

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: BARBARA HAFER, Petitioner

V. JAMES C. MELO, JR., ET AL.

CASE NO: 90-681

PLACE: Washington, D.C.

DATE: October 15, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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BARBARA HAFER, :  
Petitioner :  
v. : No. 90-681  
JAMES C. MELO, JR., ET AL. :

Washington, D.C.  
Tuesday, October 15, 1991

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
1:57 p.m.

APPEARANCES:

JEROME R. RICHTER, ESQ., Philadelphia, Pennsylvania, on  
behalf of the Petitioner.  
WILLIAM GOLDSTEIN, ESQ., Bensalem, Pennsylvania; on behalf  
of the Respondents.

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1 P R O C E E D I N G S

2 (1:57 p.m.)

3 CHIEF JUSTICE REHNQUIST: Well hear argument  
4 next in Number 90-681, Barbara Hafer v. James C. Melo, Jr.  
5 Mr. Richter, you may proceed.

6 ORAL ARGUMENT OF JEROME R. RICHTER

7 ON BEHALF OF THE PETITIONER

8 MR. RICHTER: Thank you, Mr. Chief Justice, and  
9 may it please the Court:

10 We are before the Court on a writ of certiorari  
11 to the Court of Appeals for the Third Circuit following  
12 its reversal of the entry of final judgment in favor of  
13 our client, the petitioner, Barbara Hafer, by the District  
14 Court for the Eastern District of Pennsylvania.

15 Although other claims were considered by the  
16 courts below against the Auditor General and her co-  
17 defendant, James West, the U.S. Attorney for the Middle  
18 District of Pennsylvania, no aspect of those claims is  
19 before this Court. The only issue before this Court  
20 relates to the claims against the petitioner arising out  
21 of Section 1 of the Civil Rights Act of 1871, which is  
22 Title 42, United States Code, Section 1983.

23 The principal question before the Court involves  
24 the application of the Court's 1989 holding in *Will v.*  
25 *Michigan Department of State Police*, wherein the Court

1 held neither the State nor its officials acting in an  
2 official capacity are persons under Section 1983.

3 The petitioner, the Auditor General, is an  
4 elected official of the Commonwealth of Pennsylvania. The  
5 primary function of the petitioner is to ensure that all  
6 the revenues due to the Commonwealth are collected and all  
7 the funds so collected are legally and properly disbursed.  
8 To fulfill that sensitive responsibility the Auditor  
9 General supervises a staff of approximately 800 employees  
10 consisting of auditors, investigators, and revenue agents.

11 The Auditor General is vested with the ultimate  
12 statutory authority to hire and fire the employees within  
13 that department. The Auditor General took office and was  
14 inaugurated January 17, 1989. Shortly thereafter, she  
15 fired the 16 respondents, 8 because they were ineffective  
16 managers and the other 8 because they were beneficiaries  
17 of a job-buying scheme.

18 Each of the 16 are seeking money damages  
19 personally against the Auditor General --

20 QUESTION: May I ask you a question right now?  
21 Would the issue that you're going to argue be any  
22 different if the 16 plaintiffs had been fired because they  
23 were all females?

24 MR. RICHTER: The issue would be no different.  
25 It would affect, of course, perhaps the fact that there's

1 alternative relief available under Title VII, but it  
2 wouldn't affect the argument.

3 The relevance, of course, Justice Stevens, to  
4 our making reference to the facts relating to the job-  
5 buying scheme in which eight of the respondents were the  
6 beneficiaries has to do with the concern about the  
7 interference by the courts into the internal operations of  
8 State Government, particularly in a case of such a  
9 sensitive and public nature as that involved in the job-  
10 buying scheme.

11 - But to go on, seven -- seven of the respondents  
12 as union members pursued and secured arbitration awards.  
13 They -- they were union members, and as such they were  
14 entitled to a grievance procedure which permitted the  
15 arbitration process, and each of the seven was awarded  
16 reinstatement with back pay and interest on the back pay.

17 The reason for the arbitration awards, was given  
18 by the arbitrators, was that they grounded their awards  
19 solely on the basis that there was a total lack of -- lack  
20 of adequate proof on the part of the Auditor General that  
21 the seven respondents knew that their jobs were purchased.

22 All eight beneficiaries of the job-buying  
23 scheme, including the seven with the awards for  
24 reinstatement, are still pressing 1983 claims alleging  
25 political discharge in violation of the First Amendment

1 and their due process rights against the Auditor General  
2 in her individual capacity. These eight have been  
3 consolidated, with James Melo as the lead plaintiff.

4 The other eight, who were fired as ineffective  
5 managers, have had their cases consolidated with Carl  
6 Gurley as the lead plaintiff. Two of the Gurley  
7 respondents have sought money damages only from the  
8 Auditor General, while the other six are seeking money  
9 damages as well as reinstatement, and they are seeking  
10 reinstatement against the Auditor General in her official  
11 capacity -- excuse me.

12 QUESTION: You mean that's what they -- is that  
13 they way they put it?

14 MR. RICHTER: There were 11 complaints,  
15 Justice --

16 QUESTION: Is that the way they put it?

17 MR. RICHTER: In that one complaint, the  
18 eleventh complaint, six of the Gurley plaintiffs have  
19 sought reinstatement against the Auditor General in her  
20 official capacity, and money damages against her --

21 QUESTION: And expressly so stated?

22 MR. RICHTER: And expressly so stated in that  
23 one complaint. In the other 10 complaints involving all  
24 of the other respondents, there was no identification of  
25 the capacity in which they were pursuing their claims

1 against the Auditor General.

2 With respect to the claims for prospective  
3 relief, we readily concede that the Will decision affirms  
4 the doctrine of Ex parte Young, and that a State official  
5 is a person for purposes of injunctive relief. And we do  
6 not challenge that aspect of the Circuit Court's ruling.

7 The Auditor General moved for summary judgment  
8 before the district court and relied on the Will decision,  
9 and set forth her function in summary judgment papers  
10 reflecting that she was acting in her official capacity,  
11 that she was the duly authorized State official who had  
12 the ability and authority to hire and fire in that office,  
13 and the district court concluded in entering judgment in  
14 favor of the Auditor General, that she was in fact acting  
15 in her official capacity. She therefore was not a person  
16 under Section 1983, and dismissed the case. The district  
17 court did not address the merits of the political  
18 discharge claims.

19 The circuit court reversed, treated the summary  
20 judgment as if it had been a judgment on the pleadings.  
21 While not addressing the determination of the district  
22 court that the Auditor General was acting in her official  
23 capacity, the circuit court nevertheless held that  
24 respondents could maintain the actions against the Auditor  
25 General based simply on the fact that they had asserted



1 that they were suing her in her personal capacity. And by  
2 that, the Circuit Court thus interpreted Will as standing  
3 for the proposition that State officials, sued for damages  
4 in their personal capacity, are persons under Section  
5 1983.

6 We submit that that is not what this Court held  
7 at all in the Will decision. On the contrary, at the  
8 outset of the Will decision, the Court stated that the  
9 case presented the question of whether a State or State  
10 official, while acting in his or her official capacity, is  
11 a person within the meaning of 42 U.S.C. Section 1983, and  
12 then proceeded to answer that question at the conclusion  
13 in the negative, wherein the court stated, "We hold" --  
14 and I quote -- "that neither a State nor its officials  
15 acting in their official capacities are persons under  
16 Section 1983."

17 We submit that the Circuit Court holding was  
18 inconsistent with this -- the important holding in the  
19 Will decision, and if not reversed will eviscerate the  
20 meaning of the Will case.

21 QUESTION: Mr. Richter, if you're not acting in  
22 your official capacity, does 1983 apply at all? I mean,  
23 1983 requires that the action be under color of law, under  
24 color of State law, right?

25 MR. RICHTER: Yes, Your Honor. In our

1 submission --

2 QUESTION: How can you be under color of State  
3 law if you purport to be acting only in your personal  
4 capacity?

5 MR. RICHTER: As -- as we see the Will decision,  
6 Your Honor, acting under color of law is separate and  
7 apart from the capacity in which you act. And while it's  
8 true the two may sometimes converge, there are different  
9 concepts, and moreover --

10 QUESTION: What does it mean, then? What does  
11 it mean, to be acting under color of law, if it does not  
12 mean to be purporting to be acting officially? I mean,  
13 that's what I would think it means. What do you think it  
14 means?

15 MR. RICHTER: My understanding of the definition  
16 of "acting under color of law" is a misuse of power  
17 possessed by virtue of State law and made possible only  
18 because the wrongdoer is clothed with the authority of  
19 State law. That is the definition of "action under color  
20 of law" as set forth in Lugar and U.S. v. Classic cases.

21 QUESTION: Would you read that again?

22 MR. RICHTER: Misuse of power --

23 QUESTION: Right.

24 MR. RICHTER: Possessed by virtue of State  
25 law --

1 QUESTION: Right.

2 MR. RICHTER: And made possible only --

3 QUESTION: Right.

4 MR. RICHTER: Because the wrongdoer is clothed  
5 with the authority of State law.

6 QUESTION: Doesn't that mean acting officially?

7 MR. RICHTER: We submit that it does not, Your  
8 Honor. In our view, one can be acting in their official  
9 capacity and be acting under color of State law. They can  
10 also be acting other than in their official capacity and  
11 also be acting under color of State law.

12 QUESTION: In a 1983 case, is it useful to  
13 analyze in what capacity a public official acts beyond the  
14 question of under color of State law? Don't we usually  
15 just talk about in what capacity they're sued, not in what  
16 capacity they act, once we've decided that the requirement  
17 of under color of State law is met?

18 MR. RICHTER: This Court has consistently been  
19 dealing with the issues of capacity up until 1989, based  
20 on its interpretation of the immunities and the Eleventh  
21 Amendment issues that drove those decisions. It was not  
22 until 1989 in Will, where the -- when for the first time  
23 this Court had to address when somebody is or is not a  
24 person under Section 1983 -- or to put it more  
25 specifically, when a State official is a person under 1983

1 for purposes of money damage suits. And it was only then  
2 for the first time that it had to focus on the standard of  
3 how one might be found to be a person or not under Section  
4 1983.

5 The need to identify capacity prior to that, and  
6 unrelated to that, arose out of the 11 -- Eleventh  
7 Amendment considerations. Those considerations are  
8 separate and apart from the statutory definition of  
9 "person" that was addressed in the Will decision.

10 QUESTION: Well, Will said they were separate --  
11 really, separate considerations.

12 MR. RICHTER: Absolutely, sir, and --

13 QUESTION: Do you think Ex parte Young applies  
14 in 1983 cases?

15 MR. RICHTER: Well, Ex parte Young was not a  
16 1983 case --

17 QUESTION: I -- that isn't what I asked you.

18 MR. RICHTER: No, I understand, sir, but Ex  
19 parte Young in our submission is still very much a viable  
20 doctrine. It was affirmed in --

21 QUESTION: Under 1983? In a 1983 case as with  
22 others -- is that it?

23 MR. RICHTER: It provides - it provides, as we  
24 know, for prospective relief. It tells us that the State  
25 sued through its officials is not viewed as being made a

1 defendant under 1983 --

2 QUESTION: Exactly.

3 MR. RICHTER: -- for the purpose of that  
4 fiction --

5 QUESTION: Exactly.

6 MR. RICHTER: But it's still very much available  
7 as a means of relief under 1983.

8 QUESTION: And so do you challenge the -- do  
9 you, in this case, challenge the order of reinstatement?

10 MR. RICHTER: There are two reinstatement  
11 issues.

12 QUESTION: Do you challenge them?

13 MR. RICHTER: There was no order of  
14 reinstatement entered in this case. There was a  
15 dismissal --

16 QUESTION: That's right, yes.

17 MR. RICHTER: -- of the claims for reinstatement  
18 by the district judge --

19 QUESTION: Yes.

20 MR. RICHTER: And in our view we concede that if  
21 the court didn't reach the merits, and if this Court  
22 chooses not to reach the merits, then those six Gurley  
23 claims for reinstatement under Ex parte Young ought to be  
24 considered by the district court, and we don't contest  
25 that.

1 QUESTION: So they were -- the courts below were  
2 wrong in that respect?

3 MR. RICHTER: If the court --

4 QUESTION: If. All right.

5 MR. RICHTER: That's only one aspect --

6 QUESTION: Yes.

7 MR. RICHTER: -- of the case. Our principal  
8 concern is with the money damage claims against the  
9 Auditor General personally. The reinstatement claims were  
10 brought by six Gurley respondents against the Auditor  
11 General in her official capacity, and as to those we  
12 concede that unless that's decided on the merits or  
13 considered decided on the merits, it has to go back.

14 QUESTION: So on the damages, you say that the  
15 firing was an act under the officials in the official's  
16 official capacity?

17 MR. RICHTER: That's correct, sir.

18 QUESTION: And Ex parte Young should not apply  
19 to -- in that situation, even though the allegation is  
20 that the firing was unconstitutional?

21 MR. RICHTER: The allegation -- the allegations  
22 are that the firings were unconstitutional, but we submit,  
23 Your Honor, that Ex parte Young is on a separate track on  
24 reinstatement, and we suggest --

25 QUESTION: Well, I know, but how about on the

1 damages issue?

2 MR. RICHTER: On the damages issue, we suggest  
3 that a claim of political discharge, wherein an effort is  
4 made to pursue the State official, in this case in your  
5 individual capacity, for money damages, is inappropriate  
6 because the official in connection with hiring and firing  
7 is acting in her official capacity in much the same way  
8 that the director of State Police in Will was acting in  
9 his official capacity, and as such ought not -- ought not  
10 to have to answer personally, with their personal assets  
11 at risk, under 1983 --

12 QUESTION: Well --

13 MR. RICHTER: And we submit that in the Will  
14 decision, of course, that was a suit against the director  
15 of State Police in his official capacity, whereas this  
16 case -- I'm sorry, sir.

17 QUESTION: Well, go ahead.

18 MR. RICHTER: Whereas in this case the case  
19 comes before you on the respondent's assertion that  
20 they're pressing the case against the Auditor General in  
21 her individual capacity.

22 QUESTION: But surely a State Auditor can't fire  
23 any State employee other than in her official capacity,  
24 can she?

25 MR. RICHTER: That's exactly the point. She can

1 fire and hire those on the staff within her department,  
2 and within her department alone, and she's authorized to  
3 do that.

4 QUESTION: But in her -- acting in her official  
5 capacity as State Auditor.

6 MR. RICHTER: Exactly. Acting in her official  
7 capacity as the elected Auditor General. Were she, of  
8 course, to try, for example, to fire an employee in some  
9 other department or some related agency and either  
10 directly or indirectly try to affect some employment  
11 decision, she'd be acting outside of her authority, and in  
12 our submission would not be acting in her official  
13 capacity, as an example --

14 QUESTION: Yes, but if her act is  
15 unconstitutional under Ex parte Young, it is not to be  
16 charged to the State.

17 MR. RICHTER: There --

18 QUESTION: You referred to it as a fiction.  
19 Well, maybe it is, that if the person is acting  
20 unconstitutionally it --

21 MR. RICHTER: There are numerous --

22 QUESTION: The person -- the official is then a  
23 person, not an official.

24 MR. RICHTER: Well, Justice, there are numerous  
25 instances where constitutional violations occur by the



1 State and the State is not answerable in money damages.

2 QUESTION: Exactly.

3 MR. RICHTER: They were only answerable under  
4 Young for prospective relief, and that's because the Young  
5 doctrine tells us that -- that for injunctive or  
6 prospective relief the State will not be -- will be  
7 considered a person.

8 QUESTION: Mr. Richter, what I don't understand  
9 about the -- the -- you know, the last hypothetical you  
10 gave, you say when she fires somebody from another  
11 department that she doesn't have control over, then she  
12 would be acting in her personal capacity, right?

13 MR. RICHTER: That's correct, sir.

14 QUESTION: But she also -- but she wouldn't have  
15 any authority to do it, so she wouldn't be acting under  
16 color of State law.

17 I mean, it seems to me that whenever you say  
18 personal capacity, you're just out from under 1983 anyway?

19 MR. RICHTER: Well, I beg to differ with that,  
20 because I think she would be acting under color of State  
21 law, although I think she would be --

22 QUESTION: She would in trying to fire somebody  
23 from another department? It's clear that she has no  
24 authority over that person in the other department? Now,  
25 you know, I find it hard to conceive of a case in which

1 you could ever get damages under 1983, because as soon  
2 as -- well --

3 MR. RICHTER: In our view, sir, the Will case  
4 told us to look to the function of the State official in  
5 determining whether or not they're a person under the act.  
6 In our submission, the determination of whether a State  
7 official is going to be held personally responsible is  
8 something that ought to be determined by the court and not  
9 by the pleadings of the -- of the plaintiff alone.

10 QUESTION: Before you leave that, could I ask  
11 you two quick questions? First, when Justice Scalia had  
12 questioned you before about under color of State law, you  
13 quoted something from a case, I think -- misuse of power  
14 or -- could you tell -- I missed what case that was from.

15 MR. RICHTER: That's the definition from U.S.  
16 Classic, which is referred to --

17 QUESTION: And that's from Classic.

18 MR. RICHTER: -- from time to time.

19 QUESTION: And the same question I was going to  
20 ask, would not the definition which you read apply  
21 directly -- assuming the merits. I know you dispute the  
22 merits of the underlying claim, but wouldn't that apply to  
23 the very claim we have before us? It was a misuse of  
24 power if it was unconstitutional, and so forth?

25 MR. RICHTER: We don't dispute that the Auditor

1 General was acting under color of State law.

2 QUESTION: I see. In this case?

3 MR. RICHTER: In this case.

4 QUESTION: Okay.

5 MR. RICHTER: We readily concede that that is  
6 not -- that element is not an issue. Our view is that the  
7 Will case tells us that she had to be acting outside her  
8 official capacity in order for her to be held individually  
9 responsible, because in our submission the Will case tells  
10 us she's acting in her official capacity. She is not a  
11 person, and as such, can't be held responsible under 1983  
12 personally.

13 I just wanted to make a few more points, and  
14 that is there was no case prior to the Will decision in  
15 this Court that dealt with a statutory definition of  
16 whether a State official is a person with respect to money  
17 damage claims. All of the prior decisions that have been  
18 relied upon by the respondents deal with Eleventh  
19 Amendment or immunity issues, and this Court had  
20 specifically made it clear that the scope of the Eleventh  
21 Amendment and the scope of 1983 are separate issues.

22 In Will, for example, the plaintiff cited  
23 Kentucky v. Graham for the proposition that the court  
24 assumed the State was a person. But the Will court in  
25 footnote 4 rejected that proposition and stated that this

1 Court did not address the meaning of "person" in any of  
2 those cases, and none of the cases was resolution of that  
3 issue necessary to the decision. Accordingly, we submit  
4 that the reliance on Kentucky v. Graham by the respondents  
5 here as well as their reliance on the Rhoads -- Scheuer v.  
6 Rhoads decision and the Forrester decision is misplaced.

7 The respondents had argued and the circuit court  
8 had concluded that this Court would permit State officials  
9 to be sued and to be liable solely because they're named  
10 in their personal capacity. We believe that this Court  
11 intended what it meant when it said "acting," that the  
12 Court's repeated and deliberate use of the word "acting"  
13 in its holding was with a view to focusing on the function  
14 of the actions of the State official, and that the form of  
15 the pleading does not control the statutory definition of  
16 "person."

17 If it please the Court, I'd like to reserve the  
18 balance of my time.

19 QUESTION: Very well, Mr. Richter.

20 Mr. Goldstein, we'll hear from you.

21 ORAL ARGUMENT OF WILLIAM GOLDSTEIN

22 ON BEHALF OF RESPONDENTS

23 MR. GOLDSTEIN: Mr. Chief -- Mr. Chief Justice,  
24 may it please the Court:

25 This Court in prior decisions has used the

1 expression "official capacity" in two different contexts.  
2 The first is to describe an attribute of the conduct of a  
3 1983 defendant. Was that defendant acting in his official  
4 capacity, and if so he would be acting under color of  
5 State law.

6 For example, in *West v. Atkins* Mr. Justice  
7 Blackmun stated, "Generally a public employee acts under  
8 color of State law while acting in his official capacity  
9 or while exercising his responsibilities pursuant to State  
10 law." If a person is acting in his official capacity, he  
11 is certainly acting under State law.

12 But official capacity has also been used by the  
13 Court to describe the legal personage of a defendant in a  
14 1983 case. That is, is the defendant being sued in an  
15 official or personal capacity. And legal personage is  
16 important because it determines where the real interests  
17 lie in the case, and if a money judgment is awarded, who  
18 will pay it.

19 Justice O'Connor in *Karcher v. May* stated,  
20 "The concept of legal personage is a practical means of  
21 identifying the real interest at stake in a lawsuit. We  
22 have repeatedly recognized that the real party in interest  
23 in an official capacity suit is the entity represented and  
24 not the individual office-holder," and Justice O'Connor  
25 cited *Kentucky v. Graham* and *Brandon v. Holt* for that

1 proposition.

2           The expression "official capacity," then, can  
3 have two meanings. It can be describing the conduct of  
4 the defendant which occurred before the lawsuit took place  
5 and which gives rise to it, or it can describe the legal  
6 personage of the defendant once the litigation is under  
7 way.

8           The petitioner seeks to equate the conduct with  
9 the legal personage, and to say that if the defendant was  
10 acting in an official capacity, he or she can only be sued  
11 in an official capacity. And what that equation does was  
12 basically to abolish personal capacity lawsuits where the  
13 defendant is a State employee or a State official, because  
14 in an official capacity lawsuit it is the State that is  
15 the defendant, and we know that the State is not a person  
16 under 1983, and the State has Eleventh Amendment immunity  
17 in Federal court.

18           So I do not believe that Will was ever intended  
19 to abolish personal capacity lawsuits, and I believe that  
20 Will spoke only in the context of what the Supreme Court  
21 of Michigan recognized to be an official capacity lawsuit  
22 and which this Court said in its opinion was an official  
23 capacity lawsuit.

24           I would also say that --

25           QUESTION: How do we know when it's a personal

1 capacity suit, and how specific must the complaint be, do  
2 you think?

3 MR. GOLDSTEIN: In order to be an official  
4 capacity suit under Kentucky v. Graham it is necessary to  
5 allege that the governmental entity was the moving force  
6 behind the deprivation of civil rights and that the  
7 entity's policy and custom played a factor. Without those  
8 allegations, there can be no official capacity liability.  
9 So I would say that one thing to look at in the lawsuit is  
10 whether the official capacity allegations are there.

11 Secondly, according to Kentucky v. Graham, if  
12 you're proceeding in an official capacity lawsuit, then  
13 you would give notice to the governmental entity and you  
14 would give them an opportunity to defend. In this case,  
15 the governmental entity was not notified. Only Barbara  
16 Hafer is notified, only she is requested for damages, and  
17 only she was involved in the case.

18 In addition, there have been decisions of this  
19 Court in Brandon v. Holt and I believe in the Bender case  
20 where the Court said that we can look to the subsequent  
21 conduct of proceedings if it is in doubt. And in this  
22 case we did file documents before the Court entered  
23 summary judgment in which we specifically said that we are  
24 proceeding only against Barbara Hafer in her personal  
25 capacity.

1           And there is a verification in the records which  
2           appears at page 197 where it just actually states that,  
3           where it says, "No claim for damages has ever been made  
4           against the Commonwealth of Pennsylvania. All claims for  
5           damages have been made against Barbara Hafer individually  
6           and in her individual capacity. Service of the complaint  
7           was made upon Barbara Hafer. No service was attempted  
8           upon the Commonwealth agency or the Pennsylvania Attorney  
9           General's Office. No money has been sought, and no claim  
10          has been made for monetary damages to be paid out of the  
11          Commonwealth's Treasury."

12                 I will admit that the initial pleadings are not  
13          paragons in this case, but I think that we did get the  
14          point across at a stage that was still reasonable and fair  
15          to the defendant to know what the issues were in the case.

16                 I would respectfully suggest to the Court that  
17          since 1974, with Scheuer v. Rhoads, it has been the law  
18          that if a State executive official personally commits a  
19          deprivation of civil rights, then that official can be  
20          held accountable and made in his person to respond to the  
21          victim to remedy the right that has been wronged -- that  
22          has been committed.

23                 And in that matter the Court actually cited Ex  
24          parte Young as authority for that position, and the  
25          Court -- and Chief Justice Burger, speaking for a



1 unanimous Court, said, "However, since Ex parte Young, it  
2 has been settled that the Eleventh Amendment provides no  
3 shield for a State official confronted by a claim that he  
4 has deprived another of a Federal right under color of  
5 State law," and further on, went really right down to the  
6 capacity issue and personal liability.

7 It says that, Young teaches that when a State  
8 officer acts under a State law in a manner violative of  
9 the Federal Constitution, he comes into conflict with the  
10 superior authority of that Constitution, and he is in that  
11 case stripped of his official or representative character  
12 and is subjected in his person to the consequences of his  
13 individual conduct.

14 All that we are asking in this case is that  
15 Barbara Hafer be accountable for the consequences of her  
16 individual conduct, and I would respectfully submit that  
17 if petitioner were to prevail in this case it would be  
18 necessary to overrule Scheuer v. Rhoads.

19 I would also call to the Court's attention what  
20 I believe to have been a unanimous decision in Forrester  
21 v. White. Forrester v. White was a State judge, a State  
22 official who fired a probation officer, and it was  
23 determined that that firing was a violation of the  
24 probation officer's constitutional rights. A personal  
25 capacity lawsuit was filed, and a verdict of about \$80,000

1 was entered against the judge.

2 The judge said that I am entitled to absolute  
3 immunity because I am a judicial officer, and this Court  
4 said that hiring and firing is not the type of conduct  
5 that will qualify for an absolute immunity. Hiring,  
6 firing is administrative, and we can tell -- or we think  
7 we know that back in 1871 what immunities were fairly in  
8 the minds of Congress and hiring and firing was not one of  
9 them.

10 Well, what Hafer has done in this case is a  
11 hiring and firing decision, and she is a State official.  
12 She is really seeking an absolute immunity in this case.  
13 She's saying, I can't be personally responsible for my  
14 conduct, and if she were to receive an absolute immunity,  
15 I would think that this Court would have to overrule  
16 Forrester v. White.

17 I would also say that her position simply is not  
18 supportable by the plain meaning of the statute. Mr.  
19 Richter conceded that Hafer was acting under color of  
20 State law at the time she fired these people. The statute  
21 identifies the potential defendants in this case: all  
22 persons acting under color of State law. Hafer in her  
23 individual capacity is a person, and she is acting under  
24 color of State law.

25 The statute then says that if those persons

1       commit a violation of civil rights, they are liable for an  
2       action at law, and this Court has traditionally held that  
3       an action at law is an action for damages. So under the  
4       plain meaning of the statute, if she is acting under color  
5       of State law and she commits a violation of someone's  
6       civil rights, at the very least she is liable for an  
7       action for damages.

8                 There has been some reference in Petitioner's  
9       brief to a worry about vexatious lawsuits. I would  
10       respectfully submit that the concept, this doctrine of  
11       qualified immunity, developed to the final point in Harlow  
12       v. Fitzgerald, adequately handles that situation. And I  
13       would respectfully say to the Court from the decision of  
14       Mitchell v. Forsyth, where Justice White stated, "We  
15       emphasize that the denial of absolute immunity will not  
16       leave the Attorney General at the mercy of litigants with  
17       frivolous and vexatious complaints. Under the standard of  
18       qualified immunity in Harlow, the Attorney General will be  
19       entitled to immunity so long as his actions do not violate  
20       clearly established statutory or constitutional rights  
21       which a reasonable person would have known."

22                 Justice White concluded, "We do not believe that  
23       the security of the republic will be threatened if its  
24       Attorney General is given incentives to abide by clearly  
25       established law."

1 To paraphrase that, I would respectfully submit  
2 that the security of the Commonwealth of Pennsylvania will  
3 not be threatened if its Auditor General is given  
4 incentives to abide by clearly established law. I think  
5 we will be better for it.

6 Thank you.

7 QUESTION: Thank you, Mr. Goldstein.  
8 Mr. Richter, do you have rebuttal? You have 7 minutes  
9 remaining.

10 REBUTTAL ARGUMENT OF JEROME R. RICHTER

11 ON BEHALF OF THE PETITIONER

12 MR. RICHTER: Thank you, sir. Just a few  
13 minutes.

14 We are not predicating our position on the  
15 Eleventh Amendment. We are not predicating our position  
16 on absolute immunity for the Auditor General. We are  
17 saying that the Auditor General is not, because of her  
18 conduct in this case in hiring and firing, a person under  
19 Section 1983.

20 We are not suggesting that Scheuer v. Rhoads or  
21 Forrester v. White need be overruled. On the contrary,  
22 we're suggesting that the Court in its decision in Will  
23 recognized that those cases were Eleventh Amendment  
24 jurisprudence and that those cases, each of them, never  
25 addressed the question of whether or not the State

1 officials acting in those cases were acting in such a way  
2 as to be a person or not under Section 1983. The  
3 statutory issue, the statutory definition of "person," was  
4 never addressed in any of those cases until the Will  
5 decision.

6 QUESTION: In your view, Mr. Richter, do the  
7 plaintiffs in this case then have no chance of monetary  
8 relief against the State Auditor?

9 MR. RICHTER: In our position, they -- they have  
10 no right -- they never had a right to seek monetary damage  
11 against the Auditor General since she's acting in her  
12 official capacity in the firings, is not a person, and  
13 their relief that they seek ought to be limited to either  
14 prospective relief or some other alternative relief.

15 QUESTION: You know, we frequently have cases,  
16 and there are hundreds of cases around, where people are  
17 suing policemen or prison guards for damages for violating  
18 their constitutional rights and wanting an injunction to  
19 keep them from doing it. There are a lot of judgments  
20 that have been entered against policemen on the basis that  
21 they are persons --

22 MR. RICHTER: That --

23 QUESTION: But they are -- but they were acting  
24 in their official capacity just as surely as your Auditor  
25 was.

1 MR. RICHTER: Well, may I respond to that?

2 First of all, with respect to city policemen,  
3 under Monell, of course, the city policemen, as are the  
4 cities, are identified in Monell as persons and subject to  
5 damage liability under 1983.

6 QUESTION: Well, what about --

7 MR. RICHTER: Here --

8 QUESTION: What about State prison guards?

9 MR. RICHTER: Here we're only addressing the  
10 function of hiring and firing as being within official  
11 capacity. Were we asked to draw the line, which we  
12 haven't been, we would draw the line in the context of  
13 internal operations of State Government. We would draw  
14 the line, at the very least, in the State employment  
15 context. We don't think we have to go beyond that.

16 We think that if the Court were to consider the  
17 factors that we had suggested in our briefing, that in  
18 determining whether or not a State official was acting  
19 within their official capacity such that they're not  
20 persons, we would suggest that special police power cases,  
21 cases involving the public at large, are such that those  
22 parties are not acting in their official capacity.

23 We're suggesting the definition of official --  
24 acting in official capacity is limited under Will at least  
25 to the facts of that case, which have to do with

1 employment decisions, with hiring and firing, with the  
2 internal operations of State Government.

3 We would suggest that there was an analogous  
4 situation, albeit not in a statutory context, in Bush v.  
5 Lucas, a case back in 1983, albeit not a 1983 case,  
6 wherein the Court declined to extend the opportunity to  
7 pursue Bivens actions against a Federal employer because  
8 it impacted adversely on the internal operation of the  
9 Government, and the Court concluded there was adequate  
10 alternative relief because there was the opportunity to  
11 pursue claims in the Civil Service context.

12 I just wanted to point out again with respect to  
13 the recitation and suggestion that the Eleventh Amendment  
14 derives this result that that is a different issue. The  
15 Court made it very clear -- page 66 of the Will opinion --  
16 that this does not mean, as petitioner suggests, and I  
17 quote, "That we think that the scope of the Eleventh  
18 Amendment and the scope of 1983 are not separate issues.  
19 Certainly they are, but in deciphering congressional  
20 intent as to the scope of 1983, the scope of the Eleventh  
21 Amendment is a consideration, and we decline to adopt a  
22 reading of 1983 that disregards it."

23 QUESTION: Of course, in the preceding sentence  
24 the Court would be -- pointed out that they were  
25 confronted with the question of whether Congress intended

1 to create a cause of action against States, to be brought  
2 in State courts.

3 MR. RICHTER: That's correct.

4 QUESTION: Yes.

5 MR. RICHTER: Thank you.

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

8 The case is submitted.

9 (Whereupon, at 2:38 p.m., the case in the above-  
10 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. 90-681 - BARBARA HAFER, Petitioner V

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JAMES C. MELO, JR., ET AL

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*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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