Constitution, then his confinement is unlawful. It is immaterial that *another* prison term might still await him even if he should successfully establish the unconstitutionality of his present imprisonment.

The motion for leave to proceed *in forma pauperis* and the petition for certiorari are granted, the judgment is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Motion for leave to proceed *in forma pauperis* and petition for certiorari granted, judgment reversed and case remanded.

390 U.S. 400

Anne P. NEWMAN et al., Petitioners,

v.

PIGGIE PARK ENTERPRISES, INC., et al.

No. 339.

Argued March 7, 1968.

Decided March 18, 1968.

Class action to obtain injunctive relief and award of counsel fees under Civil Rights Act of 1964 because of racial discrimination at drive-in restaurants located near interstate highway and sandwich shop. The United States District Court for the District of South Carolina, at Columbia, 256 F.Supp. 941, denied relief in part and an appeal was taken. The United States Court of Appeals for the Fourth Circuit, 377 F.2d 433, reversed and remanded for consideration of award of counsel fees and certiorari was granted. The Supreme Court held that prevailing plaintiffs were entitled, in absence of any special circumstances, to have reasonable counsel fees included as part of costs to be assessed against respondents.

As modified, judgment of Court of Appeals affirmed.

1. Civil Rights ⇐5

Drive-in restaurant located near interstate highway was within coverage of Civil Rights Act of 1964 provisions prohibiting racial discrimination in places of public accommodation regardless of where food was consumed. Civil Rights Act of 1964, § 201(c) (2), 42 U.S.C.A. § 2000a(c) (2).

2. Courts ⇐383(1)

Supreme Court granted certiorari to decide whether the subjective standard promulgated by Court of Appeals in awarding counsel fee in class action instituted under Civil Rights Act of 1964 to enjoin racial discrimination in drive-in restaurants and sandwich shop only to extent that respondents' defenses had been advanced for purposes of delay and not in good faith properly effectuated purposes of counsel fee provision of Act. Civil Rights Act of 1964, § 204(b), 42 U.S.C.A. § 2000a–3(b).

3. Civil Rights ⇐13

On passage of Civil Rights Act of 1964 it was evident that nation would have to rely in part upon private litigation as means of securing broad compliance with law. Civil Rights Act of 1964, §§ 204(a), 206, 42 U.S.C.A. §§ 2000a–3(a), 2000a–5.

4. Injunction ⇐114(2)

Only when a pattern or practice of discrimination is reasonably believed to exist may the Attorney General himself institute a civil action for injunctive relief under the Civil Rights Act of 1964. Civil Rights Act of 1964, §§ 204(a), 206, 42 U.S.C.A. §§ 2000a–3(a), 2000a–5.

5. Injunction ⇐106, 195, 197

Title II suit under Civil Rights Act of 1964 to enjoin racial discrimination is private in form only, and a plaintiff bringing action under that Title cannot recover damages. Civil Rights Act of 1964, §§ 201 et seq., 201(c) (2), 204 (a, b), 42 U.S.C.A. §§ 2000a et seq., 2000a(c) (2), 2000a–3(a, b).

6. Injunction ⇐200

If private party bringing suit under Title II of Civil Rights Act of 1964 obtains an injunction, he does so not for himself alone but also as a private attorney general vindicating policy that Congress considers of highest priority. Civil Rights Act of 1964, §§ 201 et seq., 201 (c) (2), 204(a, b), 42 U.S.C.A. §§ 2000a et seq., 2000a(c) (2), 2000a–3(a, b).

7. Injunction ⇐200

Congress enacted provision for allowance of counsel fees to prevailing party in Title II suit under Civil Rights Act of 1964 not simply to penalize litigants who deliberately advance arguments they know to be untenable, but more broadly to encourage individuals injured by racial discrimination to seek judicial relief. Civil Rights Act of 1964, §§ 201 et seq., 201(c) (2), 204(a, b), 42 U.S.C.A. §§ 2000a et seq., 2000a(c) (2), 2000a–3(a, b).

8. Federal Civil Procedure ⇐2737

Federal court may award counsel fees to successful plaintiff where a defense has been maintained in bad faith, vexatiously, wantonly, or for oppressive reasons.

9. Injunction ⇐200

He who succeeds in obtaining injunctive relief against racial discrimination under Title II of Civil Rights Act of 1964 should ordinarily recover attorney's fees unless special circumstances would render such an award unjust. Civil Rights Act of 1964, §§ 201 et seq., 201 (c) (2), 204(a, b), 42 U.S.C.A. §§ 2000a et seq., 2000a(c) (2), 2000a–3(a, b).

10. Injunction ⇐200

Prevailing plaintiffs in class action under Title II of Civil Rights Act who obtained injunctive relief against racial discrimination by owner of drive-in restaurants and sandwich shop were entitled, in absence of any special circumstances, to have reasonable counsel fees included as part of costs to be assessed against respondents. Civil Rights Act of 1964, §§ 201 et seq., 201(c) (2), 204 (a, b), 42 U.S.C.A. §§ 2000a et seq., 2000a(c) (2), 2000a–3(a, b).

Jack Greenberg, New York City, for petitioners.

No appearance for respondents.

PER CURIAM.

[1] The petitioners instituted this class action under Title II of the Civil Rights Act of 1964, § 204(a), 78 Stat. 244, 42 U.S.C. § 2000a–3(a), to enjoin racial discrimination at five drive-in restaurants and a sandwich shop owned and operated by the respondents in South Carolina. The District Court held that the operation of each of the respondents' restaurants affected commerce within the meaning of § 201(c) (2), 78 Stat. 243, 42 U.S.C. § 2000a(c) (2), and found, on undisputed evidence, that Negroes had been discriminated against at all six of the restaurants. 256 F.Supp. 941, 947, 951. But the District Court erroneously concluded that Title II does not cover drive-in restaurants of the sort involved in this case. 256 F.Supp., at 951–953. Thus the court enjoined

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racial discrimination only at the respondents' sandwich shop. Id., at 953.

[2] The Court of Appeals reversed the District Court's refusal to enjoin discrimination at the drive-in establishments, 377 F.2d 433, 435–436, and then directed its attention to that section of Title II which provides that "the prevailing party" is entitled to "a reasonable attorney's fee" in the court's "discretion." § 204(b), 78 Stat. 244, 42 U.S.C.

§ 2000a–3(b).[1] In remanding the case, the Court of Appeals instructed the District Court to award counsel fees only to the extent that the respondents' defenses had been advanced "for purposes of delay and not in good faith." 377 F.2d, at 437. We granted certiorari to decide whether this subjective standard properly effectuates the purposes of the counsel-fee provision of Title II of the Civil Rights Act of 1964. 389 U.S. 815, 88 S.Ct. 87, 19 L.Ed.2d 66. We hold that it does not.

[3–8] When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.[2] A Title II suit is thus private in form only.

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When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.[3] If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.[4]

[9, 10] It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. Because no such circumstances are present here,[5] the District Court on remand

1. "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000a–3(b).

2. In this connection, it is noteworthy that 42 U.S.C. § 2000a–3(a) permits intervention by the Attorney General in privately initiated Title II suits "of general public importance " and provides that, "in such circumstances as the court may deem just," a district court may "appoint an attorney for [the] complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security." Only where a "pattern or practice" of discrimination is reasonably believed to exist may the Attorney General himself institute a civil action for injunctive relief. 42 U.S.C. § 2000a–5.

3. See S.Rep. No. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 1–2 (1963).

4. If Congress' objective had been to authorize the assessment of attorneys' fees against defendants who make completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 Moore's Federal Practice, 1352 (1966 ed.).

5. Indeed, this is not a even a borderline case, for the respondents interposed defenses so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable. Thus, for example, the "fact that the defendants had discriminated both at [the] drive-ins and at [the sandwich shop] was * * * denied * * * [although] the defendants could not and did not undertake at the trial to support their denials. Includable in the same category are defendants' contention, twice pleaded after the decision in Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290, * * * that the Act was unconstitutional on the very grounds foreclosed by *McClung*; and defendants' contention that the Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'" 377 F.2d 433, 437–438 (separate opinion of Judge Winter).

should

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include reasonable counsel fees as part of the costs to be assessed against the respondents. As so modified, the judgment of the Court of Appeals is

Affirmed.

Mr. Justice MARSHALL took no part in the consideration or decision of this case.

390 U.S. 377

Thomas Earl SIMMONS et al., Petitioners,

v.

UNITED STATES.

No. 55.

Argued Jan. 15, 1968.

Decided March 18, 1968.

The defendants were convicted of armed robbery of federally insured savings and loan association. The United States District Court for the Northern District of Illinois, Eastern Division, rendered judgment and they appealed. The United States Court of Appeals for the Seventh Circuit, 371 F.2d 296, affirmed in part and reversed in part, and certiorari was granted. The Supreme Court, Mr. Justice Harlan, held that testimony given by defendant to meet standing requirements to raise objection that evidence is fruit of unlawful search and seizure should not be admissible against him at trial on question of guilt or innocence.

Affirmed in part and reversed and remanded in part.

Mr. Justice Black and Mr. Justice White dissented in part.

1. Criminal Law ⇐339

Improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals in that witness may have obtained only brief glimpse of criminal or may have seen him under poor conditions; even if police subsequently follow most correct photographic identification procedures and show witness pictures of number of individuals without indicating whom they suspect, there is some danger that witness may make an incorrect identification and this danger will be increased if police display to witness only picture of individual who generally resembles person he saw.

2. Criminal Law ⇐339

The danger that initial identification by photograph may result in convictions based on misidentification may be substantially lessened by course of cross-examination at trial which exposes to jury the method's potential for error.

3. Criminal Law ⇐339

The Supreme Court is unwilling to prohibit employment of method of initial identification by photograph, either in exercise of court's supervisory power or as a matter of constitutional requirement; instead, each case must be considered on its own facts, and convictions based on eyewitness identification at trial following pretrial identification by photograph will be set aside on that ground only if photographic identification procedure was so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification.

4. Constitutional Law ⇐266
Criminal Law ⇐1169(1)

Defendant's pretrial identification by means of photographs was not so unnecessarily suggestive and conducive to misidentification as to deny him due process or to require reversal of his conviction, where serious felony had been committed, perpetrators were still at large, inconclusive clues led to defendant, it was essential for FBI agents swiftly