OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: TEXAS STATE TEACHERS ASSOCIATION, ET AL., Petitioners V. GARLAND INDEPENDENT SCHOOL DISTRICT, ET AL.

CASE NO: 87-1759

PLACE: WASHINGTON, D.C.

DATE: March 1, 1989

PAGES: 1 - 39

ALDERSON REPORTING COMPANY
20 F Street, N.W.
Washington, D. C. 20001
(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

TEXAS STATE TEACHERS ASSOCIATION, et al.,

Petitioner

v. No. 87-1759

GARLAND INDEPENDENT SCHOOL DISTRICT, et al.

Washington, D.C.

Wednesday, March 1, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 o'clock a.m.

APPEARANCES:

ROBERT H. CHANIN, ESQ., Washington, D.C.; on behalf of the Petitioners.

EARL LUNA, ESQ., Dallas, Texas; on behalf of the Respondents.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

CONTENTS

P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-1759, Texas State Teachers Association v. Garland Independent School District.

Mr. Chanin?

ORAL ARGUMENT OF ROBERT H. CHANIN

ON BEHALF OF THE PETITIONERS

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

The question presented by this case concerns the standard to be used in determining whether a plaintiff is a prevailing party for purposes of the Civil Rights Attorney's Fee Awards Act, Section 1988. The parties urge two alternative standards.

The Respondents contend that the correct standard is the one used by the Fifth and Eleventh Circuits. It is referred to as the central issue standard under which a plaintiff must prevail on the central issue by acquiring the primary relief sought. On the basis of this standard, the court below held the Petitioners in this case were not prevailing parties and, therefore, ineligible for any fee award.

The standard urged by Petitioners was initially articulated by the First Circuit in Nadeau v.

Helgemoe in 1978. It is currently used by courts of appeal in 11 circuits, and it was characterized by this Court as a typical formulation in Hensley v. Eckerhart in 1983. It is referred to as the significant issue standard which establishes plaintiffs as prevailing parties if they succeed on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit.

Let me note at the outset that the question as to the correct standard for prevailing party status does not in and of itself relate directly to the amount of fees that ultimately should be awarded to a plaintiff. The standard at issue here is only the first stage of a two-stage process. It is a threshold standard to establish an eligibility for fees. If a plaintiff succeeds in crossing that threshold, the actual amount of fees to which he is entitled is determined by the district court after considering various factors, particularly the degree of success.

To put this another way, there is no dispute here about the fact that the results obtained is a crucial factor in the application of Section 1988. The dispute concerns the stage of the process at which this factor should have its primary impact. Should it be at the threshold eligibility stage to deny prevailing party

status to a partially prevailing plaintiff and totally preclude any fee award, which is the Respondents' position? Or should it have its primary impact at the second stage after prevailing party status has been achieved in determining the amount of reasonable fees in light of the results obtained? This is the Petitioners' position.

In order to establish a framework for addressing this question, it is appropriate to begin with a brief review of the facts in this case, particularly since the briefs of the Respondents and their supporting amici present such a distorted picture of the merits outcome.

This case involves a regulation adopted by a public school district in Texas, the Garland Independent School District -- I'll refer to it as GISD -- which prohibited all communications regarding employee organizations on school grounds at any time during the school day, including teachers' lunch break, non-class periods and other free time.

The regulation covered face-to-face discussions and also prohibited any use of the school district's communications facilities, bulletin boards, teachers' mailboxes, PA systems. Those were all precluded to disseminate any information regarding

employee organizations.

This prohibition applied to communications by and among the teachers themselves, as well as the communications by outside representatives of employee organizations.

The Petitioners filed a 1983 action and succeeded in having the regulation struck down as it applied to teacher-to-teacher communications and as it applied to the GISD's communications facilities by the teachers themselves. We were unsuccessful in regard to the prohibition against communications by outside representatives.

We considered this to be a significant victory, and judging by the vigorous efforts of the Respondents to overturn the ruling, so did they. They left no stone unchallenged in seeking to reverse this ruling, including ultimately an appeal to this Court which summarily affirmed the Fifth Circuit on the merits in 1986.

In the course of its efforts to reverse, the Respondents did something else. They also made clear what this ruling meant in practical terms. They repeatedly emphasized before the lower courts and, indeed, before this Court that invalidation of the teacher portion of the regulation would require

substantial modification in the school district's policies and procedures. And that is, in fact, what happened.

QUESTION: Mr. --

MR. CHANIN: As a result of this ruling, teachers now have the right to discuss and promote employee organizations during their free time.

QUESTION: Mr. Chanin, I wanted to ask about this point. As you say, you prevailed on one issue in the district court concerning the use of school premises during non-school hours. Now, the district court termed that issue minor since it said there was no evidence that union representatives were ever denied access to teachers during non-school hours.

Now, if we were to agree with you on the appropriate test, that any significant issue test that you propose, do you think that that degree of success would entitle you to fees under that test?

MR. CHANIN: Well, Your Honor, I think you're referring to a -- a minor point of victory in this case, and the answer to your question is it would fall below the threshold. But let me clarify what I am talking about as our victory and what I think you are referring to.

QUESTION: All right, okay.

MR. CHANIN: In the course of this broad-based regulation that we challenged, there was a provision that said meetings could be held before school opened, 8:00 a.m. in the morning, and after school at 3:45. And it said that it would be up to the school principal to determine whether or not to grant access for those meetings. That was the only thing struck down by the district court as too vague because there were no standards. That was not appealed.

It had no practical impact because the record indicates we never had been denied a pre-school or post-school meeting. If I had to pick a threshold, that falls below it.

QUESTION: Mr. Chanin, is -- is that before us here? I -- I didn't --

MR. CHANIN: No.

QUESTION: -- understand that -- that we took this case in order to decide whether you had substantially prevailed or not. The question you presented in your petition for cert is -- is simply whether a plaintiff who obtains judgment in his favor on a significant claim -- whether he is precluded from recovering attorney's fees if the Court determines that the claim on which he prevailed was not the central issue --

MR. CHANIN: Absolutely.

QUESTION: -- not the factual question of whether this was a central issue or wasn't a central issue --

MR. CHANIN: We come --

QUESTION: -- whether it was significant or wasn't significant. Right?

MR. CHANIN: We -- we come --

QUESTION: That's not before us, is it?

MR. CHANIN: -- before this Court in this posture. We have prevailed, according to the Fifth Circuit, on a secondary issues of significance. The Fifth Circuit has said that ain't good enough. It was not the central issue.

QUESTION: And we're not going to debate whether it was or wasn't. The --

MR. CHANIN: I certainly hope not, Your Honor --

QUESTION: It's just question of law. Right?

MR. CHANIN: -- because we are satisfied with that.

QUESTION: Good.

MR. CHANIN: The reason we present it is because it does tie into our analysis and the Respondents go out of their way to downplay the

significance of what we won. But let me accept that we did win on a significant issue, the court held it was not central, and move on.

QUESTION: May I ask you this about the statute under which you're -- you're seeking fees? The way it reads, it says that -- that a court may allow the prevailing party a reasonable attorney's fee as part of the costs. The prevailing party. On its face, it seems to say either the plaintiff or the defendant. You have to pick who is the prevailing party.

Now, under your theory you can have two prevailing parties. One party wins some significant issue, another party wins another significant issue.

How can we possibly interpret the statutory language that way? Now --

MR. CHANIN: Because if you focused on the word "the" and you said there can only be one prevailing party, I suggest it would be a far too rigid and wooden reading of the statute inconsistent with numerous prior holdings of this Court, inconsistent with the legislative history as well. Let me give you just one example.

Both this Court and the legislative history have made it clear that fee awards are appropriate pendente lite, at an interim stage. And they made those

references in the course of complex institutional civil rights cases which are ongoing, where issues change, where -- where objectives and goals change as the litigation goes on. It is quite impossible at that point to know if a plaintiff who has won on an interim matter, when all the smoke clears, will ultimately be the prevailing plaintiff in the entire lawsuit.

The cases that this Court has decided, including the ones that pick up that language from the legislative history, make it clear that there can be multiple prevailing parties in a case, and it has never focused on the word "the" in the 1988 format or in connection with other statutes that similarly use the word "the".

After this Court's summary affirmance --

QUESTION: So, you agree that the defendant could be the prevailing party and get fees under the standard you propose.

MR. CHANIN: I think once the standard is established, if the plaintiff fails to meet that standard, the defendant could be the prevailing party.

You threw in the question of fees, and I do want to just clarify that. I think the defendant could be the prevailing party certainly for cost purposes. Whether or not the defendant would be the prevailing

party for fee purposes brings in an entirely different standard as this Court has developed under Christiansburg. He would only be the prevailing party if what we had presented as the plaintiffs was frivolous, groundless or without merit.

QUESTION: Well, was Christiansburg in Section 1988?

MR. CHANIN: It was not, but the doctrine of Christiansburg has been applied to 1988.

QUESTION: By this Court?

MR. CHANIN: By this Court in Hensley, yes.

QUESTION: It has.

MR. CHANIN: In a footnote in Hensley, it specifically applied it.

QUESTION: But you -- you would say that --that we would apply Christiansburg issue by issue, that if -- if you brought -- if you brought up one frivolous issue, that fees -- fees could be awarded to the defendant on that frivolous issue even though you might get fees on some other issue.

MR. CHANIN: Yes. I think that is the extension of Hensley. All the Court said in Hensley --

QUESTION: Well, it's a kind of extension you're -- you're arguing for here.

MR. CHANIN: Yes. I think -- I think it is --

QUESTION: I mean, what's sauce for the goose is sauce for the gander. You want to us split up issue by issue.

MR. CHANIN: I think it is -- it is where I am -- I am prepared to go.

What the Court said in Hensley was that when you have one lawsuit with legally distinct claims that can be separated, that are unrelated, you can have a prevailing plaintiff and a prevailing defendant on frivolous, groundless issues. I would concede that even if they are related issues, conceptually you could have a prevailing plaintiff on a significant issue and a defendant if included with those are related frivolous, groundless issues. Yes.

QUESTION: Counsel, suppose you had two lawsuits, two different school districts. One was the lawsuit we have before us. The second hypothetical case is a lawsuit in which the teachers bring suit on just the claim that you brought here where you prevailed. And assume the hours spent on just the prevailing claim are the same. Is the fee same?

MR. CHANIN: Could I -- the answer on that would be it would have to be determined by the district court in its discretion.

But if I may, Your Honor, you've put your

finger on what is the ultimate absurdity of the central issue rule. And if I may just take your example and run with it a little bit.

After extensive litigation here, we succeeded in having the regulation declared unconstitutional in significant respects. And in that sense, we vindicated important congressional policies under the civil rights law. Had that been the only issue in this case, there is no dispute that we would have been a prevailing plaintiff even in the Fifth Circuit entitled to an attorney's fee. Now, what -- the amount of the attorney's would be determined in the second stage of the process at the discretion of the district court.

However, because we chose to include a second related issue, which I might note the district court specifically found was certainly not frivolous or brought in bad faith, and because we failed to prevail on that second issue, we were denied any fees even for the issue on which we succeeded.

QUESTION: Well, under -- but I want to know the answer to my question. Under your theory -- under your theory, assume the discretionary factors are all the same except for the fact that in case number one, your case, there were claims on which you did not prevail. Should the fee be the same?

MR. CHANIN: We --

QUESTION: Another way of saying -- another way of saying it is can the judge discount for the fact that you had some claims on which you did not prevail.

MR. CHANIN: I think under Hensley the judge certainly has the authority to discount for that and, applying the Hensley factors, might well do so.

It is our position that these were closely related issues and that the work put in on the one impacted and led to the success on the other. So, we would certainly argue before the district court that it should exercise its discretion to give us a full amount of our fee award. But the district court certainly has discretion and might well discount it.

QUESTION: Mr. Chanin, may I -- may I suggest that it -- it doesn't strike me as utterly absurd -- the hypothetical you gave us -- that had you brought this one claim alone, you would have gotten all your fees, but when you bring it with another one, you -- you don't get fees.

It may well be that had you brought this claim alone, the school district here would have said, oh, heck, that's no problem for us. We'll settle this one. This isn't worth going to litigation on. But by combining it with another one, you -- you compelled the

school district to go to -- to litigation anyway. So, they said, well, while we're at it, let's litigate the whole thing.

It seems to me quite reasonable to say that in -- in one of the situations, had you prevailed, you get all your fees. In this one, you don't. I don't see why it's absurd.

MR. CHANIN: Well, Your Honor, I think it's absurd because I think it's directly contrary -- what you suggest is directly contrary to the intent of Congress in passing Section 1988. As this Court observed very recently, last week, in Blanchard, in order to advance Congress' purpose under -- enacting Section 1988, civil rights attorneys should be encouraged to explore all possible avenues of relief in their efforts to vindicate the high priority policies of Congress.

And the Court cautioned. It cautioned against artificial incentives that could skew the way civil rights cases are structured and put forth.

We submit that based upon what you have said, the central issue standard would create an economic disincentive which could have precisely that effect. It could cause and deter civil rights attorneys from providing the type of effective representation that this

Court called for in Blanchard. Because of the inherent difficulty in determining what is the central issue and the uncertainty as to what some courts may hold in that regard, the economic self-interest of the attorneys could motivate them to press only those claims which look like sure-fire winners or have a strong likelihood of success and abandon issues that are somewhat more problematic even though they are bona fide, can be supported by a good faith argument for an extension or modification or even a reversal of the law.

If you included those issues in your hypothetical, we run the risk that we will lose all fees even for those issues on which we are successful. I think this possibility is not a positive. I think it distorts artificially the way civil rights attorneys would prepare, present and handle cases, be contrary to this Court's admonition in the Blanchard case and be contrary to the legislative history.

The significant issue standard avoids that problem and would not, as your question may also imply, encourage the inclusion of non-meritorious or insubstantial claims in civil rights lawsuits. I think the framework that this Court has established for applying Section 1988 provides ample safeguards against that possibility.

Thus, for example, if we assert issues and include issues that are unreasonable or groundless, we may be required under Christiansburg to pay the fees to the defendants. I submit to you that is a powerful deterrent.

Moreover, under Hensley, even as prevailing plaintiffs, we may be denied fees for time spent on non-frivolous issues raised in good faith, but we did not succeed. This is a further incentive for plaintiffs attorneys to consider very carefully the kinds of issues they include.

But there is a major difference between the concepts embodied in Christiansburg and the concepts embodied in Hensley which are designed to motivate responsible action by attorneys for civil rights plaintiffs and the central issue standard which threatens to impose a financial penalty for providing precisely the type of effective representation that Congress intended and this Court has called for.

Let me, if I may, pick up on Hensley v. Eckerhart because we believe and most courts of appeals believe that that case resolved this question and put to bed the question of the standard to be applied in determining who was a prevailing party for purposes of 1988.

The issue in Hensley was whether prevailing --a party who had prevailed in part could recover legal fees for the services rendered on unsuccessful claims. In answering that question, Hensley established a comprehensive analytical framework to assure that civil rights plaintiffs obtain fee awards that are reasonable in relation to the results obtained.

The framework involved a two-stage process. A plaintiff who achieves only partial or limited success must first cross what this Court termed the generous eligibility threshold to become a prevailing party. And it is appropriate for that threshold to be generous because it is only the first stage. The determination of what amount is reasonable is made by the district court, taking into account relevant factors including particularly the level of success achieved.

There are several examples in Hensley itself which illustrate the application of that analytical approach. Take Hensley. Hensley was a broad-based challenge to the constitutionality of treatment and conditions at a state mental hospital involving six general areas. The Court indicated hypothetically that even if the plaintiffs prevailed in regard to only one of those areas, visitation, mail and telephone policies, which hardly would seem to constitute the central issue

in the case, that those plaintiffs would have been prevailing parties eligible for a fee award, although the Court did say that the amount would be reduced at the second stage to reflect the work done on unsuccessful claims.

Hensley's discussion of the Eighth Circuit's decision in Brown v. Bathke is equally explicit. There you had a discharged school teacher, sought reinstatement, lost wages, damages, and expungement from her record of the negative material. She achieved only lost wages and expungement, lost on the reinstatement, lost on the damages. But this Court said that that plaintiff was the prevailing party eligible for a fee even though — and I quote from the Court's opinion in Hensley -- "she had lost on the major issue of reinstatement and obtained only a minor part of the relief she sought."

And these examples come as no surprise. They are the natural outgrowth of what Hensley establishes for assuring that civil rights plaintiffs receive reasonable fees in light of the results obtained. And as this case illustrates, the central issue standard simply does not fit within that framework. If we are to obtain reasonable fees for the significant results we obtained, having the GISD regulation declared

unconstitutional as to teachers, we must in the first instance be allowed to cross over that eligibility threshold. That would allow the district court to have an opportunity to do, as the Justice suggests, to calculate under Hensley the amount of fees that are reasonable in light of what we achieved.

The use of the central issue test has foreclosed that. It has foreclosed the discretion of the district court, and it has denied us the opportunity to recover any fees even though we have vindicated the policies of Congress by achieving substantial secondary success.

The Respondents, we would submit to you, entirely missed the point of Hensley. Instead of looking at the reasoning and the analysis, which clearly preclude the central issue test, they focus instead on the opening paragraph where the Court refers to significant issue standard as "typical and generous." But admittedly, it does not say in so many words this is the only standard that can be used. Limiting themselves to that one isolated paragraph, Respondents suggest that even if the Court accepts the significant issue standard, that does not preclude the use of others. The Fifth Circuit would be free, while some use significant issue, to continue to use central issue.

But this argument is wrong even on its own terms. The definition of prevailing party is a matter of statutory interpretation. There can be only one standard. The question is what did Congress intend. And it is not to be left to the discretion of each court of appeals to answer that question. If the significant issue standard accurately reflects the intent of Congress, which we submit is the teaching of Hensley, it cannot be that the Fifth or the Tenth or the Ninth or any other circuit is free to adopt a markedly narrower, less generous standard.

Let me pick up one other point, another teaching of Hensley and of other cases, and that is that fee applications should not result in a second major litigation. Ideally, once the merits are determined, the parties should settle without further burden on judicial resources. I submit to you that the central issue test cuts against both points. It encourages further litigation and it deters settlements.

The basic reason for this is the inherent difficulty involved in many cases in determining what is the central issue. By its very nature that is a complex inquiry that requires the court to determine post hoc the goals and the motives of plaintiffs in initially bringing a lawsuit, to arrange in some type of

hierarchical order the relative importance of the issues which the plaintiff has brought.

This case proves the point. This is a relatively straightforward and simple case, but the fee application spawned further litigation. Petitioners contended in district court that we did prevail on the central issue. We said the central issue was can this school district preclude all communication. We lost. We briefed it. We argued it. When the district court ruled against us, we appealed to the Fifth Circuit. We briefed it. We argued it. So, it spawned further litigation.

Consider how much more difficult the problem would be of identifying the central issue in complex institutional civil rights cases. Take Hensley, for example, which involves six related issues involving treatment and conditions at a state mental hospital. What was the central issue? And how much judicial time and resources would have been necessary to make that determination?

Suppose four of the issues in Hensley were of equal centrality. What's the formula? Do we have to win on two plus to meet the central issue test?

There is no need to belabor the point.

QUESTION: Well, you're -- you're inviting the

same kind of -- I mean, you can't have it both ways. If -- if you don't like that issue-by-issue inquiry to be conducted, then you have to tell us. Moreover, the fees that you get on the issue you win on should not be reduced by the issues you lost on. You said earlier, well, you can take those other issues into account by --by chopping your fees down some. I mean --

MR. CHANIN: But that, Your Honor, gets us --

QUESTION: So, that same problem arises under your theory as well.

MR. CHANIN: Not really. It gets us to the second point.

First of all, that is a much more objective analysis where you look at records. You look at outcome. You look at issues in the objective sense rather than the motives and the -- the thoughts of the plaintiff.

But let me tell you why it isn't the same because the second objective that this Court hoped for was that these cases would settle. And the central issue case deters settlement. There is virtually no incentive for me as a defendant to settle under the central issue test. I try it. I go for broke. If I win, I'm off the hook completely. And if I lose on the central issue test, the work hasn't been in vain. I'll

throw it in at the second stage, or I'll use it as the basis for a favorable settlement.

I tell you about this case. If we were not --if we were, in fact, declared to be the prevailing party, we would not burden the district court with stage two. I have every confidence that this case would have settled, which is exactly what this Court has hoped would be the case with fee applications.

I would like to reserve any remaining time.

QUESTION: Thank you, Mr. Chanin.

Mr. Luna?

ORAL ARGUMENT OF EARL LUNA

ON BEHALF OF THE RESPONDENTS

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

I think it would be helpful for us to look at some of the facts that counsel didn't cover here and that is that the Texas legislature had passed a statute that -- 21.904 of the Texas Education Code -- that said no school district, board of education, superintendent, assistant superintendent, principal or other administrator benefiting by funds provided for in this code shall directly or indirectly require or coerce any teacher to join any group, club, committee, organization or -- or association.

As a result of that, the school board passed this regulation which simply said that you won't promote these organizations during school hours. And the reason for that is that there are administrators -- there are administrators who belong to the organization, just like there are other people. So, if we had a policy that said administrators can call meetings and talk to people about joining the association and -- and recruiting members, we'd be in violation of state law.

Now, they didn't attack the state law. The state law is not attacked in this lawsuit at all.

So, as the law was passed and the regulations begin to be established, this case -- he says it was one that could be settled. This was brought as a test case. They brought in -- and the record here shows nine of their -- what they call uniserve people from all over the state and descended upon 46 schools in this school district and covered most of them in a period of two days in groups of one and two. And they made demands during the school day to talk to the teachers, said they had a First Amendment right of assembly and speech.

And we took many depositions. He talks about the amount of work. All of these people were outside association members except one of these nine people that made this trip. One of them was one of our teachers,

but we took depositions of all of the eight others and of many, many principals in preparing for this case.

Now, none of those -- if he had brought -- if he had brought a lawsuit just for the part that he's talking about, those -- eight of those nine wouldn't have been there because that wouldn't have been important to this case to begin with. But by bringing it this way, it's an attempt to build a great fee perhaps like the one in the Riverside case. And we believe that that's not the intent of the legislation in this case.

Now, as they -- as they went to the -- as the depositions showed they were asked is there anything else that you claim. Now, they set out some specific things in their complaint that they complained about, but they didn't set out -- and it didn't show up until summary judgment -- this portion about the discussion of teacher to teacher. Now, and even in their motion for summary judgment, they said it wasn't clear what the school's position was on that.

Now, the only information they have -- and we think, by the way, there is a question as to whether there could be a prevailing party in this case under any circumstances because this is little more than what this Court has referred to as an advisory opinion because we

were talking about things in the future. None of these things had happened, and they arose in a deposition. What if somebody said so and so?

So, there had been no dispute. There was no case in controversy between the parties on this issue. And these what-if questions were asked of some down-the-totem-pole administrators who were not policy makers of the school district.

And, of course, this Court has recently held that it's -- it has got to be something -- it has got to be a policy maker that makes the decision. Therefore, there couldn't have been any liability on the school district for the mistaken belief, if it was mistaken belief, of some of these administrators.

And under McCluskey, of course, the -- the school board itself is the one who would interpret its regulation. They really didn't take the school board's deposition, but they did take the superintendent's. And they asked him. In his deposition, he said that we don't have any regulation that keeps teachers from talking to each other about TSTA at lunch. We don't have any regulation that keeps them from talking about it on their break.

Now, as I say, they did ask in deposition some of the other principals, well, what if this happened.

Well, I don't know, but I guess it would be a violation. And that speculation is the only thing that is in this record that they claim to have gotten relief on.

QUESTION: Mr. Luna, do you defend the central issue test used by the court of appeals here?

MR. LUNA: Yes.

QUESTION: Do you think that that's consistent with the language that this Court included in the Hensley case?

MR. LUNA: Yes, I do. The reason --

QUESTION: Do you think it's consistent with the holdings of the majority of other courts of appeal?

MR. LUNA: No. I think there probably are a majority of the other courts of appeals that have said otherwise.

But let me just move, if I might, then to that central issue case. And the reason we think that the --first of all, in Ruckelshaus, we think this Court didn't adopt the First Circuit's rule. The Court simply referred to that First Circuit rule as a very generous rule. And the Court also referred to a number of other rules that were in use in the circuit including the Fifth Circuit rule of the central issue.

And I think it might be well to look at where that Fifth Circuit rule came from. It came right out of

the congressional history of this very statute. In the congressional history in this statute when Dorothy Parker -- Parker v. Matthews -- brought a suit in district court in the District of Columbia, the case was settled.

And then in the district court's opinion, it discussed, first, what's a prevailing party and -- and what's the criteria for it. And the district court in that case said -- they brought up the central issue, said the central issue is the way you tell a prevailing party, and had a good deal of discussion on it, but noted there are no cases. And they came up with -- from -- and took it from a Black Law Dictionary.

Now, the committee in the congressional history mentioned that case when they talked about the prevailing party and the central issue and how you set attorney fee. Now, the Petitioners here say, oh, but they only mentioned -- they only cited that case because it was settled to show that there could be a recovery for settlement. That's not the reason they mentioned that case. That case went up on appeal and was affirmed in Parker v. Califano.

Now, if the Court had just been wanting to note that it mentioned the settlement, they could have cited the court of appeals case. They cited three cases

in --in the congressional history on -- at that point including another circuit court case which also talked about settlement, but did not discuss central issue.

The only one of them that cited -- that discussed the central issue was the district court case in Parker v. Matthews, which was later Parker v. Califano. And the -- we think that the reason they didn't cite the court of appeals is, as I say, on appeal they didn't discuss the central issue. But the -- the committee was well aware of the central issue and talked in terms of it's something to protect people who have a valid civil rights case, and -- and it is not something to build attorney fees for attorneys.

QUESTION: Mr. Luna, I guess you would apply the same test then to the defendant, and if there were several frivolous claims made on which the defendant prevailed, no recovery of attorney's fees unless there was a central issue on which they prevailed as a frivolous claim.

MR. LUNA: Yes. I think it would not be material if -- if a plaintiff had a central issue, a main civil rights suit, but had something -- added something to it --

QUESTION: Added some frivolous claims.

MR. LUNA: Yes.

QUESTION: No recovery to the defendant for those.

MR. LUNA: I don't -- I don't think that the defendant is going to recover in that kind of case. If so, the plaintiff is going to recover, and it would be at most some offset under -- under this Court's decisions where we said that you've got to -- you can only recover for the work that you've done. It might be an offset, but certainly no recovery for the defendant if the plaintiff recovered on the central issue. I see no reason for the plaintiff to recover.

Now, if we take a look then at why would the Court in a case like this now say that Hensley v. Eckerhart did not foreclose the issue and decide it --that's what Petitioners claim.

Yet, this Court two or three months later, that -- after deciding Hensley v. Eckerhart on May 16, 1983, decided Ruckelshaus v. Sierra Club. And in that case where the statute was different and said that the Court could set attorney fees where appropriate, they -- the Court said that that is different. This Court said that is different from the standard that is used in the prevailing issue case. But even then the Court says there has to be some recovery. There has to be some prevailing in order -- in order for them to recover it,

but not as much as in a statute with the prevailing party.

So, if this was a suit that was brought under the EPA statute, the plaintiffs might be in a different position that they're in here because this Court noticed that there was a difference in those. And those -- and if the prevailing issue was decided, there wouldn't have been any need for the distinction that was made in the Ruckelshaus case.

Now, we think also that there is -- another very, very important thing has developed in this case or failed to developed. After the Fifth Circuit made its decision on the merits of this case the first time, the Fifth Circuit said that if that statute -- if that regulation was decided as -- as somebody might say that in the future. If it was decided that way, it was unconstitutional.

Now, they reversed then in part and remanded for -- for further proceedings and not inconsistent with the Court's opinion. They did -- on the holding then that if it was done that way, it would be unconstitutional. Now, it was reversed for further proceedings. And that's the time when it was appealed.

It was rather suspected that the Petitioners in this case would, when it got back to the district

court, ask as they had in their -- in their petition originally maybe for nominal damages or for an injunction to keep it from being enforced that way.

Now, the plaintiffs, though, apparently recognized that there was really no merit and that they had really gotten nothing from the court of appeals. So, when we got back to the district court, they don't ask for anything. They didn't ask for any further relief except attorney fees.

QUESTION: Had the regulation been declared facially overbroad and invalid or invalid as applied, or was the opinion not clear on the point?

MR. LUNA: Well, the -- the district court opinion held that it was -- that it was overbroad only in that one little area that they admit doesn't amount to anything.

Now, the -- the Fifth Circuit held that it was unconstitutional in a very limited way, that if it kept -- where it kept the teachers from talking to each other about organizations, time off and so forth, that under those circumstances, the Fifth Circuit said it was unconstitutional.

Now, the Fifth Circuit disagreed --

QUESTION: On its face.

MR. LUNA: Well, not on its -- I don't believe

on its face. They said that there was no testimony to show. They said there was no testimony to show that the administrators would not enforce it that way. So, I don't believe they said it was unconstitutional on its face, only as applied -- if applied in that hypothetical manner. There was -- there was no holding that it was unconstitutional on its face.

Now, so based on the -- see, the -- the Fifth Circuit applied the summary judgment rule most favorable to them, and -- and then still affirmed the summary judgment except in that narrow area, and then turned around, using the same standard, and granted a partial summary judgment for them on that as applied theory.

But when we got back, after it was appealed to this Court, they didn't ask for any more relief, only for attorney fees. And the court again found that they didn't recover anything, and that they were not entitled to attorney fees and the -- the court costs were attacked -- were taxed against the Petitioners. And on appeal, they didn't at that time challenge that portion of the court's decision.

So, we think then that that brings it very close to the facts of Hewitt v. Helms where the plaintiff didn't recover anything. Now, the difference in -- in this one and Helms, of course, was that in the

Helms case, the Court had instructed them to enter a summary judgment on damages unless there was some immunity.

Now, they didn't get that summary judgment entered when it went back. And this Court pointed out in that case that at the end of the rainbow lies not a judgment, but some action for -- or cessation of action by the defendant that the judgment produces the payment of damages or some specific performance or the termination of some conduct.

Now, we had even applied to stay that first order while we appealed up here to this Court so it wouldn't go back to the district court and -- what we feared -- ask for some affirmative relief. And then after this Court denied the appeal and it got back to the district court, they still didn't ask for any affirmative relief.

So, we believe that this case comes right in the decision of the Hewitt case because there is no dispute. There wasn't any dispute between the parties on this. This was something that had not happened, but the Fifth Circuit says, if it does, there's no evidence that you wouldn't enforce it this way. So, there really had never been a dispute on that.

Therefore, it -- they -- there was no dispute

which affects the behavior of the defendant toward the plaintiff. Now, there would have been while this case was being appealed had they applied to the district court for injunctive relief and gotten it. We would have had to change the policy. But they didn't do that, and they didn't do it after the appeal is over.

So, as the posture of the case is before this Court, they received no judgment that affected any action that any of the parties to this case have to take -- or that is, that the defendant has to take. No action at all. No order was entered by the trial court.

And it's not a place to complain about here, but the interesting thing about it was the -- the circuit court disagreed with the findings of fact of the trial court and made some findings notwithstanding --

QUESTION: But that really doesn't have anything to do with the question before us, does it?

MR. LUNA: Yes, all right. It does not, Your Honor.

In the case now where he's -- they're continuing to ask for attorney fees, and the main thing they're asking -- they're complaining about is -- or one of the things they're complaining about, of course, is the mail. Under this regulation, they could -- could put a stamp on it and send anything they wanted to to

the teachers through the intra-school mail. Now, they don't want to do that. They wanted to take it all to the superintendent's office and have it delivered through the intra-school mail to the teachers.

Now, of course, since then, this Court has heard the -- and decided the case of Regents versus --California v. the Public Employment Relations Board, and that now is not even something that they would be permitted to do -- use that intra-school mail. So, part of their case of what they claimed to win is out the window because of the University of California case.

So, we think that the Petitioners have not shown that they have made any recovery in this case that changed any conduct of -- or required the change of any conduct of the defendant that the defendant was carrying on. Now, they will say, yes, you can't stop the teachers from talking to each other at lunch about this. Now, the testimony showed we never tried to stop them. That had never been done. And you can't stop them from talking and -- during the classroom -- or during their off-period when they're not working. And the testimony showed that had never been done. The most it showed was there was no affirmative testimony saying we wouldn't do it if, in fact, it had happened.

Thank you very much. Appreciate it.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Luna.

The case is submitted.

(Whereupon, at 10:53 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:

No. 87-1759 - TEXAS STATE TEACHERS ASSOCIATION, ET AL., Petitioners

V. GARLAND INDEPENDENT SCHOOL DISTRICT, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)