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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MISSOURI, ET AL., Petitioners V. KALIMA JENKINS,
BY HER FRIEND, KAMAU AGYEI, ET AL.

CASE NO: 88-64

PLACE: WASHINGTON, D.C.

DATE: February 21, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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MISSOURI, ET AL., :
 Petitioners :
 V. : No. 88-64
KALIMA JENKINS, BY HER FRIEND, :
 KAMAU AGYEI, ET AL. :
----- x

Washington, D.C.
Tuesday, February 21, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 o'clock a.m.

APPEARANCES:
BRUCE FARMER, Assistant Deputy Attorney General of Missouri, Jefferson City, Mo.; on behalf of the Petitioners.
JAY TOPKIS, ESQ., New York, N.Y.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:13 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 88-64, Missouri v. Kalima Jenkins.

Mr. Farmer, you may proceed whenever you're ready.

ORAL ARGUMENT OF BRUCE FARMER
ON BEHALF OF THE PETITIONERS

MR. FARMER: Mr. Chief Justice, and may I please the Court:

This case is here in certiorari to the United States Court of Appeals for the 8th Circuit. Petitioners are the State of Missouri and its officials found liable in their official capacity. We present two issues involving the attorney's field ward arising out of the Kansas City, Mo., desegregation case.

The first is an 11th Amendment immunity issue, this time as it pertains to a Section 1988 fee award that includes prejudgment interest or compensation for delay in payment. The second issue concerns an issue that was also involved in the Blanchard v. Bergeron case, and that concerns the proper method of compensation for paralegal services.

I would like to briefly address the 11th Amendment issue first, and while the underlying facts in

1 this case have been complex, only a few facts are
2 relevant now. The Kansas City desegregation case began
3 in 1977. The fee award, however, went to two groups of
4 attorneys who entered the case later.

5 Kansas City attorney Arthur Benson and his
6 staff entered the case in 1979 and was awarded \$1.7
7 million in fees and expenses for the period through June
8 of 1986. The NAACP Legal Defense Fund entered the case
9 in 1982 and were awarded \$2.4 million.

10 The plaintiffs became prevailing parties in
11 September of 1984. The fee applications were filed in
12 February of 1986. The fee awards were based on current
13 rather than historical hourly rates. This was expressly
14 done to compensate for delay in payment. Out of
15 approximately 18,000 attorney hours compensated, about
16 85% were incurred in the years 1983 and 1984. The
17 record shows that the current hourly rates used were
18 approximately \$15 to \$20 higher than the historical
19 rates for this period.

20 Now, the 11th Amendment and the current status
21 of the 11th Amendment is involved in at least two other
22 cases before this Court this term. Pennsylvania v.
23 Union Gas argued last October and Gilhool v. Muth
24 scheduled to be argued next week. The issue was also
25 touched on briefly in Wheel v. Michigan State Department

1 of State Police argued in December.

2 The 11th Amendment has been explored in great
3 detail in previous recent opinions of this Court. I'm
4 not sure that I can add much to the detailed historical
5 argument. In this case, it is the State's position that
6 compensation for delay in payment or prejudgment
7 interest is barred by the 11th Amendment, and we submit
8 that the principles set forth in this Court's Library of
9 Congress v. Shaw decision can be extended to an 11th
10 Amendment context.

11 Now, Library of Congress dealt with the
12 fee-shifting provision of Title VII and the federal
13 government's sovereign immunity in the long-standing
14 no-interest rule. Sovereign immunity was expressly
15 waived concerning attorneys' fees and costs, but this
16 Court found that it was not waived concerning the
17 sovereign's immunity from interest.

18 We believe it can be extended to the 11th
19 Amendment context because of the numerous similarities
20 between the fee-shifting provision of Title VII and
21 Section 1988. First, Section 1988, when enacted by
22 Congress, Congress specifically relied on the language
23 of Title VII, the fee-shifting provision of Title VII.
24 The identical relevant phrase is found in both
25 fee-shifting provisions, that is, "a reasonable

1 attorney's fee as part of costs."

2 In analyzing these words, this Court has
3 already determined that they do not include prejudgment
4 interest or compensation for delay. More importantly,
5 the standard for finding a Congressional abrogation of
6 the 11th Amendment immunity is just as strict, if not
7 more so, as the standard for finding a Congressional
8 waiver of the United States sovereign immunity.

9 QUESTION: But one of your problems, it seems
10 to me, is to show that this no-interest rule attaches to
11 state sovereign immunity under the 11th Amendment. You
12 don't get to whether there's a clear statement or
13 something like that until you find that that's an
14 incident of the state sovereign immunity, it seems to me.

15 MR. FARMER: That's correct. And we believe
16 it can be extended to the 11th Amendment because of the
17 character of the element we're talking about here.

18 Prejudgment interest, or compensation for
19 delay, or whatever term is used to describe the time
20 value of money, is traditionally an element of damages,
21 not cost. And the 11th Amendment immunity is protective
22 of the state's liability from elements of damages. And
23 that's, the character of prejudgment interest is one of
24 damages.

25 We do not believe it's relevant that the

1 Missouri has a general state statute that has been
2 interpreted by state courts to allow prejudgment
3 interest against the state. This is --

4 QUESTION: Of course, Mr. Farmer, this is not
5 really strictly prejudgment interest, is it? Couldn't
6 one argue that what's at stake here is that there's no
7 sovereign immunity that's been decided for the liability
8 for fees themselves, and the question is just how one
9 measures the fee that's due, given the delay in
10 payment? There's no separately calculated item of
11 prejudgment. It's just somehow, it's mixed up in the
12 judge's calculation.

13 MR. FARMER: Well, it is mixed up in the
14 judge's calculation, but it was separately calculated in
15 terms of a, he specifically found that current hourly
16 rates used were \$15 or \$20 higher than the historical
17 rates, and that was done to compensate for delay. And
18 compensation for delay is the same as prejudgment
19 interest.

20 QUESTION: Except you don't have an interest
21 rate factor. He doesn't say the interest rate is 6% or
22 something like that. He just sort of uses a rough
23 method, what he thinks is a reasonable way to come up
24 with a fair fee.

25 MR. FARMER: That's correct. It is a rough

1 method, but it's a method nonetheless to compensate for
2 the time value of money, and it's to compensate for a
3 period before the judgment, so therefore it takes the
4 character of retroactive liability, in that sense.

5 Because this --

6 QUESTION: Well, it's retroactive just since,
7 until the suit was filed.

8 MR. FARMER: Well, it's retroactive in the
9 sense, to the time the attorneys' fees were incurred,
10 and attorneys' fees could be incurred before the suit
11 was filed.

12 QUESTION: I see. Your position is that the
13 attorney is fully compensated in economic terms when
14 just the bare fee, without any addition for delay in
15 payment, is the award?

16 MR. FARMER: Obviously, the fee is going to be
17 a little bit less. The question under Section 1988 is a
18 reasonable attorney's fee and does a reasonable
19 attorney's fee include prejudgment interest or
20 compensation for delay.

21 QUESTION: Well, another way of saying it is a
22 reasonable attorney's fee, in your view, is less than
23 full compensation for the attorney's time reasonably
24 expended.

25 MR. FARMER: But under fee-shifting statutes,

1 attorneys are typically, the standard is not fully
2 compensated. It's a reasonable attorney's fee.
3 Attorneys and fee-shifting litigation --

4 QUESTION: So your position is that a
5 reasonable fee is less than full and fair compensation.

6 MR. FARMER: No, your honor. That's -- our
7 position is that a reasonable attorney's fee, under the
8 statute, would not include prejudgment interest or
9 compensation for delay. The policy reasons for
10 including prejudgment interest or compensation for delay
11 are reasonable. I concede that.

12 They may be persuasive if addressed to
13 Congress. Those policy reasons apply equally as strong
14 in the Title VII fee-shifting statute, which this Court
15 found that reasonable attorneys' fees, that also does
16 not include prejudgment interest or compensation for
17 delay.

18 QUESTION: Mr. Farmer, if you prevail in this
19 case, do you think it would be permissible for a judge
20 to follow a practice that sometimes Masters would
21 follow, to say require the parties to make a deposit to
22 cover future liability for cost, and then stick the
23 money into an interest-bearing account to earn interest,
24 and then if the State prevailed they get the money back
25 plus interest, whereas if the plaintiff prevailed they

1 could get their interest in that manner? Would that
2 violate the 11th Amendment?

3 MR. FARMER: I think there would be serious
4 questions involved in whether you could require the
5 State, prior to any judgment, to deposit a certain
6 amount in escrow to satisfy any future liability for
7 attorneys' fees. I don't think that would be proper. I
8 don't think the 11th Amendment would allow for that.

9 You're already requiring the State to commit
10 funds it otherwise would have available for other
11 reasons and to lock them away so they can't be --

12 QUESTION: What if the State at the outset
13 admitted liability and said, "The only thing we want to
14 fight about is the nature of the decree," which is, I
15 guess, what happened here in 1984. It was pretty clear
16 that there was going to be liability, but there was
17 further litigation.

18 What if, at that point, in '84, they had said,
19 "We now know the plaintiff is going to be a prevailing
20 party and so there's going to be some liability for
21 fees, so we'll ask the State to put up \$500,000 in an
22 interest-bearing account." What would be wrong with
23 that?

24 MR. FARMER: Certainly the statute, I think,
25 Section 1988 allows for interim fees. That has been

1 done in this case.

2 QUESTION: No, no, I say put in on new ground
3 knowing that there was going to be a lot of litigation
4 over the form of the decree and things of that kind, and
5 which end that the plaintiff is ultimately going to
6 prevail, because it's been determined that it's the
7 prevailing party.

8 What would be wrong with saying that, "We
9 know you're going to have to pay these fees, so we don't
10 want the lawyer to work, just wait for the money when
11 he, all this time, so we'll require you to make a
12 deposit." Why would that violate the 11th Amendment?
13 And why is that really in substance any different from
14 what's done here?

15 MR. FARMER: Well, in substance, it's
16 different than what's done here because here there was
17 no judgment on the attorneys' fees until long after the
18 liability order had been issued and the judgment took
19 into account the delay in payment.

20 If, immediately after the liability order,
21 interim fees had been requested, certainly things may
22 have proceeded differently in the District Court.

23 Requiring a deposit, I think, is no different
24 than allowing for an award of interim fees, depending on
25 the specific factual circumstances of the case. So,

1 since an interim fee award would not be barred by the
2 11th Amendment, requiring a deposit probably would not
3 be, either. But, I think the better practice would be
4 to provide for an interim fee award, pending resolution
5 of the fees or the remedy, the scope of the remedy.

6 In this case, this action arose under federal
7 law, and we contend that the payability of prejudgment
8 interest is governed by federal law. Just last term, in
9 *West Virginia v. United States*, this Court unanimously
10 held that the question of prejudgment interest is not
11 controlled by state statute or local common law. A
12 single nationwide rule is preferable to one turning on
13 state law.

14 Now, that case dealt with a claim by the
15 federal government against a state and whether
16 prejudgment interest could be awarded as part of damages
17 on a contractual obligation. There, the states had no
18 sovereign immunity as against the federal government,
19 but the state is protected by sovereign immunity, the
20 11th Amendment immunity, as against private parties.

21 We submit that this is simply a
22 straightforward application of the principles in *Shaw*,
23 and that the 11th Amendment prohibits prejudgment
24 interest as a delay, or, a delay-in-payment factor.

25 I'd like to turn now to the paralegal issue.

1 The paralegal hours, in this case, were compensated at a
2 market-based rate, and, again, current hourly rates were
3 used for delay in payment.

4 QUESTION: Mr. Farmer, may I ask whether you
5 concede that recovery for paralegal services is included
6 in attorneys' fees recovery?

7 MR. FARMER: It's not necessary for me to
8 concede that in this case. I recognize that --

9 QUESTION: Well, you didn't challenge that.

10 MR. FARMER: We did not challenge that in this
11 case.

12 QUESTION: You just want to quibble over
13 actual costs or market. So, I take it that you must
14 accept the fact that recovery may be obtained.

15 MR. FARMER: Well, to be honest, your honor,
16 in looking at this issue in front of the District Court,
17 we litigated the issue that we felt we could win on. We
18 did not think we could win on saying that paralegal fees
19 were not separately compensable at all. I think a
20 reasonable argument could be made to that effect. We
21 are not making that here because, I think, the record
22 shows --

23 QUESTION: Well, what is your position?
24 Suppose the local market indicates that, generally,
25 paralegal services are billed separately for legal

1 services rendered in cases.

2 MR. FARMER: And I think that's what has been
3 shown here. The record shows that the local market
4 typically bills separately for paralegal services. So
5 it's not included in the hourly rate awarded to the
6 attorney.

7 QUESTION: So you do concede, in effect, that
8 they are recoverable under those circumstances as a
9 separate item on the bill for attorneys' fees.

10 MR. FARMER: Under those circumstances, they
11 could --

12 QUESTION: Why do you concede that?

13 MR. FARMER: Well, in this case, the
14 attorney's fee, the market rate --

15 QUESTION: You're conceding the fact that when
16 it says, when the statute provides for the award of a
17 reasonable attorney's fee, it includes not only a fee
18 for attorneys but for paralegals, too?

19 MR. FARMER: No.

20 QUESTION: Well, then what are you conceding?

21 MR. FARMER: I think I'm -- the statute
22 includes attorneys' fees, includes compensable items in
23 two separate categories: attorneys' fees and costs. If
24 an item, if it is not an attorney doing work, then it's
25 in the second category. If it's not included in the

1 attorney's hourly rate, then it's in the second
2 category, the category of costs or expenses.

3 QUESTION: And you're conceding that costs and
4 expenses, as used in Section 1988, includes charges for
5 paralegal time?

6 MR. FARMER: We didn't raise that issue in
7 this case --

8 QUESTION: Well, but are you conceding it?

9 MR. FARMER: Well, I will not concede it as a
10 matter of law. I think a reasonable argument could be
11 made that it does not --

12 QUESTION: Well, why don't you make it?

13 MR. FARMER: Because, in this case, we felt
14 the equitable resolution, and under the particular --

15 QUESTION: Well, why don't you make it in this
16 Court?

17 MR. FARMER: Well, in this Court, I will make
18 the argument. The cost and expenses back in 1976, when
19 Section 1988 was enacted, compensation, separate
20 compensation or separate billing for paralegals was not
21 a widespread practice. Therefore, an argument could be
22 made, I think, that Congress did not consider --

23 QUESTION: But, Mr. Farmer, could that
24 argument be made in this case when it wasn't made in the
25 lower court and you're seeking a reversal of the

1 judgment?

2 MR. FARMER: That's why we are not making it
3 in this Court, your honor. We took the position in the
4 lower courts what we felt was fair and equitable under
5 the specific circumstances of this case. And that is
6 that the reimbursement for paralegal services should be
7 under the actual cost method, not at a market-based rate.

8 QUESTION: What's the practice, generally,
9 around the country, do you think? Are paralegal fees
10 billed as attorneys' fees?

11 MR. FARMER: Well, I think the practice
12 varies. I think the prevalent practice is to bill
13 separately. Mr. Topkis may be able to answer to answer
14 that better than I can, because I've spent my entire
15 career in government service.

16 Some attorneys do not, for example, the
17 plaintiff's expert in the attorney fee litigation in
18 this case testified that he did not bill separately for
19 paralegal time. So I think the practice varies.

20 The State of Missouri, we've looked at this
21 issue very carefully and do not believe that using the
22 actual cost method will increase fees or increase fee
23 litigation. To begin with, law firms normally are not
24 guaranteed an award of fees in any fee-shifting
25 litigation. Therefore, they cannot afford to assign

1 attorneys to do paralegal work just on the mere
2 possibility that they will prevail and receive fees.

3 Likewise, the most senior attorney in the firm
4 is not going to be doing simple, basic legal research
5 that a first-year associate can do, on the chance that
6 the higher rate can be recovered some time down the road
7 if they prevail. The law firm is going to continue to
8 staff a particular case in the most cost-effective
9 manner, the most efficient manner.

10 We do not think that this will result in
11 additional fee litigation because scrutiny of attorney
12 hours and paralegal hours already exists. Courts
13 routinely reduce the hourly rate or eliminate the hours
14 entirely if, for example, senior attorneys are doing
15 work that should have been done by junior attorneys. If
16 junior attorneys are doing paralegal work, courts
17 routinely reduce the hours or reduce --

18 QUESTION: Mr. Farmer, can I ask a factual
19 question? The District Court referred to the paralegals
20 at \$40 an hour and to law clerks at \$35 an hour. What
21 exactly is a law clerk that he's talking about, do you
22 know? Is this a person not admitted to the bar and
23 doing summer work, or is this a junior lawyer or what,
24 do you know?

25 MR. FARMER: Well, the record isn't clear on

1 that, your honor. A law clerk may be, in this case,
2 someone who is not trained as a paralegal. The District
3 Court also included fees for recent law graduates who
4 are not yet admitted to the bar who also worked on the
5 case.

6 The whole range of paraprofessionals that were
7 not attorneys, basically, I've lumped into one category
8 of paralegals because that's what they are. They're not
9 attorneys, they can't receive attorneys' fees, so
10 therefore the fee comes under the paralegal. Courts
11 also routinely reduce hours or eliminate the hours if
12 paralegals are doing clerical work that should be
13 considered normal office overhead.

14 We also take the position that fee litigation
15 may actually be reduced, because the dollars at stake
16 are less. And that thereby reduces the incentive to
17 litigate the fees, particularly when everything you do
18 in fee litigation just generates more fees for the
19 prevailing party.

20 Now, we concede that Congress was concerned
21 about providing for reasonable attorneys' fees, but
22 there was also a concern in Congress that Section 1988
23 not result in a windfall to attorneys or become a relief
24 fund for lawyers. Compensating paralegals at a
25 market-based rate does result in a windfall,

1 particularly in this case, where the paralegals were
2 hired specifically to work on this case.

3 QUESTION: would this be any more so than
4 compensating attorneys at a market-based rate?

5 MR. FARMER: We believe that the attorneys are
6 treated differently under the statute. It specifically
7 refers to attorneys' fees and, therefore, the attorneys'
8 fees get the market-based rate because that also
9 includes overhead and a profit figure. The other
10 category in the statute, cost or expenses, is treated
11 differently. I'd like to --

12 QUESTION: So it depends on whether we treat
13 the paralegal fees as attorneys' fees or separately as
14 costs, under your argument.

15 MR. FARMER: Separately as cost or expenses,
16 that's correct.

17 QUESTION: Well, let me simply say it can't be
18 an attorney's fee, under the statute, if it's work done
19 by non-attorneys.

20 MR. FARMER: That's correct, your honor. It
21 therefore falls into the second category. I'd like to
22 explore this --

23 QUESTION: But doesn't work by attorneys
24 normally include an amount of overhead for secretarial
25 services and all kinds of things that aren't "work by

1 attorneys," that's incorporated in attorneys' fees?
2 What is this? Is it part of costs or part of attorneys'
3 fees?

4 MR. FARMER: Well, we believe it's part of
5 costs and expenses, an expense to the lawyer that he has
6 to pay for, in, concerning the particular case. If I
7 can give you an example, let's just take it one tiny
8 step further.

9 A legal secretary, like a paralegal, has
10 specialized training, in some cases a college program.
11 Is that also the type of expense that can be separated
12 out and billed separately? And we're talking about
13 billing separately here, not at an actual cost method,
14 but at a rate four or five times the actual cost to the
15 attorney. Now, again, this does not appear to be a
16 widespread practice now; maybe Mr. Topkis can address
17 that. But the day may come when that happens.

18 We don't believe that that kind of concept was
19 considered by Congress in allowing a reasonable
20 attorneys' fees and cost and expenses under Section
21 1988. We recognize that it is one thing for a law firm
22 to bill separately for those items on the basis of a
23 contractual agreement with the client's consent. But
24 we're talking about fee-shifting statutes, which
25 Congress has allowed the prevailing party to pass

1 attorneys' fees and costs and expenses on to one's
2 opponent.

3 With the concerns that Congress had about
4 windfall, about providing for reasonable attorneys'
5 fees, we do not believe there --

6 QUESTION: Mr. Farmer, can I interrupt you a
7 second? The judge in this case treated the paralegal
8 time as part of the fee award. Were not the costs
9 separately itemized and allowed things like transcripts
10 and so forth, and the paralegal time was not included in
11 what the judge called "costs"?

12 MR. FARMER: Well, yeah, it was not included
13 in what the judge called "costs," but it was included
14 separately from the award that concerned fees. The
15 interesting thing about that --

16 QUESTION: I thought the judgment gave a big
17 lump sum for fees which had, as a part of it, all the
18 paralegal hours and law clerk hours and attorney hours.

19 MR. FARMER: Pardon me?

20 QUESTION: Well, I thought there was one
21 figure for fees for each of the two firms which included
22 the paralegal time and all that, and that the costs were
23 a separate item, covering things like transcripts and
24 witness fees --

25 MR. FARMER: Oh. In the final recalculation,

1 or the summary, that's correct. But, in listing that
2 way, they were listed separately.

3 QUESTION: I see.

4 MR. FARMER: The interesting thing about that
5 is the cases relied on by Congress in enacting Section
6 1988, the one case -- and only one case even referred to
7 law clerk fees or paralegal fees -- that is listed in a
8 whole string of items, of costs. It's listed separately
9 from attorneys' fees and it's not in its own separate
10 category; it's listed, including in the whole string of
11 items of costs.

12 So that's why we believe that in treating
13 paralegal fees, under the statute, it should be at an
14 actual cost method.

15 QUESTION: Your position is that our decision
16 will not affect the way attorneys use paralegals in
17 their practice, in these cases?

18 MR. FARMER: We do not believe it will, your
19 honor.

20 QUESTION: If you're wrong about that, then
21 your position means that the cost, or the legal bill may
22 ultimately be more because attorneys will be used
23 instead of paralegals.

24 MR. FARMER: That is certainly a possibility,
25 but I think it's --

1 QUESTION: So a large part of your argument
2 seems to rest on a judgment as to whether or not what we
3 say makes any difference to the practice of law in these
4 cases.

5 MR. FARMER: Well, one would hope that what
6 you do say makes a difference in the practice of law.

7 (Laughter.)

8 MR. FARMER: We do not believe that law firms
9 are going to be treating paralegals any differently or
10 staffing cases differently. To speculate that,
11 ultimately, fee awards may increase, I think, just
12 cannot be shown from the record in this case and would
13 be speculation at best.

14 QUESTION: Well, if attorney are used in lieu
15 of paralegals, then it clearly will increase the size of
16 the awards.

17 MR. FARMER: Yes, but, even now, those kinds
18 of hours are scrutinized by District Courts in fee
19 litigations, so if attorneys are doing paralegal work,
20 the hours, District Courts now typically reduce or
21 eliminate the hours entirely. That's --

22 QUESTION: So you think there should be a
23 legal requirement that paralegals be used?

24 MR. FARMER: Well, I think there's a, in
25 determining whether to use paralegals or an attorney,

1 the law firm must staff the case as efficiently as
2 possible.

3 In deciding what compensation to require one's
4 opponent to pay, if a work could have been done by a
5 paralegal but was instead done by a lawyer, then
6 District Courts should reduce the fee award
7 appropriately. Just as now, if work is done by a junior
8 associate, or if work is done by a senior attorney that
9 could have been done by a junior associate, courts
10 routinely reduce those fee awards on that basis.

11 Unless there are any further questions, I'll
12 reserve the balance of my time for rebuttal.

13 QUESTION: Thank you, Mr. Farmer.

14 Mr. Topkis?

15 ORAL ARGUMENT OF JAY TOPKIS

16 ON BEHALF OF RESPONDENTS

17 MR. TOPKIS: Mr. Chief Justice, and may it
18 please the Court.:

19 I'd like to begin, if I may, with some
20 comments on questions that were put to my friend, Mr.
21 Farmer, in the course of his argument. First, in
22 connection with a question that Justice Stevens put, I
23 must advise the Court that there is no reference
24 whatsoever in the trial court's opinion, or in the
25 record, to any \$15 or \$20 differential between historic

1 and current market rates for lawyers.

2 That's, I don't know where Mr. Farmer got that
3 from, but he certainly didn't get it from the record
4 here. The fact is that the State chose to offer no
5 proof whatsoever as to historical rates, and now comes
6 before this Court and says, "We want historical rates to
7 govern." It seems to me that the State should have made
8 up its mind some time ago. Justice Kennedy --

9 QUESTION: There was such mention of
10 compensating for delay, wasn't there?

11 MR. TOPKIS: There was, indeed, your honor.

12 QUESTION: And the judge did compensate for
13 delay.

14 MR. TOPKIS: He said that he was taking,
15 actually, he divided his treatment between the way he
16 treated Mr. Benson and the way he treated everybody else.

17 In both situations, in varying ways, he did
18 say that he was using current market rates and, in
19 consideration of the fact that there had been delay in
20 com-, in payment --

21 QUESTION: Joe, we just don't know how much
22 compensation there was for delay.

23 MR. TOPKIS: That is exactly the situation,
24 your honor. If I may, there is a sharp distinction
25 between what the Court did here, where he said, looking

1 at everything, I think I have to take the fact that
2 there has been delay into account, without specifying
3 what account he gave it, and what happened in Library of
4 Congress against Shaw, on which my friend relies, where
5 the District Court very deliberately set out to award
6 10% per annum by way of interest on --

7 QUESTION: It's better or worse?

8 MR. TOPKIS: Better or worse for whom?

9 QUESTION: Do you prefer the courts to say,
10 "Well, I'm giving some indeterminate amount of interest
11 here, I don't know quite how much it is"? You think
12 that's good, although, if you said, "I'm giving exactly
13 10% interest," it's bad.

14 MR. TOPKIS: Well, I think I've got a
15 two-pronged argument. As I'm sure your honor knows from
16 our brief, we take the position that the 11th Amendment
17 has no application here and so on.

18 But I think that it is perfectly reasonable to
19 say, to draw the dividing line that Judge Ginsberg drew
20 in Library of Congress against Shaw, where she said that
21 if a Court, where she said that she thought interest is
22 bad. A flat award of 10% per annum or whatever is
23 forbidden by the 11th Amendment.

24 But, taking the fact of delay in payment into
25 account, along with all of the other factors appropriate

1 for setting a fee, is permissible under the, under,
2 there she was speaking not of the 11th Amendment, of
3 course. But we also see a difference between the 11th
4 Amendment and the common-law immunity of the states.

5 The 11th Amendment -- pardon me, of the
6 sovereign -- the 11th Amendment, of course, derives from
7 one source, and the no-interest rule derives from a very
8 different one.

9 Now, the, there's another point that I wanted
10 to make in response to a question from Justice Kennedy.
11 Your honor asked Mr. Farmer what his position was, I'll
12 make bold to tell the Court what our position is. Our
13 position is that reasonable compensation means
14 reasonable compensation.

15 We don't know, as I said, what the difference
16 is between, was, historical and market rates. But let's
17 suppose we were still in a time of 17%, 18% annual
18 inflation, which we saw some years ago. Now let's
19 suppose that this went on for years. Would anyone call
20 an award whose value was devalued by 40% or 50% or 60%
21 because of delay "reasonable compensation"? I can't
22 imagine it.

23 QUESTION: Yes, we would, if the suit were
24 against the United States. We have held that.

25 MR. TOPKIS: Held that it would be reasonable

1 compensation, your honor?

2 QUESTION: Well, the same provisions at issue
3 here, if applied against the United States, would,
4 according to our decision in Library of Congress, be
5 held to preclude an award of interest.

6 MR. TOPKIS: That is true. In that context, I
7 certainly must agree with you.

8 QUESTION: So that must mean that we're
9 willing to swallow that very large camel, at least in
10 the context where the United States is the defendant.

11 MR. TOPKIS: Well, I think, perhaps, if it
12 came up before the Court in those circumstances, the
13 situation might be different. But I don't know. I
14 don't attempt to forecast what this Court will do. I
15 just try in my humble way to influence it.

16 QUESTION: I'm just going by what we said in
17 Library of Congress anyway. And holding there certainly
18 does have that bizarre consequence that you just
19 described.

20 MR. TOPKIS: And I suggest, with all respect,
21 that Library of Congress is not determinative here and
22 that its rule, whatever its merits in that context,
23 calls for no particular attention in this context.

24 QUESTION: Its principles may be exactly the
25 same, if we recognize state sovereign immunity.

1 MR. TOPKIS: Yes.

2 QUESTION: Yes.

3 MR. TOPKIS: I'm forced to agree with that.

4 But if you recognize state sovereign immunity, you would
5 have to recognize that you were departing from the
6 roots, the bases of the 11th Amendment. The 11th
7 Amendment didn't come out of a concern --

8 QUESTION: Well, is that so? I think the 11th
9 Amendment may have arisen out of a concern for state
10 sovereign immunity, don't you?

11 MR. TOPKIS: With all respect, your honor, I
12 would suggest that the 11th Amendment arose more out of
13 a concern for the federalist system, a concern for the
14 proposition that the states should not be called to
15 account for anything in the federal courts.

16 Q. Because the states were sovereign.

17 MR. TOPKIS: Your honor may hold that view,
18 and I certainly am not going to attempt to do other than
19 put forward the view that it was not because the states
20 were sovereign, having the mystical attributes of the
21 sovereign, the king, the almighty, but because the
22 states were federated, that they were independent
23 entities coming together by consensus to form these
24 United States of America.

25 QUESTION: They were sovereign states coming

1 together in a federation.

2 MR. TOPKIS: Sovereign, yes, but not sovereign
3 in the sense of necessarily possessing immunity. It was
4 because the federal system would work best. And I think
5 that was Justice Holmes' phrase, it won't come to me
6 quite -- but it's important that the system work, we all
7 know that.

8 And I submit that the 11th Amendment was
9 adopted in order to help attain that objective -- not
10 because of any mystical concern with the integrity of
11 the king or anything of the kind, but because it was a
12 deal.

13 And the deal would never have been made, as so
14 many historians have pointed out. The deal that was the
15 Constitution of the United States would never have been
16 made had the states not believed that they would never
17 be amenable to suit in the courts of the United States.

18 Now, there was, if I may pass to another
19 point, there was lurking in the conversation, while Mr.
20 Farmer was up, some reference to the time period that
21 elapsed between the decision on liability and the
22 application for fees.

23 I would accept no penalty for that, certainly,
24 because the fact is that, after the decision on
25 liability was announced by Judge Clark, he said he was

1 going to hold up on any fee award pending appeal of that
2 liability decision, because, until then, he wouldn't
3 know who was the prevailing party and it would be a
4 futile exercise to attempt to award fees. And it's
5 significant to note that both sides consented to that
6 treatment.

7 Now, Mr. Farmer said that plaintiff's expert
8 testified, and this is on the subject of paralegals, he
9 said that plaintiff's expert -- and he was referring to
10 one of our experts, a personal injury lawyer from Kansas
11 City named Max Foust. He said that our expert, Mr.
12 Foust, testified that he didn't bill separately for
13 paralegals. And that is the way the record reads.

14 What Mr. Foust said was, "I don't have any
15 truck with that kind of fancy nonsense. I make
16 contingency arrangements with my clients, 33-1/3% if I
17 settle, and 40% if I go to trial. That's enough for
18 me," Mr. Foust said. It would be enough for most of us,
19 I respectfully suggest.

20 But in any event, he said also that whatever
21 the practice of personal injury lawyers in Kansas City,
22 he knew very well that the Kansas City law firms that
23 bill on an hourly basis uniformly bill paralegals at \$40
24 to \$50 an hour, not at cost, but the \$40 to \$50 an hour
25 was the market in Kansas City. The District Court here

1 awarded us the low end of that range. Another --

2 QUESTION: Mr. Topkis, do you think paralegals
3 come under the head of "reasonable attorneys' fees" or
4 under the other branch -- under "costs" in 1988?

5 MR. TOPKIS: If I may, your honor, I would
6 answer that question by saying that the overall thrust
7 of 1988 is to put civil rights plaintiffs on a par with
8 all other plaintiffs in competing for legal services.

9 And that, in consequence, their lawyers, if
10 they are to have equal access to lawyers, their lawyers
11 must be compensated as lawyers in other cases are
12 compensated --

13 QUESTION: Are you going to answer the
14 question?

15 MR. TOPKIS: Yes, I will, and I will say, in
16 consequence, it appears to me that market should
17 determine because market is what determines in all other
18 contexts.

19 QUESTION: But I asked you a question which I
20 don't believe you've answered.

21 MR. TOPKIS: I apologize.

22 QUESTION: My question was, do you think
23 attorneys' fees are recoverable, rather, paralegal fees
24 are recoverable as a part of a reasonable attorney's fee
25 or as a part of other costs?

1 MR. TOPKIS: I would say, I would say with all
2 respect that I don't think it makes a great deal of
3 difference --

4 QUESTION: Let's take reasonable attorney's
5 fee. Now, you think that, in addition to all the hours
6 that the attorneys put in and their hourly rate, under
7 the heading "reasonable attorney's fee," one can then
8 add paralegal charges.

9 MR. TOPKIS: I would be quite content to see
10 that --

11 QUESTION: Then you add secretarial charges,
12 too?

13 MR. TOPKIS: No, because that's not the way
14 the profession behaves. It seems to me that when
15 Congress said "award reasonable attorneys' fees as part
16 of costs," Congress said the legislative history is
17 perfectly plain --

18 QUESTION: Well, Congress said "reasonable
19 attorney's fee as part of costs," it didn't say any
20 more, did it?

21 MR. TOPKIS: That is correct. That is
22 correct. Nor did it specify costs, item by item.

23 QUESTION: And you feel that a reasonable
24 attorney's fee should include a fee not only for
25 attorneys, but for paralegals?

1 MR. TOPKIS: I'll take it there or I'll take
2 it as part of costs, but in either event, I want
3 paralegals to be compensated on a par so that the
4 plaintiffs, the civil rights plaintiffs, are not
5 disadvantaged. Because putting them on a par was
6 exactly where the Congress meant to go.

7 QUESTION: Mr. Topkis, it does make a
8 difference to me whether you put it under attorneys'
9 fees or costs, because you, it is an impossible job to
10 persuade me that you get costs awarded on some basis
11 other than costs. I mean, it, I cannot go that far.
12 When you, when I ask you to submit your costs, I mean
13 you submit your costs.

14 MR. TOPKIS: You mean out-of-pocket expenses.

15 QUESTION: That's what "costs" means.

16 MR. TOPKIS: That's what it does to me, too,
17 your honor.

18 QUESTION: Well, so, you really think it has
19 to be under attorneys' fees if it's going to be anywhere.

20 MR. TOPKIS: Well, I would submit again that --

21 QUESTION: That is to say, if it's going to be
22 compensated on market basis. And that's all we're
23 fighting about here. I can understand your putting it
24 under "costs" if all you're asking for is
25 out-of-pocket. But if you want market, then I don't see

1 how you can possibly get it under "costs." So you're
2 really left with getting it under attorneys' fees.

3 MR. TOPKIS: As a logical matter, I am, of
4 course, in total accord with your honor. But the
5 reality sometimes is a little different from logic. And
6 the reality here is that you've got to put it somewhere,
7 and if you want me to pick somewhere, all right, I'll
8 pick it as attorneys' fees. But you could easily come
9 back at me by saying, "One thing we know about
10 paralegals is that they're not attorneys" and --

11 QUESTION: Well, I don't deal with reality,
12 Mr. Topkis, I deal --

13 (Laughter.)

14 QUESTION: -- I deal with statutes.

15 MR. TOPKIS: I think better of your honor than
16 that, with all respect.

17 (Laughter.)

18 QUESTION: I take it there is no instance,
19 counsel, I take it there's no instance in which costs
20 are billed at anything other than out-of-pocket.

21 MR. TOPKIS: Oh, I think there are many
22 instances, your honor. Very frequently, you --

23 QUESTION: What are those?

24 MR. TOPKIS: The statute allows you a certain
25 cost regardless of what your actual costs have been.

1 Usually it's less. But, but I --

2 QUESTION: Well, is there any instance in
3 which it's more?

4 MR. TOPKIS: I can't recall. I can't think of
5 any. No. My argument on this point, to belabor it, is
6 the argument of parity. And if you want to single out
7 civil rights plaintiffs and their lawyers as bearing, as
8 required to be some kind of lesser citizens, I don't
9 think that's what Congress intended. Now, the --

10 QUESTION: You don't, even if the market would
11 say that lawyers in this community do these cases on a
12 contingency, you don't, you aren't required to recognize
13 contingency fee arrangements, are you, under 1988?

14 MR. TOPKIS: Not required to recognize them.

15 QUESTION: In one, it says in a 1983 damages
16 suit, and there's a recovery and the contingent fee, the
17 contract is, would give him, would give the attorney
18 twice as much as what hours times a reasonable rate
19 would produce. Can you make the defendant pay that?

20 MR. TOPKIS: Your honor has the advantage of
21 me in being familiar with this Court's decision in the
22 Bergeron case, which was announced this morning. But I
23 would say that I think that a reasonable fee means a
24 reasonable fee. And I can't really add very much to
25 that --

1 QUESTION: No matter what the market says.

2 MR. TOPKIS: I'm sorry?

3 QUESTION: No matter what the market is in
4 Kansas City.

5 MR. TOPKIS: Well, I'm not sure I agree with
6 that, your honor, because it seems to me that what
7 economists teach us is that barring collusion, the
8 market produces what is reasonable. That's what the
9 economists tell us. But this is an area in which, I
10 confess, I proceed with the greatest hesitancy.

11 Now, I think it's important to recognize -- to
12 keep in mind, if I may alter it -- when we're discussing
13 the 11th Amendment, that the first question that was
14 presented here is really a misstatement of the issue,
15 and I mean no disrespect, of course, when I say that.
16 But the first question presented was whether the 11th
17 Amendment prohibits an award of attorneys' fees against
18 a state based on current hourly rates, which include
19 interest and a delay-in-payment factor.

20 Well, the current hourly rates here, there's
21 nothing in this record to suggest that they include
22 interest. I've never heard of a current hourly rate
23 which includes interest. When your honors were at the
24 bar, I rather imagine that you didn't have that concept
25 in mind. Certainly there's nothing in this record on

1 It. And, equally, current hourly rates do not include a
2 delay-in-payment factor. Most lawyers like to be paid
3 very, very promptly, and they don't build a
4 delay-in-payment factor into their current hourly rates.

5 QUESTION: But they don't charge the rates of
6 10 years from now, either.

7 MR. TOPKIS: Ten years prospectively, you mean?

8 QUESTION: Right. I mean, that's what
9 happens, that is what is happening here. I mean, by the
10 time recovery is obtained, the rates being charged are
11 the rates of five years after the time the services were
12 performed. Right?

13 MR. TOPKIS: Well, yeah --

14 QUESTION: Whatever the time --

15 MR. TOPKIS: Whatever the numbers, that is
16 correct. That is correct. And Judge Clark said that he
17 was looking at the delay-in-payment factor. I said
18 before -- If I may interrupt myself, Justice Scalia -- I
19 said before that he treated Arthur Benson differently
20 from the rest.

21 He, what he did with Mr. Benson was to say
22 that, on the basis of skill and experience in the Kansas
23 City current practices, Mr. Benson's current hourly rate
24 ought to be \$175, but that he was going to give him an
25 enhancement to \$200 an hour because of three factors.

1 One was the fact that Mr. Benson was precluded
2 during this representation from representing anyone
3 else. He couldn't accept any other clients for a period
4 of two and a half years or something like that. In
5 effect, he bet his professional life on this case and,
6 as the record reveals, he went into debt to the extent
7 of 600 and some-odd thousand dollars. So, all right,
8 Judge Clark thought that that was a factor appropriate
9 to be recognized.

10 The next was the unpopularity of the case.
11 And Judge Clark thought, referred to newspaper
12 editorials and newspaper stories and letters to the
13 press and letters to the court denouncing this case.
14 Mr. Benson became a pariah and Judge Clark thought that
15 that was a factor that might be taken account of in
16 setting a fair rate.

17 And, finally, he thought that the delay in
18 payment should be considered. He didn't allocate
19 anything for each of these factors particularly. He
20 just said, taking everything together, he thought \$200
21 was an appropriate fee. I don't see that as any award
22 of interest. If you split the \$25, which is 14%
23 enhancement, three ways to account for the three
24 factors, that would be about 5% for a delay of several
25 years. I've never seen an interest table that gave you

1 less than 1% in interest.

2 On the subject of being a pariah and proper
3 compensation for that factor, let me call to the Court's
4 attention something that, to me, as a veteran of some
5 class actions, strikes me as significant.

6 This was a class action. There were class
7 action plaintiffs available by the, probably, hundreds
8 of thousands, every black school kid in Kansas City was
9 a potential plaintiff. The extraordinary thing about
10 this litigation is that not one lawyer in Kansas City or
11 anybody else stepped forward to join in this case.

12 If it had been an antitrust case, or if it had
13 been a, if the Hyatt Hotel had collapsed, if whatever, a
14 Securities Act case, there would have been hoards of
15 lawyers coming in, saying, "I want a piece of the pie."
16 Nobody joined Arthur Benson. He remained alone until
17 the Legal Defense Fund came to join him. I think that,
18 too, is worthy of consideration, and so did Judge Clark.

19 Now, I think that's about, really, all I have
20 to say, or need to say on the question of the way Judge
21 Clark treated this. Taking everything into account, he
22 thought \$200 was fair. I don't see any reason why the
23 11th Amendment stands in the way of that kind of setting
24 of a reasonable fee. It seems to me totally responsive
25 to the statutory command.

1 Now, I think that it might be appropriate to
2 mention that the use of current rates in billing, in the
3 experience of all of us, conforms to the practice of the
4 profession. I have never seen, I don't think any member
5 of this Court has ever seen a bill which read something
6 like, "for services performed in 1987, at 1987 rates,
7 dollars X; for services performed in 1988, at 1988
8 rates, dollars Y; and for services performed in 1989, at
9 1989 rates, dollars whatever."

10 I might kick myself for having waited so long
11 to render a bill, but I think that the uniform practice
12 of the bar, when it renders bills, is to bill them out
13 at current rates.

14 QUESTION: I'm not sure that's right, Mr.
15 Topkis. Say somebody goes into the office and says,
16 "what do you charge an hour?" and the lawyer quotes him
17 an hourly rate and nothing else is said. And then the
18 matter takes four years to conclude. Would not the
19 client expect to be billed at the rate he was told when
20 he went into the front door?

21 MR. TOPKIS: I would think, in that case, yes,
22 your honor. Absolutely. Now, one final observation on
23 that point, and that is this. As I've said, while this
24 date -- record contains no data specific to Kansas City,
25 it is clear that in the midwest, generally, market rates

1 In the period with which we are concerned did not keep
2 pace with inflation.

3 Our expert on rates, Mr. Weil, testified to
4 that effect without contradiction. And I said that the
5 circumstances of this case make it particularly
6 appropriate to recognize the delay in payment. Mr.
7 Benson went into personal debt to the extent of \$633,000
8 to fund this case. And he paid \$113,000 in interest by
9 December 31, 1986. And he was continuing to pay
10 interest at the rate of \$5,000 a month.

11 For the Legal Defense Fund, the case was a
12 near disaster. We -- I'm proud to be a member of the
13 board of the organization -- we experienced deficits
14 which we had never experienced before in 1983 and 1984
15 because of the burden of this case.

16 Now, the State says, of course, that we should
17 be happy with historical rates. But, as I've mentioned,
18 the state put in no evidence of historical rates, so we
19 don't know whether to be happy or not. And I may say
20 that, so far as the record reveals, that 1987 current
21 market rates, which Judge Clark used, were the same as
22 or higher than rates in '83 or '84. I don't know. We
23 don't know. There's no evidence.

24 Now, what the State would apparently like is
25 for this court to remand so that we could have a trial

1 on that issue. Well, the State had its chance, I
2 respectfully suggest. This Court has said, and so many
3 of the lower courts have echoed, that we mustn't allow
4 these fee controversies to become second Jarndyce
5 against Jarndyce litigation. That's the very real
6 danger with which we deal.

7 And so I say, on the 11th Amendment, we wind
8 up like this. There was no award here of interest.
9 There was no dollar or percentage award or adjustment
10 for delay in payment. There was only a recognition by
11 the trial judge that there had been great delay in
12 payment, and an attempt to deal with that by using
13 current rather than historical rates to award reasonable
14 fees.

15 Now, let me, oh, I don't think I need trouble
16 the Court with a review of the legal authorities. Your
17 honors are doubtless infinitely more familiar with them
18 than I am. Just a final word or two on the question of
19 paralegals.

20 I, oh, no, if I may stay with the 11th
21 Amendment for just a second. This Court has often said
22 that the reason for requiring unmistakably clear
23 language, when the Congress sets out to abrogate 11th
24 Amendment protection, is so that enormous fiscal burdens
25 -- and I quote -- "shall not be imposed on the states by

1 the Congress without careful thought." That's
2 reasonable enough.

3 But we have here no enormous fiscal burdens.
4 As I've seen, we don't know the historical rate that the
5 State will employ. But the total fee award here for
6 services was only around \$3.2 million. So use of
7 historical figures would save the State, what, hundreds
8 of thousands of dollars? I don't know. To the State --

9 QUESTION: A million dollars here, a million
10 -- you know, Sen. Dirksen's line. First thing you know,
11 it adds up to real money.

12 (Laughter.)

13 MR. TOPKIS: Right. Right. Nice to see a
14 devotee of the classics.

15 (Laughter.)

16 MR. TOPKIS: It adds up to real money to two
17 interests, your honor. Not to the State of Missouri,
18 with all respect. This case, at the very least, is
19 going to involve vast expenditure by the State. The
20 people to whom these hundreds of thousands of dollars,
21 or this million dollars, will make all the difference in
22 the world, are Arthur Benson and the Legal Defense Fund.

23 Thank you very much.

24 QUESTION: Thank you, Mr. Topkis.

25 Mr. Farmer, you have three minutes remaining.

1 REBUTTAL ARGUMENT OF BRUCE FARMER

2 ON BEHALF OF THE PETITIONERS

3 MR. FARMER: Mr. Chief Justice, and may it
4 please the court.

5 Just briefly, I'd like to respond to Mr.
6 Topkis' implication that I picked this \$15, \$20 rate out
7 of the air. In the District Court's opinion, on page
8 A-28 of the petition, of the appendix to the petition
9 for cert, the court says, "the Court notes that the \$80
10 per hour rate is approximately \$15 to \$20 higher than
11 the average hourly rate for Kansas City associates in
12 1982 to 1984."

13 Now, he's talking there about associates of
14 Mr. Benson, but he did specifically find that the hourly
15 rates for the period we're talking about was \$15 to \$20
16 difference. Other than that, there's nothing else I
17 need to add other than to say that, in terms of a fiscal
18 impact on the State of Missouri, the part of Missouri I
19 come from, a million dollars still means something, so --

20 QUESTION: Mr. Farmer, could I ask you about
21 where you draw the line with respect to the principle
22 you're talking about, that the 11th Amendment requires
23 us to interpret statutes strictly against state
24 liability. I mean, I can understand that where the
25 question is, are states covered by this statute or are

1 they not covered.

2 But once you know that the state is covered,
3 every single issue of law that comes up in the
4 interpretation of that statute we have to, we have to
5 interpret in favor of the state unless Congress has made
6 its intent unalterably clear? So, for example, we
7 should interpret attorneys' fees not to cover fees for
8 counselors at law in those states where they are not
9 called attorneys? That can't be right. I mean --

10 MR. FARMER: Your honor, it's a difficult
11 analysis --

12 QUESTION: So where do you stop? Why should I
13 go along with you as far as you want to go, to say that
14 you can't get interest?

15 MR. FARMER: Well, we think you should go as
16 far as we want to take you in this case because it is
17 almost identical to the situation in *Library of Congress*
18 *v. Shaw*. In that case, Title VII waived the federal
19 government's sovereign immunity for attorneys' fees and
20 costs, but not for interest.

21 And, similarly, in this case, while Section
22 1988 waives 11th Amendment immunity for attorneys' fees
23 and costs, but also not interest. And *Hutto v. Finney*
24 applies Section 1988 to the states, but even *Hutto*
25 recognizes that if you expand the traditional concept of

1 costs, then that analysis would not apply.

2 I'm not sure there's any easy answer to your
3 question. It's a difficult analysis, but I think in
4 this case the principles in Shaw are completely
5 applicable to the 11th Amendment context.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
7 Farmer.

8 The case is submitted.

9 (Whereupon, at 11:13 o'clock a.m., the case in
10 the above-entitled matter was submitted.)

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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. 88-64 - MISSOURI, ET AL., Petitioners V. KALIMA JENKINS, BY HER FRIEND,

KAMAU AGYEI, ET AL.

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

BY alan friedman

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