Court as an exception, as a necessary exception to vindicate federal rights. And the relief in that case was a prospective compliance order against a state official to comport, to have that official comport his conduct with the constitution and not enforce a statute that was held to be

unconstitutional.

At no time has Ex Parte Young or the subsequent cases applied by this Court dealing with the exception encompassed declaratory judgments of past actions in the notice relief requested here.

QUESTION: May I ask a question, Mr. Caruso?

MR. CARUSO: Yes.

QUESTION: This case is somewhat unusual because of the change in the law on October 1st, 1981, as I remember the facts.

MR. CARUSO: That's right.

QUESTION: If there had been a judgment entered by the District Court, say, on September 15th, 1981, pursuant to a complaint which asked for injunctive relief and declaratory judgment, would you say that at that time the Court could have entered a declaratory judgment?

MR. CARUSO: No, the Court could not have entered a declaratory judgment unless a declaratory judgment was related to the prospective -- the ongoing violation.

QUESTION: Supposing the judge --

MR. CARUSO: I did not ask for past violations.

QUESTION: Supposing the judge -- you don't

think the finding as to past violations -- say there was no change in the law at all. Could he not then have entered a declaratory judgment saying you violated in the past, and I want the parties to argue about the kind of injunctive relief what was appropriate, and one of the things I will take into consideration is the nature of the past violations?

MR. CARUSO: It may take into consideration the nature of the past violations only for the purposes of stopping the ongoing violation insofar as the exception to the Eleventh Amendment is concerned, because the Eleventh Amendment prohibits equitable and legal relief in state courts against the state.

QUESTION: My question is whether -- if at the time the declaratory judgment is entered it is then legally permissible to enter an injunction, why isn't the declaratory judgment also legally permissible at that time, just as a predicate for the rest of the litigation?

MR. CARUSO: Because a declaratory judgment is not a prospective compliance order. That is the only exception that is permitted.

QUESTION: Wouldn't the District Court in an injunction action enter his conclusions of law?

MR. CARUSO: Yes.

QUESTION: And the proper basis for an injunction is that there is a violation of law that has been going on.

MR. CARUSO: That is correct.

QUESTION: And you conclude that there is -- that this is what the statute means, this is what the state is not doing, and therefore you need an injunction. Now, that is for all intents and purposes a declaratory judgment.

MR. CARUSO: It is not a declaratory judgment.

QUESTION: Well, what is it? What is it? It is a declaration --

MR. CARUSO: Well, it requires -- it requires --

QUESTION: -- that the state is violating the law, and therefore it is an injunction.

MR. CARUSO: If that is a declaration of the violation of the law that is occurring at that time, it would not be prohibited by the Eleventh Amendment. Based upon that declaration of violation an injunction could be entered under the Eleventh -- and not violate the Eleventh Amendment as to prospective compliance.

QUESTION: And in Justice Stevens' example, suppose six months before this law was changed --

MR. CARUSO: Yes.

QUESTION: There was an injunction, there was an injunction entered based on a declaration or a conclusion that the law was being violated.

MR. CARUSO: Then a proper Quern notice could be entered as predicated on that injunction --

QUESTION: Exactly. Exactly.

MR. CARUSO: -- that is based upon the declaratory judgment that was entered.

QUESTION: Yes.

MR. CARUSO: And that injunction that would be entered --

QUESTION: Isn't that exactly true of the stepparent case in this case?

MR. CARUSO: No.

QUESTION: Well, there was a preliminary injunction entered.

MR. CARUSO: There was a preliminary injunction, but a preliminary injunction --

QUESTION: And that injunction was on appeal. Wasn't the state supposed to have made that injunction?

MR. CARUSO: That preliminary injunction was against the state, but it was a preliminary injunction. It was never filed --

QUESTION: Wasn't it supposed to -- wasn't it supposed to obey the preliminary injunction, or was it --

MR. CARUSO: And it did obey the preliminary injunction. It did comply in every respect, and it did make the payments.

QUESTION: I see, so they made the payments.

MR. CARUSO: That's right.

QUESTION: So there wasn't any need for a notice for that period.

MR. CARUSO: There wasn't any need to have any notice. There isn't any need at this time because not only did they pay with respect to the claim --

QUESTION: Okay, that is all I wanted.

MR. CARUSO: But -- that's right. Now, one of the things you may have as a prospective injunctive order could be based, Justice Stevens, upon a declaratory judgment of ongoing violation. Perhaps I misunderstood, and orders ancillary to such injunctive relief have been permitted by the Court as necessary to accomplish termination of this conduct, because the essence of the Ex Parte Young exception is termination of unconstitutional conduct by state officers by a prospective injunctive order absent Congressional abrogation or a state waiver of that immunity.

Now, the orders ancillary to injunctive relief have been permitted by the Court, and an example of that is Milliken v. Bradley, which required the taking of

affirmative steps that resulted in expenditures of money out of state treasury, but that relief, however, so far as the ancillary order is concerned, was prospective and primarily directed toward cessation of the violation of the federal law.

As a matter of fact, in Milliken v. Bradley, the Court made it very clear that that is all they could do, is to award prospective relief, prospective compliance order. I wish to make it clear here --

QUESTION: May I pursue my other question just --

MR. CARUSO: Pardon me.

QUESTION: -- because I am not quite sure I follow everything you are saying. Supposing again in my hypothetical example you have a declaratory judgment and an injunction entered, which you agree would not be barred by the Eleventh Amendment.

MR. CARUSO: Yes.

QUESTION: Then 30 days later Congress passed the new statute that says you don't have to follow this procedure any more, and so the state goes in or its officials go in and say we want the injunction vacated because the law has been changed. You vacate the injunction.

MR. CARUSO: Yes.

QUESTION: Would the Eleventh Amendment require that the declaratory judgment also be vacated, in your view? And if so, why?

MR. CARUSO: I don't believe it would require the declaratory judgment to be vacated if the law was changed because there was a determination at that time that the state was in violation of federal law by virtue of the declaratory judgment and an injunction put in place.

QUESTION: And it had been violating federal law for the past two years.

MR. CARUSO: So then after that the law had changed. I wouldn't say it would be necessary to vacate. It would be ineffectual. It wouldn't --

QUESTION: Well, it wouldn't be ineffectual as it might happen here. The members of the class thereafter go into Michigan administrative proceedings and say we would like to get our past benefits or whatever it is based on that finding of illegality, and the state would have to decide whether or not to pay.

MR. CARUSO: If there was an ongoing violation and a determination of that ongoing violation by a declaratory judgment upon which there was based an injunction, and notice on that injunction to the class concerning the violation, I would say that they could do

that in the state administrative procedure. That would be all right. But in the hypothetical that you pose there would have been a determination of liability of an ongoing violation.

In this case there is no such thing as an ongoing violation. There is nothing to enjoin. There is nothing to determine except --

QUESTION: Well, is the ongoing violation --

MR. CARUSO: Except by going in the past and making a declaratory judgment as to past actions.

QUESTION: Is the ongoing violation essential? Sometimes we get cases where a governmental agency has voluntarily changed its policies pending adjudication, supposing before the time of the judgment they voluntarily changed their policies and then later on there was the statute.

MR. CARUSO: In that hypothet there would be no determination by a court as to ongoing violation, and that is necessary. There must be an adjudication by a federal court.

QUESTION: Not an adjudication of liability, adjudication of ongoing violation.

MR. CARUSO: An ongoing -- an adjudication of liability concerning their present acts and the relief would be to stop that ongoing violation, in other words,

to put a termination to that --

QUESTION: Well, it can't be ongoing if they are going to evade the injunction, and as soon as the injunction entered, whatever the violation was --

MR. CARUSO: That ends it.

QUESTION: -- it stops.

MR. CARUSO: That ends it. That stops. That's right.

QUESTION: And so what would the possible purpose of a notice in that situation be except to be of an aid to past violations?

MR. CARUSO: I think that that is the way you have to read the Quern notice. The Quern notice, I think, probably would have to be the past violation, but nevertheless insofar as we -- as the courts have gone today, it has to be based upon a prospective compliance order and not a judgment as to past action, because an injunction, a determination by injunctive order doesn't adjudicate the actions that have taken place heretofore as a declaratory judgment to past actions would necessarily do.

At any rate, as I say, I wish to make it clear that the respondent does not seek any decision here that would permit the avoidance of the state's responsibility with respect to the state's federal aided programs,

public welfare programs, because they do have the administrative procedures in place or mandated by Congress, and also there is available the judicial forum in the state and they could -- that could review any decisions made at the administrative level, and they could take judicial action.

QUESTION: But, Mr. Caruso, it is true that your position is that whatever federal question of law has to be decided ought to be decided by the state court.

MR. CARUSO: Not every federal question of law, but in this situation, the type of relief that they are seeking here should be decided in state court because the type of relief that is available to them because of the Eleventh Amendment immunity is only a prospective injunction, and a prospective injunction is not available here simply because there is no violation of federal law, and there has never been a determination made by a federal court that there was at any time a violation of federal law.

CHIEF JUSTICE BURGER: You have one-half minute left, if you can do anything with that.

ORAL ARGUMENT OF WILLIAM BURNHAM, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. BURNHAM: I would like to just briefly

respond to something that Mr. Caruso said about the availability of hearings.

In fact, as indicated in our reply brief in the stepparent case, for those persons who asked for hearings, they were denied hearings. They were told that because it was an automatic change in grants and so on, they could not get an administrative hearing. Now, later they changed that policy when they found that that was also a violation of federal law.

However, at the time that the suit was filed, it was quite clear that the plaintiffs were unable to get any relief by way of the state administrative tribunal, which is, of course, one of the reasons why they filed in federal court.

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

(Whereupon, at 2:25 o'clock p.m., the case in the above-entitled matter was submitted.)

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No. 84-6270 - JOHNNY GREEN, ET AL., ETC., Petitioners V. AGNES MARY MANSOUR, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES

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BY Paul A. Richardson

(REPORTER)