# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5

TITLE PENNSYLVANIA, ET AL., Petitioners V. DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL.

PLACE Washington, D. C.

DATE March 3, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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PENNSYLVANIA, ET AL., :

Petitioners, :

V. : No. 85-5

DELAWARE VALLEY CITIZENS' :

COUNCIL FOR CLEAN AIR, ET AL. :

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Washington, D.C.

Monday, March 3, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 o'clock a.m.

APPEARANCES:

JAY C. WALDMAN, ESQ., General Counsel of Pennsylvania, Harrisburg, Pennsylvania; on behalf of petitioners.

MS. KATHRYN A. OBERLY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C., on behalf of respondent United States in support of petitioners.

JAMES DOUGLAS CRAWFORD, ESQ., Philadelphia, Pennsylvania; on behalf of respondents.



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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Waldman, I think you may proceed when you are ready.

ORAL ARGUMENT OF JAY C. WALDMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This litigation involves an award by the District Court of substantial legal fee enhancements by use of so-called multipliers for three phases of legal work during controversies over implementation of a consent decree, calling for the institution of an automobile emission inspection program in Pennsylvania under the Federal Clean Air Act. The effect was to increase these legal fees by up to 200 percent for inexperienced attorneys already receiving a high hourly rate. The result were hourly rates for attorneys of up to $400, or compensation for the equivalent of 1,700 hours of legal work that was in fact never done.

The explanation consisted of three conclusory paragraphs in a 45 page opinion, that the quality of representation was high in one phase, that the issues were novel and difficult in two phases, and that in all three phases, the Respondent was found to have had a low likelihood of success. This was despite the heavy

burden of proof that Petitioner bore in all phases under the controlling law of the circuit, and this was after the Court disallowed 306 hours requested, including time for attendance at press conferences and interviews as unnecessary, duplicative, inadequately documented, and of dubious significance. The Court also awarded legal fees for submitting comments on draft administrative regulations and attending an administratiave hearing. We contend that the latter violates Section 304(d) of the Clean Air Act which clearly specifies there shall be compensation for work done only in litigation, and we find that the former violates reason, it is irrational; it violates the intent of Congress in the fee shifting statute. We find -- excuse me -- we contend that it is violative of the underpinnings of this honorable Court's holdings in Blum v. Stenson, and indeed, we ask the Court to decide today the issue it left open in Footnote 17 of Blum as to whether these use of so-called multipliers in cases based on a finding that the prevailing party was in fact unlikely to prevail and ran a high risk of not succeeding are ever appropriate.

We contend they are irrational because they penalize defendants with the best defenses. They reward plaintiffs with the most marginal claims, and therefore have to encourage the flooding of the court with those

claims. They are particularly inappropriate where the losing party bore the burden of proof. They result in irrational and anomalous kinds of findings. We force a court to decide that it was likely, in retrospect, that it would have decided a case differently than it in fact did, and one must ask oneself, if one wishes to be rational, how unlikely must a court find it was to have reached the result it did before one must question whether that result was correct.

It forces the attorney for the losing party, in order to protect his client from the risk of substantial additional fees, to argue after the litigation that in fact he never had a very good defense, that there was no serious likelihood that the prevailing party would fail.

There are absolutely no standards; these multipliers are awarded randomly, and often the court will pick a number out of the air that it deems appropriate, that will multiply the fee.

QUESTION: Mr. Waldman, the District Court, as I recall, acted before our opinion in Blum v. Stenson came down, didn't it?

MR. WALDMAN: Yes, it did, Justice Burger.

QUESTION: And the Court of Appeals wrote its opinion after that opinion?

MR. WALDMAN: They did indeed. In a two-to-one opinion, they affirmed. That is absolutely correct.

QUESTION: Mr. Waldman, the District Court allowed, as I understand it, two sorts of multipliers or increases. One was a so-called quality of representation multiplier or increase, and although the Court acted before our opinion in Blum v. Stenson, it did appear to set forth as its reasons some of the reasons spelled out in Blum v. Stenson that might justify such an increase, did it not?

MR. WALDMAN: I would have to say no, it did not, Justice O'Connor. In fact, the entire explanation that the Court gives under the heading of multiplier, which begins on page 38a of the Appendix, consists of three conclusory paragraphs in which it simply states as a conclusion that they find that in fact there was a high quality of representation. But I think of greater importance is the Court's holding in Blum that absent rare circumstances, quality of representation and result achieved, and in virtually all cases novelty, complexity and difficulty of the issues also cited by the District Court, are subsumed in the normal calculation of reasonable hours expended, multiplied --

QUESTION: Well, what should the Court have

said in terms of any incantations before its quality of representation multiplier should be allowed?

MR. WALDMAN: Well, I would say this. I would say that before you can allow a quality multiplier, based on this Court's holding, the burden is on the fee applicant to prove in evidence in the record that the Court can cite to that it meets the test of this Court for the so-called rare and exceptional test, and I read that as a two-part test. One, they have to prove that the quality of the representation is not adequately reflected in the calculation this Court held is presumptively reasonable, reasonable hours times a reasonable hourly fee, and B, that their success was exceptional, not excellent, exceptional. And there was absolutely no evidence in the record and no evidence cited by the Court for either of those tests.

QUESTION: What do you mean by success being exceptional? Is it more than a reasonable attorney would have expected to achieve?

MR. WALDMAN: Well, I can only say, Justice Stevens --

QUESTION: If so, how is that different from contingency?

MR. WALDMAN: Well, I would say two things. I would say that this Court in the Hensley case made the

distinction between excellent and exceptional, and I must conclude that by exceptional, the Court certainly meant some kind of success that was beyond excellent, and I would say extraordinary.

QUESTION: I'm just not quite clear.

Is it your position that the contingency factor, the probability of success in the case must be totally disregarded and can never be weighed by the Court?

MR. WALDMAN: It -- yes, it is, although I would say certainly if it can ever be weighed, it should be weighed and considered under a test no less stringent than the test that this honorable Court set forth in Blum for quality and result.

QUESTION: Well, is it your view that lawyers never take into account contingency in fixing the fees at the end of -- I think the ABA standard suggests contingency as one of the many factors to look at.

MR. WALDMAN: Justice Stevens, I would say this to you. The ABA -- and I think it is the sixth factor -- I am trying to remember. I can't remember the number. It's in their Code of Professional Responsibility -- when the ABA said you may consider contingency, I really submit to you that they never contemplated by that that a lawyer, after he totalled up

his fee based on reasonable hours, should then multiply it by a number picked out of the air and send a bill for that amount to his client.

QUESTION: Well, I would agree, the multiplier may be a little different concept, but I am just wondering whether, you know, maybe a 10 percent bonus or 15 percent bonus because it was a case in which the odds of prevailing were very long, is it your view that is totally impermissible under the statute?

MR. WALDMAN: It is in my opinion, Justice Stevens, because unlike the hypothetical that you give where a private party is free to enter into any agreement with a private attorney to file the riskiest, most dubious litigation, we are here dealing with cases where Congress only intended that meritorious cases be brought.

QUESTION: Well, but even apart from an agreement in advance, sometimes lawyers take a case, I know I did often, and they say, well, when we are all done I will figure out what's fair, and we'll talk about it, and at the end of the work I think back and I think, well, it was kind of a difficult case and we had a much better result than we expected, and the odds were rather long, and I think maybe we are entitled to be paid a little extra for that reason.

You would say that would -- first of all, would you say that was unethical to approach fees in that way, and secondly, you say it is prohibited by the statute in this context.

MR. WALDMAN: The answer is no and yes. I do not think it's unethical.

QUESTION: Okay.

MR. WALDMAN: But I think that where Congress --

QUESTION: I think a lot of us used to work that way. That's why I am puzzled.

MR. WALDMAN: I think where Congress, however, says A, we are only going to compensate successful claims, and we are not going to subsidize directly or indirectly unsuccessful claims, and where it says we are interested in attracting meritorious cases, then one must ask what in the marketplace would be reasonably necessary to induce an attorney to take a meritorious claim? And I submit that if a meritorious claim is anything, it is a claim that when properly analyzed offers at least some reasonable likelihood of success with proper presentation and preparation by a competent attorney putting in the hours.

QUESTION: Well, doesn't the competent attorney always figure that some of his more profitable

cases are going to help him with some of his losers? I mean, isn't thate part of the business?

MR. WALDMAN: Yes, and I believe it's precisely, Justice Stevens, what Congress did not intend, and I think this Court recognized that in Hensley, among other cases, in the fee shifting statute because it specified for compensation only for successful claims. In fact, this honorable Court has gone so far as to say it, that the District Courts must scrutinize records to make certain that they are not compensating an attorney for work done on unsuccessful portions of a case or unsuccessful claims in the same litigation, let alone help subsidize him for losing work done in unrelated cases, for unrelated parties.

MR. WALDMAN: Mr. Waldman, do you think that in determining the prevailing market rate, that there is a different rate generally in the community for -- that lawyers for plaintiffs charge when there are these uncertainty factors, and the rate charged by the typical defense bar, and does the Court maybe look to a specialized market within the plaintiffs' bar for determining the prevailing market rate?

MR. WALDMAN: In a case involving damages as well as equitable relief, I would say quite possibly yes, Justice O'Connor, but think about what's really

happening here. What's happening here is we are compenating these lawyers as if they were getting a fixed fee, fixed hourly fee typical of the defense bar, plus a contingency or percentage typical of the plaintiffs' bar. We are giving them both. First, we are multiplying the reasonable hours times a reasonable hourly rate, and on top of that, we are picking a number out of the air and multiplying that, resulting in still a greater amount of relief. In effect, we have created a small class of attorneys here who are getting compensated as if they were both plaintiffs and defense lawyers in the same case.

QUESTION: Well, should there be a higher hourly rate in the first place for a plaintiff's compensation in a case like this?

MR. WALDMAN: I would say, Justice O'Connor, that the Court in Blum set out what is -- what I would submit is a proper test. Where the quality is high, where the results are excellent or outstanding, then certainly one would assume this reflects both the skill of the attorney and the hours and dedication he put in, and these absolutely can and should be reflected. We have no objection to that.

QUESTION: So there could be --

MR. WALDMAN: In a higher hourly rate.

QUESTION: -- a higher hourly rate and compensation for all the hours spent.

MR. WALDMAN: We would not object to that, and for one thing, Justice O'Connor --

QUESTION: And that wasn't done here, I gather.

MR. WALDMAN: No, Your Honor, not at all. In fact, your approach would result in an objective, measurable standard that one could at least discuss and analyze and review. The standard that is being used in awarding a massive multiplier based on likelihood that the prevailing party would fail is something like going to Las Vegas. I mean, they pick a number out of the air, it is not explained, and the fee is multiplied, resulting in this case, for example, of a fee that is over 125 percent higher than the fee you would get if you simply awarded hours times a high hourly rate. The Court specifically found in this case, Justice O'Connor, that they use a high hourly rate, and it's a rate approximately $100 an hour for lead counsel, that this honorable Court recognized in Blum as a high rate. So they already were getting a high rate, multiplied by every hour that the Court found to be sustainable.

With the Court's permission, I would like to reserve the remaining four minutes for rebuttal.

QUESTION: May I ask, is $100 an hour a high rate in Philadelphia?

MR. WALDMAN: Well, the Court found it was, and this honorable Court found it was in the City of New York in the Blum case. It found $105, in the case of New York City, was a high rate.

QUESTION: It is more than most partners get in Philadelphia, I suppose?

MR. WALDMAN: I would say in some cases yes, in some cases no.

CHIEF JUSTICE BURGER: Ms. Oberly.

ORAL ARGUMENT OF MS. KATHYRYN A. OBERLY, ESQ.

ON BEHALF OF RESPONDENT UNITED STATES

IN SUPPORT OF PETITIONERS

MS. OBERLY: Thank you.

Justice Stevens, just to address your last question, the Court should bear in mind that the lawyers who received the $100 hourly rate in this case were barely out of law school. This was the first major piece of litigation they had ever handled. They -- one graduated in 1977, one graduated in 1978, and by the time, the end of this fee litigation, they still wouldn't have made partner, and yet they were being compensated at perhaps low partner rates, but very high associate rates.

QUESTION: It takes seven or eight years to make partner in Philadelphia, doesn't it?

MS. OBERLY: Pardon?

QUESTION: It takes seven or eight years to make partner in Philadelphia?

MS. OBERLY: I have not practiced in Philadelphia, but I assume that's standad in any major city.

The government's position is, in this case, that contingency multipliers, multipliers employed for the risk of failing to win a case, should never play a part in setting a reasonable attorney's fee. There are two reasons for that position. The first is we think such multipliers are inconsistent with the intent of Congress, and the second is that the reason that they are applied is so irrational that we cannot believe that Congress intended courts to be employing this sort of system in setting what is supposedly a reasonable attorney's fee.

To look at the intent of Congress and how contingency multipliers subvert that intent, the Court need only consider two hypothetical cases. In case A, the plaintiff loses his case, and we know that he is entitled to no fee whatsoever. He did not prevail, and there is no fee. In case B, the plaintiff wins, and we

know equally clearly that he is entitled to a fully compensatory fee.

But once the Court starts adding contingency multipliers to case B, the successful case, to compensate that plaintiff's lawyer for the fact that he lost case A, the Court is doing exactly what Congress and this Court has said is impermissible, compensating for losing cases or losing claims in totally unrelated cases. It is worse even than what the Court condemned in Hensley. It isn't even an unsuccessful claim in the same case. It is an --

QUESTION: May I ask, why do you assume it is compensation for the other case? Supposing a lawyer won every case he ever tried and he had one that was a particularly long shot and he said I think I will charge a little extra because of the contingency factor, would you -- well, he wouldn't be charging for some other case.

MS. OBERLY: Well, the rationale given for contingency bonuses is --

QUESTION: But is it necessary? Is that the only possible rationale?

MS. OBERLY: There are two given, that one and the other one is delay in payment where you expect to get paid, but you don't know how long it's going to take

before you get paid, and therefore you will charge higher than your hourly rate to protect yourself against the time value of money. As far as that reason is concerned, the United States --

QUESTION: What about simply the reason you are uncertain whether you will get paid or not, even though you won all your other cases?

MS. OBERLY: Those cases are -- if you were in private practice, you would definitely protect yourself against those cases, and you would charge a higher rate in those cases, and you would work without --

QUESTION: But you might not do that pursuant to an advance agreement.

MS. OBERLY: You would work it out in advance with your client --

QUESTION: Why do you have to work it out in advance?

MS. OBERLY: If your client was willing, I think the canons require that at least at the outset of the representation you sit down with your client and explain either we will work it out now, or if it is acceptable to the client, we will work it out at the end.

QUESTION: We will work it out later, and at that time we will agree on what appears to both of us to

be a fair fee.

MS. OBERLY: But it's an agreement between two people --

QUESTION: But listen to my question for a moment.

Supposing the agreement was we will fix the fee when the litigation is over, we will do something that's fair to both of us. You get all over, all done, could the lawyer then at that time say simply because I was doubtful about whether I would get paid at all, I think I'm entitled to a premium, 5 percent?

MS. OBERLY: Yes, he could in the marketplace. The question here is whether Congress intended to replicate every element of the private practice of law when it enacted fee shifting statutes. We already know that that's not the case. Congress imposed a limitation on these cases saying we will only pay for prevailing cases; we will only pay for prevailing claims in the same cases if they are sufficiently distinct that they can be severed out, then you must sever out --

QUESTION: Has the government, has the government changed the position it took in its brief in Blum v. Stenson that they took --

MS. OBERLY: No, Your Honor, and Respondents

misquote our brief in Blum, if that is what you are --

QUESTION: What did they --

MS. OBERLY: What Respondents leave out is the fact that that quotation from our brief in Blum is the government quoting a District Court case explaining the rationale for contingency multipliers. It is not -- and then, after setting forth that quote, we quote the District Court case, we then go on and say why it's wrong for the same reasons I'm giving you here today, and Respondents have neglected to note that this is a quote within a quote.

Our position, just to sum up on that point, is that if Congress wanted to adopt a system of paying for every case, whether successful or not, then it should legislate such a system. That is essentially what the Court held in Ruckelshaus v. Sierra Club. Congress has not enacted such a system. In fact, it's made a point of doing the contrary, and until Congress makes the change for courts to compensate losing parties by cross-subs, by taking extra money in winning cases and cross-subsidizing losing cases, is contrary to congressional intent.

We also think that just as the burden of proving the reasonable number of hours, the reasonable hourly rate falls on the fee applicant under this

Court's cases, so, too, the burden of proving the need for a contingency adjustment should fall on the fee applicant. The fee applicant should be required to show that absent the contingency adjustment there would not be sufficient competent counsel to take the types of cases that Congress meant to encourage. The Court need only scan through the pages of the Federal Reporters to know that that is in fact not the case. There is no empirical evidence whatsoever, and in fact, the evidence is to the contrary, that the current system of compensation without multipliers is fully adequate to attract competent counsel to take the cases that Congress intended to encourage when it enacted fee shifting statutes.

As I mentioned a moment ago, the other rationale for contingency adjustments is delay in payment rather than uncertainty about being paid at all. For the United States, that rationale is as inconsistent with sovereign immunity as the argument that you heard last week in Library of Congress v. Shaw. It is simply a disguised interest payment, and it violates sovereign immunity without express congressional authorization.

We also agree strongly with the Commonwealth that contingency multipliers, as currently applied, are

so irrational that Congress could not have intended them. Hensley in the lodestar approach have, as the Court noted in the Hensley opinion, the virtue of objectivity, but once the Court starts plucking numbers out of the air, having made what is supposedly a mathematically precise calculation of a reasonable attorney's fee, then says now I am going to double it, I am going to multiply it by 1.5, by 3.5, by whatever number strikes the Court in a clearly subjective sense as the multiplier, we have lost all sense of computing an objectively reasonable attorney's fee.

The doubling, the tripling, whatever the Court does with these multipliers makes it impossible for the Court to justify to a reviewing Court why it has picked the number it has picked, makes it impossible for the defendants who are saddled with this extra fee liability to meaningfully challenge it because they have no idea where the number came from. It also produces counterintuitive results about what kinds of litigation Congress meant to encourage. As my colleague pointed out, plaintiffs with the weakest cases have the strongest incentive to pursue these cases because the Court is likely to give them the highest multiplier because their chances of success were least. That is clearly not what Congress intended.

Finally, in response to Justice O'Connor's questions at the beginning of my colleague's argument about what kind of incantation a court would have to engage in, here in this case our position is there is no -- it's not that the words weren't there, it's that on the facts of this case there simply is no incantation that would have justified the multiplier.

The quality multipliers, I am moving now from contingency to quality multipliers, were, although in one sentence the Court said the work was superior, the reason the Court said the work was superior was because, it said, the issues were novel and complex. Those factors we know from Blum are subsumed or are supposed to be subsumed in the lodestar fee, and therefore, it's not a question of missing words in this opinion. It's a question of the Court counting on the novelty and complexity, merging superior quality and novelty and complexity, and it's true that this litigation was quite protracted, post-consent decree, but what that did was force or enable, however you want to view it, the plaintiffs, respondents, to spend more hours open the litigation. Those hours that the District Court found were reasonably expended were then compensated at a fair hourly rate, respondents have not challenged that in this Court, and they have dropped any challenge to

whether that was a reasonable hourly rate or a reasonable number of hours, and therefore our quarrel isn't really with the explanation given but rather with the fact that no permissible explanation could have been given on the facts in this case.

Thank you.

CHIEF JUSTICE BURGER: Mr. Crawford?

ORAL ARGUMENT OF JAMES DOUGLAS CRAWFORD, ESQ.

ON BEHALF OF RESPONDENTS

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

I had suspected that this argument might involved a great deal of the facts of this case, and in that sense the case is really not certworthy because you have a District Court required to deal with factors that were going to be announced by this Court long after the decision was rendered.

The argument plainly has not turned that way. The argument has turned on the question left open in Blum, and I would address that primarily here.

The question which is posed is should a contingency adjustment ever be appropriate in any case on the fee shiftinh statutes. It seems to me there are six reasons why it is obvious that in some way, whether in an adjustment of the lodestar or in a multiplier,

because the lodestar has not been adjusted, contingency must be awarded, must be a factor in the determination of a fee.

The first answer, of course, is the intention of Congress, and Congress, when it did its most comprehensive study of the fee shifting statutes, in dealing with Section 1988, went to some District Court cases and one leading Court of Appeals case in the Fifth Circuit and said this is the kind of factor we are looking at. They took Johnson in the Fifth Circuit, and Johnson, of course, turned back to the ABA standards, and one of the factors that they said was used in determining what is a reasonable attorney's fee was the contingent nature of the case, whether the fee is fixed or contingency.

Three District Court cases were cited, and at least in one of them, Stanford Daily v. Zurcher, there was a plain award of a multiplier because of contingency. It's a three factor problem there, but contingency is plainly part of what the Court cited there, and at least in one of the other three cases there is some indication that contingency was involved.

So Congress plainly was thinking of adjustment, by the way, adjustments up and down, as this Court has said, but an adjustment for contingency was

there.

Second point you would turn to is, of course, history. I meant to take a little time this morning to go see what Justice Sharswood's lecture said back in the middle of the 19th Century. Absent those and the Alabama rules of 1887, I can go no earlier than 1908, but I presume that most of the members of Congress who adopted the fee shifting statute had probably, those who were lawyers, begun their practice after 1908 and were operating on the basis of the then canons of professional responsibility. And Canon XII plainly lists among the factors that can be taken into account in setting a reasonable attorney's fee, an ethical attorney's fee, the contingent nature of the case.

That wasn't such bad --

QUESTION: What do you think that means, Mr. Crawford? Does it mean the fact that you have an agreement with the client that you will be paid only in the event of success, or does it mean your agreement with the client may be somewhat indefinite or the client's means somewhat suspect?

MR. CRAWFORD: I think, Justice Rehnquist, that both of those factors are taken into account in the canons. Canon XIII deals with what we call in the tort field contingent fee cases. That's Canon XIII which

talks about fees which are set on contingency.

I think what we are talking about in Canon XII was plainly the "If I don't win, my client isn't going to pay me very well," or "My client may not have any money if I don't wint the case," or "I'm going to say to my client, either beginning, when I start to set out my fee discussion or in a fair discussion at the end, I took a chance on this, I got you something special, and I think you ought to pay me something special," it could be a lot of different ways, Justice Rehnquist.

QUESTION: Well, that really means very little more than if you win a case you are going to be able to get a better fee for it than if you lose the case.

MR. CRAWFORD: I think that's true.

QUESTION: Even though --

MR. CRAWFORD: Except, except here -- it also means whether you can get any fee at all, quite probably. For instance, if you are -- although you don't have a contingent fee that says you get a third of the recovery, you know your client has no funds unless you win the case, that that is plainly a contingency. You only get a fee, then. You can mark it up because you took those chances. And it is clear that this was permissible then, it's clear it was permissible under the Code of Professional Responsibility, it's clear that

it is a method which was in existence when Congress acted, it's clear it still is the case under the model rules, so that contingency is one of the things you figure when you decide how you're going to set your fee.

QUESTION: For me, Mr. Crawford --

MR. CRAWFORD: Yes, Justice.

QUESTION: -- it confuses this issue markedly to talk about this as a contingent fee case. A contingent fee case is one where in advance, the typical tort negligence case, 33 1/3 or 40 percent as is being charged, that is a contingency fee case.

MR. CRAWFORD: Mr. --

QUESTION: Hold on. Let me finish.

So it confuses this issue when you take this other and draw it in.

Now, what these standards mean is that when there is a success, the hourly rate is one factor, and that the result is taken into account, and that is quite different from the traditional contingent fee case.

MR. CRAWFORD: Mr. Chief Justice, it's different from the traditional contingent fee case primarily because what Mr. Waldman told the Court is just so wrong. In the traditional contingent fee case, I can make a fortune if I win. I get nothing if I

lose.

Mr. Waldman says we have the best of both worlds, we have the worst of both worlds. If we win, we never get a third of the recovery or 40 percent of the recovery or 20 percent of a recovery. If my client wins, he gets to recover a reasonable rate. If my client loses, like the person in the standard tort contingent fee case, he gets nothing. So we have the nothing bottom line, just like the tort case, and in that sense it is no different from the tort case.

QUESTION: You mean you're --

MR. CRAWFORD: We don't have --

QUESTION: You are assuring the client in advance that you will not charge him anything if you don't recover?

MR. CRAWFORD: There will be no fee recovery in these cases. Whether the client can pay something, then it's the client who is bearing the risk, but I think Congress plainly talked in terms of a fee shifting statute, and in the case of most of these cases, though we have not studied it, I assume that it is either you get the fee because you recover a fee here or you don't get the fee at all.

QUESTION: What happens if you tell the client this is a lousy case, you haven't got a chance of

winning it. I'm not interested in a one-third agreement, I want a flat fee now, and he takes the fee in advance and wins a substantial recovery for the client, and then goes to the client and says, well, I want some extra money.

MR. CRAWFORD: There, Justice --

QUESTION: What happens?

MR. CRAWFORD: There, Justice Marshall, he settles for the fee agreed to in advance because he said I'm going to waive my contingency, you pay me, I've got it, you aren't contingent.

QUESTION: Well, have you ever heard of a case where the client paid him a nickel?

MR. CRAWFORD: I don't know the case where the client has paid it in advance, so I'm not sure, but he certainly doesn't pay anything in the end because he's already made an agreement.

Anyhow, the history plainly says that contingency is one of the things you figure.

Contrary to what is suggested, as I read the brief in Blum v. Stenson -- and I didn't bring it along -- the government cited that District of Columbia language that you don't expect to get counsel to take a fee where there's a danger he won't be paid at the same rate he would take a case when he was sure of being

paid.

I thought it was cited as a statement of reality. That's how I read it in Blum. What I certainly read and I do have present in the Court, the courtroom, the brief in Shaw, argued a week ago today, in which in Footnote 8 the government ends by saying moreover, for a beginning practitioner or small firm attorney identified by Respondent as the typical civil rights lawyer -- we're not so sure that's true -- factors wholely independent of the no interest rule such as the contingent nature of the fees awarded under Title VII and the likelihood that the lawyer will have no steady stream of income will have more effect than the delay of interest.

So the government, when they wrote their brief in Shaw, knew that contingency mattered, and I suggest an interest is plainly -- delay in payment is plainly a part of the contingency question, and I saw in the courtroom a week ago and I listened to Mr. Rothfeld tell the Court in answer to a question that if you weren't dealing with the government, normally the way you would build a fee would be to include as one of the factors in that fee the delay in payment.

So the Solicitor General as recently as a week ago still believed that that part of contingency, the

difference between whether you get paid when you do the work, or whether you get paid years later, made a difference.

I don't think the Solicitor General was wrong in those cases. I think he was talking common sense that Congress saw.

But in any case, he ought to be bound by his own beliefs.

What else did Congress have? Congress had, or what else has --

QUESTION: What you are saying, Mr. Crawford, may have a great deal of applicability to the fixing by a client of a private attorney, but I think one of your opponent's arguments is that Congress did not intend the fee shifting bar, if you will, to make a good living at this business. They were to make a fair fee off the cases they won, but they weren't to be able to pick up for the cases they lost in the same way that a private attorney could.

MR. CRAWFORD: Justice Rehnquist, I assume that the bar that practices civil rights law is not among the wealthy bar of the United States because with such multipliers as are given in those cases where they exist, they still don't come up to the kind of money that either the best or most expensive private counsel

on either side of cases make. And I don't think Congress intended that.

But Congress plainly intended enough of a fee to permit -- to bring people, competent people, into these cases. And I suggest that this has not been lost on the courts who have looked at the legislative history. At this point there are thirteen circuits which could have ruled on the question, thirteen circuits have ruled, and as I read and cite the cases, thirteen circuits have said contingency is a factor that would be involved in setting fees in these cases.

QUESTION: Well, Mr. Crawford, isn't the question -- put it this way. The question is not whether the result may be taken into account, but to what extent it may be taken into account, the multiplier.

Really, most of this argument evades or avoids at least that issue.

MR. CRAWFORD: Mr. Chief Justice, if I were sure the Court were ready today to say that we face reality, that some kind of a multiplier, either in setting the lodestar or in setting -- or in putting a multiplier to the lodestar, some account must be taken for the contingent nature of recovery, I would stop. I am not convinced that the Court is prepared to rule that

way, so I will give a couple more reasons why I would ands then turn to the extent of the multiplier.

The final historic reason, I suppose, that you can say that Congress intended a multiplier is that for several sessions of Congress, now, bills have been introduced to do away with multipliers, and in each case the bill has failed to get out of committee, and if this Court's holding in Vasquez v. Hillary, just January of this year, or in Patsy v. Florida Board several years back is the standard you measure it by, you have to say that the fact that Congress has been aware of the fact that contingency is a factor in setting fees, and Congress has refused to change it, even in the face of 13 circuits which have applied those multipliers, then that is an indication that Congress approves the multiplier, that nobody has been doing anything wrong in allowing the contigency multiplier to exist.

QUESTION: What is the range of multipliers that they have used in the 13 circuits?

MR. CRAWFORD: The range of multipliers that I am familiar with in cases -- and this involves whole cases, Mr. Chief Justice, not as in this case certain discrete little pieces of cases or pieces of cases, whatever, the range runs from 4.5 down to 1.1, 1.05, 1.2. There is a long range of multipliers that have

been permitted.

QUESTION: And what's the reason for the multiplier?

MR. CRAWFORD: The reason for the multiplier, Justice Marshall, it seems to me, is that's the only way you're going to get competent counsel to take these cases, and that's what Congress intended, and that's the --

QUESTION: The only way that you can get counsel is to pay counsel more than he's worth?

MR. CRAWFORD: No, Justice Marshall. The only way you can get counsel to lay aside the kind of business that good lawyers have, the kind of lawyers the Chief Justice had said ought to be practicing in the federal courts, the kind of lawyers who have clients knockingnat their door and saying either I will give you a contingent fee, 35 percent of the verdict, 30 percent of the verdict, 40 percent of the verdict, or I will pay you your hourly rates straight up, as soon as you submit the bill I'm going to pay, you want lawyers who are that good to turn down those cases and to say I'm going to take a civil rights case. I'm going to take it partly because I think these cases matter, because I think that the Civil Rights Acts and the Clean Air Acts and other acts that Congress has adopted with a fee shifting

provision are acts that represent important things. --

QUESTION: Is there anything in this record where the lawyer has said that?

MR. CRAWFORD: No.

QUESTION: In this case.

MR. CRAWFORD: Justice Marshall --

QUESTION: Well, where are you getting it from?

MR. CRAWFORD: I'm getting that from the congressional history.

QUESTION: Is't not in the record.

MR. CRAWFORD: I think --

QUESTION: What in the record in this case justified the multiplier, in the record?

MR. CRAWFORD: The traditional rule, Justice Marshall, that one of the factor that courts have used all over the country in determining how you build a fee is if the lodestar rates that are set are the rates you would set when you were sure of getting paid, then in order to bring counsel in, in order to compensate them reasonably, you have to make an upward adjustment because they took the case on the chance. That's what the record

QUESTION: Mr. Crawford --

MR. CRAWFORD: Yes, Justice O'Connor.

QUESTION: To what extent are the courts around the country, in setting the hourly rate, looking not at what a defense lawyer might get per hour but looking at what a lawyer might get who had to take some risk in the payment factor, in other words, a higher hourly rate, in short.

MR. CRAWFORD: There are some cases, the District of Columbia circuit referred to some cases, for instance, in which the rates that were built were rates that had contingency as a factor in them. It seems to me very clear here where the rates run from a high of $100 an hour to a low of $25 an hour, and in Philadelphia, Mr. Waldman to the contrary notwithstanding, there aren't partners who bill at less than $100 an hour that I know about -- these --

QUESTION: Well, the work here was done by very inexperienced lawyers who would be likely to charge $100 an hour?

MR. CRAWFORD: The inexperienced lawyer who graduated from law school in 1977 -- and you will remember, Justice O'Connor, this is a case which deals with engineering problems -- had 32 years experience as a licensed engineer before he went to law school and worked in this case. So the answer is in cases involving technical matters, what would you pay a person

who had been out of law school two years when the case began and seven years when the case was over? I think $100 an hour would be the kind of fee that you would collect if you are sure you are getting paid. But that's -- there's no record made on this.

And to jump ahead to where --

QUESTION: Well, but to the extent that courts can and do look at what you call a contingency factor in setting the hourly rate, is that not satisfactory, and doesn't that take care of most of these cases?

MR. CRAWFORD: I don't know whether it takes care of most of these cases, Justice O'Connor. There is no question that if the Court had turned rather than to the rates that are being paid associates and partners in Philadelphia law firms that are in basically the defense business, the Court had turned to people who had contingency built into their rates to look, that that would do it. You don't get paid double for contingency. If the Court had said what do people charge when they realize they are not going to get paid for five years from the start of the case, they are not going to get paid anything, and they said, well, we have a batch of people who do that, and these rates reflect that, that would be fine. But the question here is that they -- that the Court didn't do that.

I'd like to touch a little on the portion of the facts of this case that make this an obvious case for multipliers.

This case has its nearest analog -- and say this respectfully -- nearest analog in the massive resistance cases of thirty years ago. This is a case where the legislature of Pennsylvania and eventually the Supreme Court of Pennsylvania stood at the door not of a school house or a college, but at the door of the emissions testing apparatus and said you have won a verdict from the -- or a consent decree in the United States District court, a decree which should have ended this litigation, but you are wrong. Like President Jackson's remark to Chief Justice Marshall, what the legislature said to Judge Bechtle is you have made your decision; now you enforce it.

And what Judge Bechtle and Delaware Valley and many times Delaware Valley against not only Pennsylvania but against the United States, and the Solicitor General suggests how could we have lost when we had the United States for our ally? Well, this isn't the first time our ally has stood up against us. When there was a request for a substantial, 25 month delay in what had been agreed to in the consent decree, the government said that's wonderful, and we had to go to Judge Bechtle

against the federal government and the state and say don't let this happen, and eventually we had delay, but Judge Bechtle said you can't wait until they invent a new testing device, one that hasn't been invented to this day, in order to start the program you agreed to.

And then we came to the next section where the questein was the legislature has now said not one penny. How are you going to turn the legislature around? And eventually, working with the judge in the phase where the extraordinary multiplier, or what is called an extraordinary multiplier, was described, we helped develop a program by which federal highway funds were held up and the legislature finally found some pressure.

QUESTION: Mr. Crawford --

MR. CRAWFORD: Yes.

QUESTION: I can see why all of this would result in the attorneys putting in a great deal amount of time on the case, but you got paid for all the time.

MR. CRAWFORD: Justice Rehnquist, it didn't result in putting in a lot of time, and one of the very peculiar things here is that the Judge said this doesn't take long. It doesn't take long at all.

And having cut us down to what I think are minimal hours, having watched what it takes to write

briefs in this Court, what it takes to write briefs in the Third Circuit, having seen those hours cut down, the judge says, gee, in that short amount of time you accomplished remarkable results and against great risk.

And there were remarkable results and a great --

QUESTION: But counsel?

MR. CRAWFORD: Yes, Justice Marshall.

QUESTION: If you go back to those cases thirty or forty years ago and you put a multiplier of a thousand times, you wouldn't find much money.

MR. CRAWFORD: That may well be true, Justice Marshall.

QUESTION: So I don't see what it's got to do with this case.

MR. CRAWFORD: Well, I think it has to do with who we are fighting and the kind of fight we had, or my clients had to do.

The kind of enemy we have, maybe, or the kind of opponent we have maybe is best illustrated in the briefs in this Court. The Commonwealth of Pennsylvania four times came to the Supreme Court of the United States, to this Court, they said, this is a case so important and so wrong that you ought to take the case. In one case, it's so bad that you ought to stay the

operation of the Third Circuit's order because that cert is plainly going to be granted, and there's a great likelihood that there will be reversal.

We were told at that point that these issues were so important that this court must deal with them. We had to fight all of those issues. And then when they get to this Court and the Court finally accepts certiorari to deal with the question left open in Blum v. Stenson, they say we could never have won this case. This isn't a case that you had any problems with.

That's the opponent we have fought in this, and that is the opponent against whom this multiplier, which comes to something under a nickel apiece for the 6 million people in Pennsylvania who didn't have clean air for five years because of this resistance to a consent decree, that's what it comes to.

The last point I would like to make in this case -- and I think I will rely entirely on my brief on the question of the importance of the administrative proceedings except to say that common sense says you don't have regulations required under a consent decree, tell counsel don't bother to go over to the hearings on the regulations that are going to be adopted, you wait until the wrong regulations are adopted, then you can litigate them in court, and with a lot more time you can

get paid for your work. I think it is perfectly obvious that common sense says that you go to the -- when you have won a decree that says create regulations, you go to the place where the regulations are being made and make them part of the decree.

But I will go on past that and talk about what seems to me to be the final question here. The one thing that all three of the judges in the court below were clearly in agreement on was that you can't reverse this case out of hand. You can't simply say because Judge Bechtle didn't foresee all of the points that were going to be developed in Blum v. Stenson, that anywhere he didn't touch base just right on the language we hold it against him, and the way he built the fee -- and this is what you're doing you're building a fee, which is what a lawyer does or a judge acting for a lawyer in setting a reasonable attorney's fee here, the way you build a fee is you work --

QUESTION: Don't you think it sounds better to say computing a fee rather than building a fee?

MR. CRAWFORD: I'll take computing a fee, but it makes it sound more mechanical than I believe the setting of a reasonable attorney's fee is, Justice Rehnquist, but to compute a fee, you are certainly working a whole series of factors against each other,

and to suggest that you can take the multipliers out when Judge Bechtle computed his entire fee built on saying this kind of result that deserves a multiplier is based on work in the very limited number of hours I allowed, or my decision on the rates is based on the fact that I have -- I can -- I picked noncontingent rates because I can multiply them for contingency later.

Judge Becker, who dissented in the Court below, said what you've got to do is you've got to send it down to Judge Bechtle and let him look into the question of whether he's built contingency into the rates, whether the rates are reasonable under Blum v. Stenson was in his reading. The majority of the Court said, and I think this is absolutely correct, Judge Bechtle had the foresight to anticipate where this Court was going in Blum, he cited the right factors, his discussion is not three paragraphs; his discussion is a 40 some page opinion, and the paragraphs bring together the issues that were discussed in that 40 some page decision and say here's why I have the multipliers here.

It seems to me that at the very least, if this Court does not affirm or conclude that apart from the contingency matter, this case really doesn't belong

before the Court at all, that at the very least the matter should go back to the Third Circuit and from them to Judge Bechtle to say all right, here are all the rules you operate with, build or compute a fee that will fairly compensate so that you will continue to get able lawyers in the bar doing what they should do because, contrary to what Ms. Oberly says, we've had enough people doing these cases because in thirteen circuits, over many years, there was the possibility among other things of multipliers for excellence or for contingency. That should be continued.

Thank you.

CHIEF JUSTICE BURGER: You're welcome.

Do you have anything further, Mr. Waldman?

ORAL ARGUMENT OF JAY C. WALDMAN, ESQ.

ON BEHALF OF PETITIONERS -- Rebuttal

MR. WALDMAN: Yes, Mr. Chief Justice, just a few points in rebuttal.

First of all, in this case this particular party's lawyer received an average of $210 an hour for all the legal work done in all phases, even the ones where no multiplier was used. I submit this is more than adequate to attract competent counsel in the future to represent comparable parties with comparable claims, and particularly under a scheme where Congress intended

only meritorious cases be brought.

Another point that I would make is that --

QUESTION: Well, this case was certainly meritorious, wasn't it?

MR. WALDMAN: I would say that the Commonwealth of Pennsylvania had very good arguments on the facts, but what made the case very, very difficult was in fact that we bore a heavy burden of proof.

QUESTION: But at least you entered into a consent decree, and for eight years you resisted it.

MR. WALDMAN: Well, we didn't, but the Commonwealth did, and a new administration taking a new view for three years attempted to amend it, not resist it. But in any event, we bore a strong burden of proof in all phases. We had the award here of a multiplier of four, one of the highest multipliers ever used, for an attorney a year out of law school. And were not paying an engineering fee, we were paying a legal fee.

Also, I think very importantly, my opponent confuses the contingent nature of litigation with a contigent fee. All the case that he refers to indicated was that where in fact there is a contingent fee agreement, a contract, the Court should look to that contract as a guideline for what fee it in fact allows, and under no circumstances should it exceed that fee.

But the courts have held where there is no contract for a fixed fee or a contingency, it awards reasonable attorney's fees. And this honorable Court has held that a fee is presumptively reasonable under a fee shifting statute if it multiplies the reasonable number of hours expended times a reasonable hourly rate.

In this case, Your Honors, we had a high hourly rate and a substantial number of hours, and I would submit that certainly the fee is reasonable and should, I would argue, be sufficient to compensate any lawyer in the future who was asked to undertake a comparable kind of case.

I would make one last point. Thirteen circuit courts may have ruled the way my opponent indicates, but in fact, only three circuit courts have even addressed this issue since Blum was decided. And two of them, the Seventh and the District of Columbia, do not agree with my opponent's position. In fact, they raise most of the objection we have raised here today to the use of contingency multipliers. One went the other way, the First Circuit.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:58 o'clock a.m., the case in

the above-entitled matter was submitted.)

# CERTIFICATION

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

#85-5 - PENNSYLVANIA, ET AL., Petitioners V. DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL.

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BY Paul A. Richardson

(REPORTER)