OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-224

TITLE CITY OF RIVERSIDE, ET AL., Petitioners V. SANTOS RIVERA, ET AL.

PLACE Washington, D. C.

DATE March 31, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF RIVERSIDE, ET AL.,

Petitioners

v. No. 85-224

SANTOS RIVERA, ET AL

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Washington, D.C.

Monday, March 31, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:29 p.m.

APPEARANCES:

JONATHAN KOTLER, ESQ., Encino, California; on behalf of the Petitioners.

GERALD P. LOPEZ, ESQ., Stanford, California, on behalf of the Respondents.

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C O N T E N T S

PROCEEDINGS

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

ORAL ARGUMENT OF JONATHAN KOTLER, ESQ.

ON BEHALF OF THE PETITIONERS

MR. KOTLER: Thank you.

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

This case raises an issue involving the interpretation of the language chosen by Congress when it enacted Section 1988 of Title 42 which provides that a trial court may award a reasonable attorney's fee to a prevailing party in certain civil rights actions.

Specifically, this case raises the question of whether an award of attorney's fees seven times the amount received by the plaintiffs in a private action resulting only in monetary relief can possibly be deemed reasonable under Section 1988.

More broadly, this case also raises the question of whether Section 1988 mandates some relationship between the results obtained by a prevailing party in a civil rights action and the fees which a trial judge may award thereafter.

As such, it caused them to question the effacacy of the continued use of the lodestar approach to fee calculations in cases which are essentially private court actions.

It is the position of the Petitioners that the lodestar approach in a case such as this, rather than producing a fee which is presumptively reasonable, can often, as here, produce a fee which is unreasonable on its face.

QUESTION: The calculation I made, counsel -- Their request was for $495,708, is that right, their original request?

MR. KOTLER: That took in the number of hours that doubled, the multiplier of two, yes.

QUESTION: And, the court allowed them $245,000.

MR. KOTLER: Yes. All their hours at a rate of $125 an hour.

QUESTION: And, what was your offer of settlement?

MR. KOTLER: Our last offer of settlement was $25,000.

QUESTION: Twenty-five?

MR. KOTLER: Yes, Your Honor.

There has been a great amount in the record disputing that back and forth. The last offer that was made in front of a trial judge was $10,000. The last offer that was made to one of the co-counsel was $25,000.

It is likewise Petitioners' belief that a fee calculated on the same basis as fees for similar litigation in a given community not only provides a more accurate

reflection of the true value of legal services rendered in a private 1983 case, but, moreover, would produce a fee more consistent with the goals of Congress when Congress enacted 1988, which is, of course, a fee that is reasonable.

QUESTION: Mr. Kotler, you referred to a private 1983 case. Are there public 1983 cases that are different from this?

MR. KOTLER: I think there are. I think if the benefit that is yielded as a result of an action benefits more than the individual plaintiffs results in policy changes, results in --

QUESTION: You are talking about a case that results simply in an award of a damage judgment to a particular individual?

MR. KOTLER: I would characterize that as a private 1988 case.

Factually, this case began following an altercation between the Respondents and various members of the Riverside City Police of Riverside, California, in August of 1975.

Thereafter, the Respondents filed an action in the United States District Court for the Central District of California against 32 defendants, including the City of Riverside and its chief of police.

Their action included civil rights claims as well as a mixed bag of pendent state claims, including

claims for assault and battery, claims for property damage, infliction of emotional distress, malicious prosecution, defamation, false arrest and false imprisonment, and simple negligence.

In addition to seeking money damages, the Respondents herein sought wide-ranging injunctive and declaratory relief as well.

Ultimately the matter was tried to a jury in 1980 and when all was said and done Respondents recovered jury awards against only six of the 32 defendants against whom they had litigated.

No police officer above the rank of lieutenant was found to have any liability to any of the Respondents and 26 of the defendant officers, including 17 who had been previously dismissed by the first trial judge assigned to hear this case on summary judgment, 26 of the defendant officers were found to have no liability to any of the Respondents on any theory whatsoever.

QUESTION: Wasn't there some problem about identifying the officers responsible for the unfortunate fracas?

MR. KOTLER: That is correct, Justice Blackmun. Initially there was but --

QUESTION: What would you as an attorney have done had you represented the other side?

MR. KOTLER: I would have taken discovery as the attorneys for the other side did, and once I found out who was involved, I would have dismissed those that were not involved. However, once this was found out, the other side not only refused to dismiss, but --

QUESTION: Just as you have refused to make a larger offer and got caught under the rule.

MR. KOTLER: The offer that we made was within $8,000 of the eventual jury verdict, so I don't think it was that far off, but I don't think I would have continued to have litigated against people that I knew two years before the trial, and that is when it was, two years before the trial, had no liability or not culpability whatsoever.

Of all the claims asserted by the Respondents, they recovered only on their Section 1983 claim and their pendent state claims for false arrest, false imprisonment and negligence.

Of all the types of relief which Respondents sought-- They only recovered money damages and this in the sum of $33,350.

No injunctive or declaratory relief issued as a result of their action, and more importantly, the City of Riverside was not compelled to and did not change any of its policies or practices as a result of this lawsuit.

In sum, the results achieved by this litigation was far less than the revenue sought.

QUESTION: Are all of the officers still employed by the City of Riverside?

MR. KOTLER: To my knowledge, they are, Your Honor, and the one lieutenant who was found to have culpability is now the chief of police.

And, yet, the district court, following these verdicts, awarded to Respondents' attorneys fees under Section 1988 for every minute of every hour they claimed to have spent litigating this action against every defendant sued on every claim, on every issue, and every avenue of relief pursued.

They were fully recompensed for the time they spent pursing the 26 defendants who were found to have no liability, any of them. They were fully recompensed for time spent pursuing claims and avenues of relief on which they achieved no success whatsoever.

In sum, while the jury awarded to the Respondents the amount of $33,350, the trial judge awarded to their attorneys an amount seven times that sum, approximating a quarter of a million dollars.

Petitioners paid the jury award, but appealed the trial judge's award of attorneys' fees to the Ninth Circuit which thereafter affirmed the trial court.

QUESTION: Counsel, one last question and I will stop interrupting you.

Suppose they had recovered a verdict of half a million dollars here, would you be making the same argument?

MR. KOTLER: That they would be entitled to a contingency or fee based on the prevailing market rates for similar litigation, yes, I would.

I think you have a situation here --

QUESTION: So, the amount is irrelevant then. Your seven-times argument means nothing.

MR. KOTLER: I think it would be just as outrageous if it was five times or four times or three times if that is what Your Honor means.

QUESTION: Well, suppose -- my premise was, suppose the recovery was for $500,000 and fees were allowed here roughly equal to -- I suppose -- what a contingency fee basis would be in your state. I don't know California law. My question was would you be making the same argument and I thought you answered that in the affirmative.

MR. KOTLER: If the result in this case would wind up being contingency fee approximating the same amount here -- that would have to be, I guess, in about $600,000 or $700,000 in judgments. They would be entitled to one-third of whatever the contingency was because the value of this case would have been $600,000 or $700,000 as

judged by the trier of fact, the jury, but the jury didn't judge itself. So, yes.

QUESTION: If they would have recovered $500,000, the original fee that asked for was roughly equivalent to the amount of that hypothetical recovery. They asked for $495,000, didn't they?

MR. KOTLER: In attorneys' fees.

QUESTION: That was their request if the calculations in the record are correct.

MR. KOTLER: I am sorry, Your Honor, I don't seem to understand your question. That would have been --

QUESTION: Well, Lopez, $316,000 and some odd dollars, Cazares, $173,000, law clerks and others and miscellaneous, an additional $7,000. That adds up to $495,000 that they requested. And then the court cut them approximately in half, didn't they?

MR. KOTLER: No, the court didn't cut them in half, the court just refused to award a multiplier. The court gave them --

QUESTION: Oh, I see.

MR. KOTLER: The court gave them everything they asked for, every hour they asked for, based on $125 an hour.

QUESTION: Four hundred and ninety-five included the multipliers.

MR. KOTLER: Multiplier of two, yes, Your Honor.

QUESTION: Mr. Kotler, can I ask you a question, because I am a little confused in view of your discussion with Justice Blackmun.

You are making two different arguments as I understand. One, you are saying there was a lot of time spent in litigating people who were innocent and I gather in effect they were compensated for time that they shouldn't be paid for.

MR. KOTLER: That is correct.

QUESTION: And that would be true however big the verdict was, is that not right?

MR. KOTLER: That is correct.

QUESTION: That is one argument. Your second argument, as I understand it, is that even if all the time is properly computed, there is -- are you arguing as a matter of law you may never -- the lawyer may never be paid more than the client?

MR. KOTLER: No. What I am saying is we have a situation now -- We use the lodestar approach to fee calculation.

QUESTION: Yes.

MR. KOTLER: Basically that is where the court begins. After the lodestar is calculated, the court may then either raise or lower the fee award consistent with

the dictates of Hensley and Blum and other cases.

What I am arguing for, instead of starting with the lodestar in private tort action -- and I would characterize this a private tort action -- we ought to start with the similar market-based fee and then raise or lower from that.

QUESTION: Well, would you ask them to put on evidence in effect that if they had to go out and raise money -- every now and then you read in the paper about someone who is raising money to finance an important piece of litigation -- he should get paid what a competent counsel would charge if a war chest were created for him or what is it?

MR. KOTLER: No, Justice Stevens, I would not. What I would ask is that evidence be put on as to what the fee arrangements were in California, or Los Angeles more narrowly, for similar tort actions. What kind of arrangements were common in that locality.

QUESTION: That would always mean the fee would have to be less than the recovery because contingent fees are always paid out of the recovery then.

MR. KOTLER: Would be less than the recovery, but assuming an award of a million dollars --

QUESTION: But, if that is the test -- Isn't it true in California also that contingency fees are generally

a percentage of the recovery?

MR. KOTLER: If your question is would it always be less than the total recovery in a case, a private case winding up in money damages only, the answer is yes.

QUESTION: So, what would you do with a case like Carey against Piphus where the court says there is a one dollar nominal damage or just say there are not fees in those cases.

MR. KOTLER: No, because I think it is clear under the Carey case and under Hensley and under Blum the court, trial court still retains a certain amount of discretion to --

QUESTION: Well, why not in a case like this then?

MR. KOTLER: I think the trial court had discretion, but I think the discretion must be exercised consistent with the factors and guidelines that this Court said had to be used in the Hensley case.

All I am arguing for is that as a starting point we start at a different place than we are now. We don't use the lodestar as a starting point in private action tort suits.

QUESTION: Well, you are really telling me two different things. I thought you first said that if you start that way you end up on a contingent fee approach

which requires the fee to be less than the award.

Now you are saying all you do is start there and then if that doesn't seem fair the district judge can then approach it from a lodestar point of view.

MR. KOTLER: Okay. I didn't mean to imply that the contingency basis, just like the lodestar basis, is absolute.

QUESTION: Well, if it is not absolute, why isn't it fair to infer in this case -- the district judge looked at it and said, well, in view of the time spent the lawyers have to get more than $30,000 and the only way we can figure out how to do it is to move on to a lodestar.

MR. KOTLER: That brings me to my second point. My second point is that you still have to look at the results obtained by the litigation and if you look at the results obtained, it wouldn't be possible to raise this case from $11,000, which is a one-third contingency, to a quarter of a million. I am arguing for both things.

QUESTION: What do you do with a nominal damage case then if that is the result, a dollar?

MR. KOTLER: Well, fortunately, under my theory, you would start with thirty-three cents and then you could raise it.

QUESTION: To may 10 or 15 or something like

that.

MR. KOTLER: No, not at all, not at all. If the value of the case -- if the thing the case resulted in achieves some societal benefit, obviously it could be raised.

But, Congress, when it passed 1988, I don't think was looking to provide access for the marginal or less than good case. It was providing access for meritorious cases. And, a case that has no value might not be a meritorious case. We have triers of fact who give value to these cases and they are the jurors and in this case the jurors said the value of this case was $33,000. In other cases, the value might be less, but certainly the trial judge would retain some discretion to raise a fee if the value of the case in the trial judge's mind was in excess of that set by the jury.

Briefly, on the facts, a petition for certiorari was filed in this case initially and was granted by this Court which vacated the first award of attorneys' fees herein and remanded the matter back to the district court to be considered in light of this Court's then recent decision of Hensley versus Eckerhart.

Thereafter, at spreading of the mandate from the Ninth Circuit, the trial judge announced that it was going to reinstate its previous award to the penny

and subsequently did exactly that.

Petitioners again appealed and once again the Ninth Circuit affirmed the trial court and then this Court granted cert last October.

I believe the legislative history of Section 1988 makes two things clear. First, Congress' purpose in passing the legilsation was to provide civil rights plaintiffs with effective access to the judicial process.

Secondly, in so doing, Congress' intend as to any fees to be awarded thereunder were to be adequate to attract competent counsel but not so large as to result in windfalls to the attorneys involved. Congress thought such fees reasonable and left it up to the trial courts to decide what a reasonable fee would be in each individual case.

Since the passage of Section 1988, however, this Court and other lower appellate courts have provided numerous guidelines to be followed by trial courts to either calculation of such fees.

Heretofore, it appears that this process required the district court to make two distinct calculations. First, the district court had to determine the lodestar figure, that is the number of hours reasonably expended on the litigation by a reasonable hourly rate.

Secondly, the district courts had to examine

the relationship between the claims on which counsels' efforts were expended in light of the ultimate relief which was obtained by those efforts.

In that regard, this Court has stated in Hensley that where a plaintiff achieved only limited success, the district court should award such fees as are reasonable in relation to the results obtained by the litigation.

However, the fee award here, nearly a quarter of a million dollars, following judgments aggregating $33,350 in a tort suit brought solely for the monetary benefit of the eight respondents, is not one which under any stretch of the imagination could be called reasonable.

QUESTION: Well, Mr. Kotler, I thought a moment ago you said that there had been prayers for injunctive relief, at least at the beginning of the suit.

MR. KOTLER: That is correct. The claims for injunctive relief were dropped prior to trial. There were claims in addition to declaratory relief and those were also dropped.

QUESTION: Well, suppose some injunctive relief were granted or some declaratory relief as well as damages, how would you then suggest the court approach the fee problem?

MR. KOTLER: It would depend on the nature of the injunctive relief. If the injunctive relief went

no further than the eight individuals, then I think the case would still be a private litigation but certainly would have value over and above any monetary relief which was awarded and the court could raise the fees.

QUESTION: Do you think that it is arguable that even though this is private litigation that the precedential value it sets may have value above and beyond the individual plaintiffs?

MR. KOTLER: It is arguable? Yes, I think it is arguable. Do I think that is necessarily the case? I would say to that no more than any plaintiff's victory in any type of litigation has value to deter conduct by defendant. It doesn't make any difference what kind of litigation it would be.

I think to the extent that this had a public benefit, it would be incumbent upon the fee petitioner to prove that such benefit existed, since, after all, it is the fee petitioner who is asking for fees.

I think it is arguable. Whether it is provable or not would be up to fee petitioner.

QUESTION: May I ask this question? The district court made findings. I have in mind the one that states this, that all claims made by plaintiffs listed on one of the -- It is on page 2-6 of the District Court's decision, if I have the right document, Appendix II. In any event,

the District Court said that time devoted to claims on which the plaintiffs did not prevail cannot reasonably be separated from the time devoted to claims on which the plaintiffs did prevail.

You argue that under Hensley we still may find despite that finding of fact that the fee award was not related to the claims for which it did not prevail?

MR. KOTLER: Justice Powell, I am saying the record herein shows that that finding is, on its face, absurd.

QUESTION: That that finding is what?

MR. KOTLER: Is absurd.

QUESTION: Absurd?

MR. KOTLER: Yes, sir. It is certainly not based on the record.

QUESTION: Did the Court of Appeals find it clearly erroneous?

MR. KOTLER: No, the Court of Appeals did not.

QUESTION: Did you argue that it was absurd up there?

MR. KOTLER: We argued it was erroneous. I didn't dare use the word absurd.

(Laughter)

QUESTION: And, two pages later, the Court of Appeals, which I know you don't like these findings, they

found the time expended by plaintiffs' counsel in conducting this litigation was clearly reasonable and necessary to serve the public interest as well as the private interest. I think that is still current enough to ask you a question about that.

MR. KOTLER: I think the problem we have in this particular case is there is a finding that the time couldn't reasonably be separated. Certainly it couldn't be separated if all you had to go on, as the District Court did, were the time records of the respondents. The time records didn't separate time spent as among any of the defendants or on any of the theories.

So, I think to that extent it was impossible to separate out. I also think though that this Court in Hensley and other cases, Webb versus Board of Education, has said that the District Court must exercise its discretion based on time records, at least up to a certain level, and in this particular case those time records never existed and there were no findings made of the quality of the time records despite our objections to the time records.

QUESTION: May I ask this question? Discovery went on for four years. Did you object to that at any time? Did you try the case?

MR. KOTLER: Yes, I did.

QUESTION: Did the trial court supervise discovery?

MR. KOTLER: There were no motions to cut off

discovery as I recall, and there certainly were no attempts to stop depositions.

QUESTION: The district judge in the eastern district of Virginia will not permit discovery to go beyond six months without his prior approval after hearing. Does anything like that every happen in California?

MR. KOTLER: Not in the central district that I am aware of.

QUESTION: Oh, really.

MR. KOTLER: I can say that in this particular case discovery --

QUESTION: Lawyers will go on forever in discovery as long as they can run up chargeable hours.

MR. KOTLER: The problem, Justice Powell, in this case was that there were not multiple discoveries taken of the same people. There was always depositions of additional people, so it wasn't --

QUESTION: All 32 defendants?

MR. KOTLER: Excuse me?

QUESTION: All 32 defendants.

MR. KOTLER: Certainly there was discovery of all 32 defendants and there were different kinds of discovery as to all 32 defendants, but there also was discovery taken of people who were not named as defendants, quite a bit of discovery. There wasn't very much discovery

taken after 1978. The case was tried in 1980.

QUESTION: Mr. Kotler, on the second finding that Justice Powell mentioned about the case serving the public interest, did you challenge that finding in the Court of Appeals? It seems to me it goes to the theory of your case in this Court.

MR. KOTLER: I can't recall whether we did or not. My recollection is that we did.

QUESTION: But, would you not agree that we have to accept that as a valid finding of fact for purposes of our decision?

MR. KOTLER: Only in terms of the record, Your Honor, and the record -- There was nothing --

QUESTION: We can go behind it and read through the record and decide whether we agree.

MR. KOTLER: I don't think the Court is allowed to make findings that are clearly erroneous and to that extent the Court is bound by the record. I think the record doesn't indicate that there were any benefits to the public. Certainly a finding that there were important public benefits without more is as amorphous as the term reasonable, I would submit.

QUESTION: How long had these lawyers been out of law school when the litigation began? Is it two years, one year?

MR. KOTLER: I believe one was one year and one was two or three years.

QUESTION: Did they have a flat rate of $125 an hour for the entire period or was it a raising scale as they acquired experience?

MR. KOTLER: Mr. Chief Justice, there was absolutely nothing in the record, not word one, as to what their normal billing rate was during any period of time.

QUESTION: It is clear what they charged here.

MR. KOTLER: Yes, sir.

QUESTION: Or tried to charge, $125 an hour?

MR. KOTLER: That is correct. The only thing in the record at all with respect to an hourly rate, there was a declaration by another attorney in Los Angeles, whose declaration never said that he did civil rights litigation, never even said that he knew either of the fee petitioners, he said that in his view $125 was a reasonable rate, but there was nothing more than that.

QUESTION: Well, there is a finding, is there not, No. 13, that that is the hourly rate typical in the market for comparable service by comparable lawyers? Do you think that is clearly erroneous too?

MR. KOTLER: Not only do I think that is clearly erroneous, but I can state for a fact that we did challenge that one in the court.

QUESTION: And, did the Court of Appeals agree with you or disagree with you?

MR. KOTLER: I don't recall if the Court of Appeals made a finding with respect to --

QUESTION: At least they didn't set the finding aside.

MR. KOTLER: No, they certainly did not.

QUESTION: Did you introduce evidence to the effect that the $125 an hour was unreasonable?

MR. KOTLER: We introduced evidence that -- basically attacking the affidavit by the one person who filed an affidavit on their behalf, saying that that is not sufficient.

QUESTION: But, you had no evidence as to the prevailing rate in the community?

MR. KOTLER: There was no evidence one way or the other as to the prevailing rate in the community.

We would argue that a disproportionate fee such as here is no less unreasonable simply because the losing party is the one that has to foot the bill. Yet after arriving at the lodestar figure in this case, the District Court failed to meet its duty both under Blum and under Hensley to adjust the lodestar figure to fit the degree of success achieved to insure that the fee herein was proper, that it was reasonable.

We would argue that where the lodestar fee such as here exceeds or equals the damages recovered by a plaintiff in a case resulting solely in that form of relief that the lodestar produces an unreasonable fee and should be reduced.

On the other hand, the free market test of contingency fee arrangements in general use in a given community not only provide a more accurate reflection of the true value of a fee petitioner's service in a private tort action, which this was, but also produces a fee more consistent with the goals of Congress when it enacted Section 1988, again, a fee that is reasonable.

For these reasons, petitioners suggest the implementation of new guidelines to be followed by district courts awarding fees under Section 1988, guidelines, which if adopted, would preclude the kind of result which has occurred herein.

First, we would ask that the District Court ascertain whether or not a case was a public case or a private case. Let me explain what I mean. A public case would be one which would demonstrably result in public benefit; that is a provable benefit to persons in addition to the individual plaintiffs.

Conversely, a private case would benefit only the individual plaintiffs.

QUESTION: Well, counsel, don't you start off in trouble where the defendants are police officers? Doesn't that automatically make it public?

MR. KOTLER: I am focusing on the relief, Your Honor, not the defendants, on the relief obtained by the lawsuit.

QUESTION: Would it be the same?

MR. KOTLER: I don't think so, in this case, there were no policies or practices changed.

If it is found that the matter is a private litigation, attorney fees would be awarded based on the prevailing fee schedule for tort actions, probably not necessarily on a contingency basis.

Of course, the trial court would always retain its discretion to adjust this amount up or down to account for the plaintiff's degree of success.

QUESTION: Was there any evidence offered to show what they customarily charge, what their charges were in other cases, these particular lawyers?

MR. KOTLER: Nothing. There wasn't one word.

However, if the District Court determined that the case is one which has provable benefits, provable public benefits, that it had achieved policy changes or resulted in vindication of civil rights of a representative class of individuals over and above the respondents, the

fees could be calculated on the existing lodestar approach, again adjusted up or down to account for the degree of success.

One but not both of these fee arrangements or these fee calculations would result in a presumptively reasonable fee depending on the factual determination first made by the trial court.

I would like to reserve the remainder of my time that I have for rebuttal.

CHIEF JUSTICE BURGER: Mr. Lopez?

ORAL ARGUMENT OF GERALD P. LOPEZ, ESQ.

ON BEHALF OF THE RESPONDENTS

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

Let me remind you of the formal question before the Court raised by this case, whether or not a fee award otherwise reasonably calculated on the basis of rates and hours should solely, as the result of the damage award, be reduced?

The search for an answer to this question begins and ends with the legislative history. In enacting Section 1988, Congress decided that as a matter of law all meritorious Section 1983 claims have social value.

QUESTION: Suppose they had recovered a jury verdict of $3 million. Would you think the amount of

the verdict should be taken into account in fixing the fees?

MR. LOPEZ: I think that the size of the verdict, just as is true of the nature of the right vindicated, is irrelevant to the finding of social value. The size of --

QUESTION: Did you say social value?

MR. LOPEZ: Social value. There is a debate going on between whether or not this is a case concerning private as opposed to public value. I suspect more accurately what the debate is over is whether or not there is social value for purposes of this particular legislation, not for purposes of any other legislation.

My position is that be definition, when Congress took this Court's invitation to decide whether or not Section 1983 cases and other civil rights cases were important enough to amend the American rule, that what it concluded was that these forms of cases when they are meritorious, and no other circumstance, by definition have social value.

Mr. Chief Justice, you asked me the question whether I might, and, of course, self-servingly argue differently in the event that we had been successful in some other case, for example, with actual injuries and had recovered with $500,000? I would make no different statement.

QUESTION: My question was if you had recovered $3 million in this case, not some hypothetical.

MR. LOPEZ: If we had recovered $3 million in this case, it would not by definition add to the social value of the merit of the case.

What it would do is --

QUESTION: Did the jury decide the social value of this case?

MR. LOPEZ: By definition when they concluded that these claims were meritorious. That is what Congress decided as a matter of law.

The size of the verdict is relevant. There is no question about that for the best of reasons. Congress made it relevant. Congress said in passing the statute that the appropriate standards were those enunciated in Johnson and applied in three specific cases. And, in those standards it is true that both the size of the jury award, if any, and the results obtained, are relevant to the determination of whether or not the hours expended were reasonable in light of the results achieved.

But, when you are considering the monetary amount, it has nothing to do with social value. That is decided when you win. What it does have to do with, and quite relevant here too, is whether or not in light of your success it can be said that the hours you have reasonably

expended are justified in light of the results obtained.

Now, if you push the question a little, you should ask me what distinction am I drawing? What distinction, therefore, is there between the notion of there is by law social value but there is, nonetheless, important discretion to be exercised by the District Court as announced by Congress and as pursued by this Court in Hensley and Webb.

The distinction is that Congress and this Court invited this attention said we don't want courts, district courts or the Supreme Court, to muck around with the incredibly difficult finding of whether or not one case, one right, one remedy, equals more social value than another.

What is important in civil rights cases, as it has been important in antitrust cases, in fair trade cases and the like, is that Congress makes the decision as a matter of national policy that some classes of cases deserve national attention through private litigation. These cases are important enough to reverse the typical presumption that each side must pay its own way, but only if you prevail. When you prevail, there is social value.

The important question that Congress did want the District Court to investigate --

QUESTION: Are you saying that all cases filed under 1983 have "social value?"

MR. LOPEZ: If, and only if, they win.

QUESTION: If they win.

MR. LOPEZ: If, and only if, they win.

QUESTION: And, if they don't win, they don't have social value.

MR. LOPEZ: For purposes of 1988 that is precisely right. That is why the trigger for the statute is prevailing.

Let me complete my thought, because it is critical that a distinction that I think is being pledged here.

Nonetheless, the District Court has discretion not to determine social value, but to determine, in an insistently practical way, can it be said in light of what the results were and in light of what was complained of when this went to trial, that the hours reasonably expended as calculated according to what Congress suggested and this Court has approved, may be said to be reasonable.

That is the hard work of the District Court. It was those kinds of findings that were made and approved of by the Ninth Circuit. And, it is on the basis of those findings, unless there is a sufficient case they are clearly erroneous, not an insubstantial matter to meet, that this legal question is before this Court.

QUESTION: Well, do you think there is an argument that these findings and allowances were clearly erroneous in view of the fact that so many of the defendants were

found not responsible in the last analysis and that a good amount of the work went to pursuit of their liability?

MR. LOPEZ: I think that is a very tough practical question, both in this case and in any other case.

QUESTION: And then I think also the fact that the total amount of recovery was so much less than that sought. Don't those things go to reasonableness and can't you make a valid argument that the court below was clearly erroneous?

MR. LOPEZ: Both go to reasonableness, Justice O'Connor. They do not go to social value but they do go to reasonableness. Let's take them in order.

Hensley was a case, and Justice Powell's opinion, intimately concerned itself with just the first question you asked. What happens when there is something less than total success, either on the basis of all the claims brought or all the defendants sued, and it said sensibly these are not easy matters but let me provide you the guidance that you might follow.

If the claims cannot be said to be discreet, which Justice Powell's opinion said would likely be the case in most civil rights cases, if they follow from one story, one claim, more than one claim, responsibly litigated by the respondent's counsel, plaintiffs' counsel, should be thought of as overlapping.

Then the question becomes do they overlap sufficiently, thus that it may be fairly said that you can't distinguish between the unsuccessful and the successful.

While I think there are always sensible arguments to be made by the losing party which says some of the claims weren't successful, others were, separate them -- In order to be successful with that, you would have to demonstrate that something in the record, something in the trial transcript, which I might add was never ordered here, would justify the substance of that claim.

While the argument might obviously be sensible and, indeed, reasonable, it was, after very careful analysis, and twice rejected by a district court, a district court that I might add which add probably significantly greater experience in major litigation and with respect to police abuse than most other district courts.

The second question, whether or not the size of the damage alone might itself be reason --

QUESTION: Are you referring to, Mr. Lopez, Judge Pfaelzer's experience in private practice?

MR. LOPEZ: And, in her experience on the Police Commission of the City of Los Angeles, yes, both, Your Honor.

The second question, namely whether or not the size of the damage alone, might offer reason for the petitioners

the losing defendants to argue, that the whole amount of the order is not reasonable surely is just the kind of argument among 11 others that this Court, that Congress decided was relevant for what it takes to determine the highly practical question of what should be awarded after winning.

The key thing to understand, however, is that when you isolate that amount of money you are not trying to determine social value but rather whether in light of what the actual damage rules are, Carey v. Piphus, the injuries that were awarded some dollar amount, actually were awarded a dollar amount, that good, experienced counsel might have gotten for them.

In this case, that is precisely what the District Court found, namely that this sort of injury is typically awarded, indeed, something less than what we gain and in light of the fact that social value wasn't her job to determine, that was gained through these findings and through the jury's judgment justified the hours expended.

If I might elaborate in a slightly different way, while I think that the answer to the question put before this Court, the reason this Court is concerned about the case, is found within the pages of the legislation and its history. It occurs to me that only slightly beneath the surface both of what petitioners' counsel has said

and what this Court has asked is the suspicion about what happened in this case? Is there something that justifies what hours were expended and Justice Powell's questions begin to link up the kinds of things I am concerned about.

QUESTION: These findings, Mr. Lopez, read plaintiffs' counsel are entitled to be compensated at the prevailing market rates within that area. Now, for a one- and two-year law graduate is the prevailing rate $125 an hour?

MR. LOPEZ: Immodesty aside, Your Honor, Congress recognized and cited Johnson as the case which said that while the years out matter, if someone is good enough to gain the kind of wage that is typically paid to more experienced people, that is what they are to be paid.

QUESTION: Now let's come back to my question. Is $125 an hour the prevailing rate which is what the district judge purported to use for a one- and two-year law graduate?

MR. LOPEZ: If they were as good as --

QUESTION: Never mind, never mind. I am asking you a direct question. Is that the prevailing rate for a one- and two-year law graduate?

MR. LOPEZ: I think that that varies depending on what kind of firm you are working for and what kind of client you are charging.

But, the more important thing to understand is that is a Johnson factor elaborated by this Court in Hensley and it doesn't end on what is the prevailing rate in light of the number of years of experience, but in light of the expertise of counsel.

QUESTION: Well, is the expertise measured something by the result they got? Is that taken into account?

MR. LOPEZ: It is certainly one of the 12 factors that is relevant to the expertise, to be sure, which is why I would like to return to the question of what exactly was the product of these many hours of litigation?

For all that was said about what happened before the District Court, conspicuously absent are the findings of the District Court, a peculiar omission, you might understand, in light of the challenge that one should have to make to them.

In addition to what Justice Powell underscored, let me just briefly iterate some of those findings relevant to your consideration today.

The District Court found that both the City of Riverside and individual officers, including two of the only three supervising officers involved, participated in lawless, unconstitutional conduct.

The District Court also found that this lawless, unconstitutional product was not simply the product of

individual acts, but also the product of racial animus, the product of hostility toward the Chicano community in the City of Riverside.

Finally and importantly, the same District Court said that this racially motivated police discrimination, this lawless and unconstitutional conduct, had to be stopped, and I now quote the District Court: "And nothing short of a lawsuit like this could have done this."

Now, obviously, these findings by the District Court mirror what the jury found. The jury found after all that the City of Riverside's customs or policies themselves caused a constitutional deprivation. They also found that not only did the individual police officers intentionally deprived people on constitutional rights but they did so with malicious intent, the very predicate for the punitive damages that we gain.

It was on the basis of those findings, on those specific findings by the trier of fact after four and a half years of discovery and nine days of jury trial, that the District Court found that --

QUESTION: Mr. Lopez, you said a moment ago you were interested in what concerned my work beneath the Court's surface or something to that effect and a concern that at least lurks on my part is in my 16 years of private practice you could try a case very, very well

for a private client and have every expectation of getting a reasonable fee, the client fully able to pay, and if you get a judgment for $35,000 where perhaps you had expected a judgment for half a million dollars, you simply cannot bill that client a quarter of a million dollars.

MR. LOPEZ: I think that is often the case in litigation outside the boundaries of fee-shifting statutes and 1988 in particular. Although I might add that I think there is an empirical matter. There is some fairly strong suggestion that there are some cases where the basis for the amount charged is not the damage recovered, but rather the hours expended.

QUESTION: There may be, but are you suggesting then that 1988 was simply -- when it used the term "reasonable fee" was intending to transmute what the normal experience in private practice was?

MR. LOPEZ: Absolutely, Your Honor. When 1988 was enacted, it had two forms of fee understandings in mind. One was an hourly rate and it concluded that most of the people who file civil rights claims typically can't pay the hourly rate of attorneys. Somewhere in there, I suspect, is your understanding in private practice about what the relationship is between what is recovered and what may be fairly charged.

The other type was the contingency fee record;

that is the typical understanding which says, listen, for these kinds of cases isn't it true that you shall get a recovery that provides you for taking out attorney fees. It also specifically found, Congress that is, that this simply wasn't working in civil rights claims, that as a matter of empirical understanding too many of these claims giving the damage rules that don't permit you to easily evaluate what a constitutional right is worth, apart from physical injuries, lead predictably to such little money that any sensible P.I. type or anybody else who is not otherwise funded or was not incredibly heroic in time they are willing to give away was simply not taking the case.

The result of those definings was to say that much like in many other statutes, it is not simply civil rights statutes, we are going to find that the typical understanding of Justice Rehnquist's or anybody else's practice is not what operates in these cases.

What operates in these cases is we shall make the plaintiff's attorney suffer the difficulty of deciding whether or not a case is worth it, because if it is not going to win, you can put in four and a half years of stuff and nothing shall happen, but if it wins, if it prevails, the single predicate and the critical one, then what shall happen is you are entitled presumptively to a reasonable

fee.

QUESTION: Do you think, Mr. Lopez, that understanding is the same in the authorization for fee shifting, the Fair Labor Standards Act, the Antitrust Act, earlier fee shifting statutes?

MR. LOPEZ: Actually it differs enormously little which is what my study of all the statutes suggests; that is the fee shifting statutes have actually gone back to something like a hundred years ago. These are not novel things, though they typically weren't very common.

What happened quickly over time, when people began to discover that as a result of sometimes not terribly careful and sometime very careful empirical study the national investment in particular kinds of rights wasn't being actualized because attorneys simply weren't taking case.

So, what they decided typically was to throw out normal understandings which weren't working and to conclude that given that you had to prevail that people should otherwise be awarded fees that are reasonable.

Your next question I suppose should be that you don't mean to ask that we simply invite the District Court discretionless to take a look at these things and having concluded that you prevailed give you all that you have. I think not and clearly Congress never intended

that, these courts' three opinion on this question have never said so, nor did we act so presumptuously as to push that either at the District Court or the Court of Appeals.

We carefully elaborated precisely what we thought we were entitled to specifically as this Court directed us in light of Hensley and it was exactly that that took into account both the size of the monetary damage, the total award, along with the other 11 features that Johnson made relevant.

So, while I do think that Congress said you have to throw out normal understanding, not only hourly rates, but most importantly the equivalent of what the Solicitor General proposed and what petitioners now endorse, namely, this effort to relegislate what Congress threw away as an appropriate interpretation of 1988, because those aren't the way that these kinds of cases shall be vindicated in the private market.

There is one final glimmer of something that is ugly about our performance here, perhaps other civil rights attorneys' performance, that I think should be made slightly more explicit. That is there is either -- and this is probably the weaker of the two notions -- some sense that plaintiffs, either in this case or in other cases, highly romaticized what has happened to them,

that they put a higher dollar figure than actual damage rules permit and, therefore, when confronted with sensible offers, somehow refused them.

Coupled with that is the idea of a lawyer, either who sees the case as an easy winner or for some economically irrational reason given empirical doubt about this case, nonetheless figures this is where I shall gouge.

Both those concerns, it seems to me, follows from an understanding which says either this case, Mr. Lopez, or these cases in the aggregate surely concern us because, while you may be right that Congress said this is okay, what is happening is the taxpayers in general are made to foot the bill that is excessive.

The focus is then, you, Mr. Lopez, somehow justify what is going on here. Aren't you the party that decided that? This is the way it had to be litigated, you put too much time and charge too high a rate, etc.

While I think the concern is immensely justified, I think the focus is badly skewed.

The party that had most to do with this case going on and on was not the plaintiffs but the defendants. The defendants were the ones after all, and I speak now of both the City of Riverside and the individual defendants, who decided that after the filing of the administrative complaint, before a federal lawsuit was ever in mind,

never to respond by saying that in light of what was done, ultimately unconstitutional and lawless, we shall both apologize and offer you something like what was actually the damages here.

The defendants were the ones that, after refusing to make that offer after the administrative complaints were filed, then pursued without probable cause of finding of the District Court the longest misdemeanor trial in the City of Riverside simply to avoid having the lack of probable cause finding against them.

The defendants were the one who, after the filing of the suit and for some four a half years, as a matter of the finding of the District Court, never made a sensible offer.

The defendants were the ones, and perhaps this is most critical, most critical in light of Justice Stevens' opinion in Marek v. Chesney and the operation of Rule 68, the defendants were the ones who decided never to make an offer of judgment to both the plaintiffs and the plaintiffs' attorneys who they now describe as gouging, an offer of judgment that would have foreclosed the capacity to gain costs if, in fact, the jury's verdict were, indeed, less than what the offer was, costs in light of Marek, including attorneys' fees.

When that is the behavior of defendants, then

you have little doubt about why it took four and a half years to try and get information that was solely in the hands of the defendant and why you went to trial on a case where we knew too, in light of Carey v. Piphus and the actual damage rule, that it was immensely likely that the damage award would be small.

What was important nonetheless was that these clients were treated disrespectfully, not as a highly romaticized matter, but as a kind of insistently practical matter because all they were asking was not to be treated, because they were Chicanos in a place where they lived and worked, in an incredibly and institutionally discriminatory fashion so that the judgment, a monetary judgment to be sure, was thought to subsume the important social value and the deterrent value that at least thus far in this argument has been presumed solely to follow from either declaratory relief or an injunction.

And, if there is concern about what the taxpayers have to pay here, taxpayers who include my clients, I will add, then the real scrutiny ought to be of defendants and defendants' behavior in these kinds of cases, particularly when they have all the tools to put an end to it.

If they fail to take advantage of it, it hardly strikes me as an appropriate argument or at least one you ought not make without significant embarrassment to

then claim that plaintiffs' counsel are the ones who gouged and plaintiffs are themselves the highly romaticized unrealistic people who don't know that a case actually isn't worth much.

QUESTION: Does the record show why or when you dropped your request for an injunction?

MR. LOPEZ: In our brief we clarify what was actually an incorrect statement, both by petitioners' counsel today and in the in-chambers opinion, that we did not drop the request for injunction before trial. Rather, we waited until the evidence came in and decided on our own that we got what we wanted in the judgment against both the city for customs and policies that violated constitutional rights and against individuals that included punitives.

We presupposed, which is precisely what this Court has invited us to presuppose in Fourth Amendment cases and many other kinds of cases, that damage awards have social value and were deterrents.

The judge nonetheless --

QUESTION: You say you got what you wanted, but that still doesn't explain why you dropped the --

MR. LOPEZ: We dropped it for the best of reasons, we thought we got what we wanted and that in light of the pervasiveness of the lawless and unconstitutional

conduct --

QUESTION: I would think your injunction might have been easy to get.

MR. LOPEZ: Oh, precisely the opposite as perhaps you should know best in light of your opinion in O'Shea and in light of Justice Rehnquist's opinion in Rizzo and then your later opinion in Lyons.

QUESTION: You say you proved they had a policy.

MR. LOPEZ: We did. We absolutely proved under Monell, which is the standard for demonstrating municipal liability, that they had a policy that lead to this unconstitutional conduct.

QUESTION: You mean you can't get an injunction to enjoin a policy?

MR. LOPEZ: Well, in light of Lyons, though I unfortunately disagree with you, you concluded that though there is a policy in place, unless you can demonstrate with some reasonable certainty that you shall again be the product of the unconstitutional policy, that you are not entitled to an injunction. Indeed, this is Justice Marshall's argument in the dissent.

QUESTION: Did you withdraw your prayer for injunction after the jury verdict came in?

MR. LOPEZ: Yes, we did. In fact, to clarify the record yet still, it was the District Court that invited

our attention, perhaps thinking as Justice White does, to whether or not we wanted it, because it was her disposition, again made explicit on the record, that she was inclined to give us an injunction and it was at that point that I said on the record that the only kind of injunction I thought was appropriate was the tautological one, please ask the city and the individual defendants to obey the Constitution.

The typical presumption is local governments as much as federal government care enough about the Constitution to obey it and it was on that understanding in light of the case law that I decided that the judgment we got did what we wanted and why invite some mess that actually accomplished nothing more than what we wanted.

QUESTION: And, was part of your recovery based on state causes of action?

MR. LOPEZ: Yes, it was, Justice White.

QUESTION: And, did you think you should be compensated on those?

MR. LOPEZ: For the best of reasons, because Congress, both in the Senate report and the House report, the Senate report at page five, I think, and the House report at page seven, affirmed by this Court in Maher v. Gagne, says that you are entitled to both recovery on the basis of your winning pendent claim as well as

on your winning civil rights claim so there was little question --

QUESTION: Mr. Lopez, I would just like to make one statement. If you think you are the first one who ever tried a lawsuit in this field, excuse me.

MR. LOPEZ: I am not the first and I am certain I am not the best, Your Honor.

QUESTION: And, if you can show me some other case of this type that took how many years?

MR. LOPEZ: It took four and a half years, Your Honor.

QUESTION: That took that long to try, I would like to know of the case.

MR. LOPEZ: It took four and a half years for discovery, Your Honor.

QUESTION: Well, that took four and a half years of discovery I would like to know.

MR. LOPEZ: I would gladly submit a quite lengthy list of those cases even in the central district, Your Honor.

QUESTION: Do you mean a whole page?

MR. LOPEZ: If you would like it, Your Honor, I would be happy to do that.

QUESTION: If you could show me one, I would appreciate it.

MR. LOPEZ: Actually there are some cited in our brief.

QUESTION: Are they all in Riverside?

MR. LOPEZ: No, they are in the central district, Your Honor.

QUESTION: Oh, they are all in the central district. That is where you just take discovery as long as you want to.

MR. LOPEZ: Hardly. It why you take discovery when the information is not forthcoming because of intransigent politics and strategies on the part of the defendants which we, as much as anyone, wish would not happen.

It is hardly a matter that you want to pile up time when you don't know if you are going to win.

QUESTION: If you hadn't had it that long, you wouldn't have had that much of a fee, would you?

MR. LOPEZ: If they hadn't tried to avoid what we are trying to learn, we certainly wouldn't have been in there that long. I entirely agree.

QUESTION: Right.

MR. LOPEZ: Petitioners, both here and in their brief, ignore both what Congress did and what the District Court found. Now, that may well make their argument that much easier, but it hardly strikes me as a good reason for this Court to relegislate what Congress has already

decided.

The District Court did precisely what you asked on remand after Hensley. It carefully reconsidered the record and most specifically decided that it must reconsider the relationship between the results obtained and the amount of hours expended. That kind of careful work ought not easily be deprecated by deciding to do anything but affirm on the basis of arguments that have no basis in the legislative history as a matter of what went on in litigation or even as an empirical matter.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Kotler?

MR. KOTLER: Yes, I do.

CHIEF JUSTICE BURGER: YOu have two minutes remaining.

ORAL ARGUMENT OF JONATHAN KOTLER, ESQ.

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. KOTLER: At the outset I would like to point out that the Seventh Circuit two weeks ago in a case called Kirchoff versus Flynn, Seventh Circuit No. 85-2187, set forth a ruling precisely of the nature of the one we want today. It was a 1988 case brought on 1983 claims for assault and battery. It was a $25,000 award. The request for attorney's fees was $50,000 and the District Court

in Illinois awarded fees based on contingency in that case reflecting the local policy for personal injury actions. The case has just been remanded by the Seventh Circuit but on other grounds, but in this case they did use the contingency basis.

QUESTION: What is the case?

MR. KOTLER: I am sorry, Justice, it is Kirchoff, K-I-R-C-H-O-F-F.

QUESTION: Would you leave the title and citation with the Clerk.

MR. KOTLER: I would be happy to.

Secondly, I beg to differ with counsel, but there was no policy proven in this case, no finding to that effect either that there was a policy of the City of Riverside to do certain things.

QUESTION: Was the city held liable?

MR. KOTLER: Yes, there was a judgment against --

QUESTION: On what theory if there was no policy?

MR. KOTLER: That these officers who were --

QUESTION: Respondeat superior?

MR. KOTLER: I believe so.

QUESTION: They were the persons who had authority to make policy, weren't they, or not?

MR. KOTLER: They were the persons who did what they did. As to whether they were -- There were no supervisory

personnel -- The police chief, for instance, was dismissed from the case by --

QUESTION: What is the basis for the judgment against the city?

MR. KOTLER: That the city was negligent and the city violated 1983 claims.

Second of all, there were offers of settlement in this case. There was a second suit brought by eight other people and those claims were settled for a total of $16,000 in 1977.

And, finally, with respect to discovery, participant discovery in this case was concluded in 1978. From 1978 until the case was tried in 1980, there was no meaningful discovery taken. There was no discovery that had to be taken.

Respondents were aware of all the people involved and what they did as early as 1978.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:28 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the upreme Court of The United States in the Matter of:

#85-224 - CITY OF RIVERSIDE, ET AL., Petitioners V. SANTOS RIVERA, ET AL.

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BY Paul A. Richardson

(REPORTER)