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COURT OF APPEALS

STATE OF NEW YORK

WENCESLAO JUAREZ, ET AL.,

Respondents,

-against-

NO. 5

NEW YORK STATE OFFICE OF VICTIM
SERVICES, ET AL.,

Appellants.

20 Eagle Street
Albany, New York
January 6, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: We'll be starting with
2 appeal number 5, Matter of Juarez v. New York State Office
3 of Victim Services.

4 Good afternoon, counsel; in the Matter of Juarez
5 v. New York State Office of Victim Services. Counsel?

6 MR. DEMUTH: May it please the court, good
7 afternoon, Your Honors. May - - - Owen Demuth on behalf of
8 the appellant, Office of Victim Services. May I please
9 reserve three minutes for rebuttal?

10 CHIEF JUDGE DIFIORE: You may, Mr. Demuth.

11 MR. DEMUTH: Thank you. Your Honors, the
12 Office's 2016 regulations modifying the availability of
13 attorneys' fees during the administrative claim process are
14 both authorized by the Agency's enabling statute and
15 rationally applied here.

16 They are also authorized - - -

17 CHIEF JUDGE DIFIORE: Counsel, may I interrupt -
18 - - may I interrupt you for a moment?

19 MR. DEMUTH: Sure.

20 CHIEF JUDGE DIFIORE: If the attorneys' fees are
21 only recoverable for administrative reconsideration or
22 judicial review, are you eliminating recovery of attorneys'
23 fees in the majority of the cases that find their way to
24 the Board?

25 MR. DEMUTH: That - - - yeah, as a general



1 proposition, that is correct, because we're talking - - -
2 the only stage at which you're eliminated is the initial
3 stage of the claim, which, and I think it's very important
4 to explain right off the bat, what that initial stage
5 entails.

6 CHIEF JUDGE DIFIORE: But my concern is, are you
7 - - - are we then out of synch with what the legislature
8 intended here, to assist people in rewarding reasonable
9 attorney fees?

10 MR. DEMUTH: Oh, not at all, Your Honor. The
11 question, of course - - - and when there's an ultra vires
12 argument made like this, is whether there's a sufficient
13 statutory predicate for the regulations. And here there
14 is, because of the reading together of the plain language
15 of Executive Law 626(1), attorneys' fees must be reasonable
16 before they can be awarded, and in conjunction with
17 Executive Law 623(3), which gives the Office the authority
18 to promulgate rules for the approval of those types of
19 fees. So together we have the sufficient statutory
20 predicate.

21 We know from this language that the Office has
22 the power not only to determine whether the - - -

23 JUDGE RIVERA: Judge, if I may ask a - - - if I
24 may ask a question?

25 MR. DEMUTH: Sure.



1 CHIEF JUDGE DIFIORE: Yes, please.

2 JUDGE RIVERA: Thank you.

3 Counsel, but isn't the problem that what you've
4 done is decide - - - and this is apropos of what the Chief
5 Judge has asked you - - - decide that there's an entire
6 class of conduct and fees that is unreasonable. You've
7 made this per se rule as opposed to, as your own
8 regulations indicate, looking at a variety of factors, kind
9 of the lodestar approach that we see on the civil side and
10 civil rights cases, to determine whether or not the
11 request, the demand, for the fees is reasonable.

12 Instead, you've made that determination up-front
13 without any information about a particular case. Isn't
14 that really the problem with the approach that you've
15 taken?

16 MR. DEMUTH: Well, I don't think it's a problem,
17 because again, whether it's authorized under a statute,
18 talks about is there anything that prevents the agency from
19 using its - - - and here it's supported by two different
20 grounds: its own experience in determining, after years of
21 processing, reviewing, and awarding, thousands upon
22 thousands of claims.

23 And again, I should point out, it's a - - - this
24 is the record - - - it's a four-page pre-printed form.
25 It's not a pleading. It's not a brief. There's no need



1 for the claimant to present an argument or appear - - -

2 JUDGE RIVERA: Well, counsel - - - but counsel,
3 that may be grounds to determine in any particular case
4 that the amount of the demand is unreasonable or that a
5 lawyer is not necessary. And if the lawyer is seeking
6 their own fees when they have other people in the office
7 doing it, perhaps that's unreasonable.

8 But again, and we have it in the record - - -
9 there may be cases where it's not going to take a few
10 minutes to do the form, right? There may very well be more
11 involved.

12 And what you have done is make it impossible for
13 that kind of case to - - - for the - - - for, in that kind
14 of a case, excuse me, the victim to seek attorneys' fees
15 for that (audio interference).

16 MR. DEMUTH: Right. But they didn't just come up
17 with this out of - - - pull this out of the air. They did
18 it based on agency experience, which does count, and which,
19 consistent with this court's line of precedent, can justify
20 the regulations with sufficiency.

21 JUDGE RIVERA: Why - - - why can't you just take
22 it to the legislature? It seems to be a policy choice.
23 Why doesn't it go to the legislature, as the Third
24 Department mentioned in its writing?

25 MR. DEMUTH: There's no need for it to go the



1 legislature. The authority is right there in the statute.
2 Reasonable attorneys' fees - - - I know you're concerned
3 about - - - it's true, under the old regime, they - - -
4 they - - - they reviewed applications on a case-by-case
5 basis. But the important question here: is there anything
6 in the statute that compels - - - and of course this was
7 the big concern of the Third Department - - - that compels
8 attorneys' fees to be paid at all stages of an attorney
9 representation - - -

10 JUDGE STEIN: Chief Judge, may I ask a question?

11 MR. DEMUTH: Sure.

12 CHIEF JUDGE DIFIORE: Yes. Judge Stein.

13 JUDGE STEIN: Mr. Demuth, would your argument be
14 the same or would it be as strong if there were not these
15 victim assistance programs throughout the state? And has
16 that changed anything from when - - - when you - - - when
17 the earlier regulations were promulgated? Is that
18 different?

19 MR. DEMUTH: It - - - it's very different. And I
20 - - - I - - - in answer to your first part of your
21 question, I don't think - - - I think we would - - - even
22 if we were just talking about agency experience - - - and
23 here we have two grounds, we have agency experience and the
24 expertise, which as - - - as you just referred to the
25 Office's creation, funding, and training of this extensive



1 statewide network of VAPs - - - if we just had the
2 experience alone, I think that's enough, given - - - given
3 the ultra vires standard.

4 But we do have these victim assistance programs
5 which - - -

6 JUDGE STEIN: How many are there? And - - - how
7 many are there, and who pays for them?

8 MR. DEMUTH: There are 228 at the moment. They
9 receive funding from - - - from both the Federal Victims of
10 Crimes Act and also from the State Criminal Justice
11 Improvement Account. And contrary - - - I know this was
12 one of the affidavits that petitioner submitted states this
13 - - - but they do not primarily come from general taxpayer
14 funds.

15 They are primarily funded by fees, fines, and
16 surcharges that are paid by persons convicted of federal
17 and state crimes.

18 JUDGE STEIN: But do they - - - do they impact
19 how much money is available to go to the victims directly
20 for their expenses, reasonably incurred, as the statute
21 says?

22 MR. DEMUTH: I'm sorry, do they impact - - -

23 JUDGE STEIN: Does the cost of the VAPs come out
24 of a budget that OVS has that has to be, you know,
25 delegated to either victim direct expenses from the victim



1 - - - from the crime, versus counsel fees, or something
2 else?

3 MR. DEMUTH: No, they - - - they come from
4 limited sources of funding, that the VOCA - - - you know,
5 which is the federal statute. And they - - - and they fund
6 not just the - - - you know, the VAPs in their capacity of
7 - - - of helping to fill out the claim form, but all of the
8 different services that - - - that they provide.

9 And they run the gamut across the state from - -
10 -

11 JUDGE STEIN: No, I understand that. But I don't
12 think I'm making myself clear. Is - - - if - - - if the
13 money was not spent on the VAPs, would that be more money
14 available to pay attorneys, or conversely, if more money
15 was paid to attorneys for attorneys' fees, would there be
16 less money available to go directly to the victims?

17 MR. DEMUTH: I think as a general proposition,
18 that is true. The more - - - the more money that would be
19 paid to attorneys' fees would be less money that would
20 essentially go - - -

21 JUDGE FAHEY: Judge?

22 MR. DEMUTH: - - - but there isn't really a - - -

23 JUDGE FAHEY: May I ask a question?

24 MR. DEMUTH: Yes, sir.

25 CHIEF JUDGE DIFIORE: Yes, Judge Fahey.



1 JUDGE FAHEY: Thank you. Judge Stein makes a
2 good point, particularly on the policy level. But if we're
3 restricted now to just a pure statutory interpretation of
4 the meanings of the word "shall" and the meaning of the
5 word "may", how do you get around the "shall" part of - - -
6 of your amend - - - of your new regulations?

7 MR. DEMUTH: I'm sorry - - -

8 JUDGE FAHEY: The original regulation says "shall
9 grant reasonable attorneys' fees." I think it's fair to
10 say that the word "reasonable" gives some discretion to the
11 agency, as it properly should.

12 MR. DEMUTH: That's right.

13 JUDGE FAHEY: But "shall grant reasonable
14 attorneys' fees" means that it hinges not on whether or not
15 a person may use an attorney or an agency, but the "shall"
16 part takes away all discretion from the agency. And that
17 was the legislative enactment is in the executive law.
18 Where does the agency get the authority to make that
19 "shall" a "may"?

20 MR. DEMUTH: I don't think that's - - - that's in
21 conflict. Are you talking about "shall" as it's used in
22 626(1), Your Honor?

23 JUDGE FAHEY: Yes. Yes.

24 MR. DEMUTH: Well - - - well, our argument, of
25 course, it's - - - it's - - - as the Third Department read



1 it, and as petitioners would like to read it, it just means
2 shall include attorneys' fees, just at every stage, even
3 though that's - - -

4 JUDGE FAHEY: Well, let me stop you. I'm not
5 arguing that. What I'm saying is I do think you have some
6 discretion as to whether or not the attorneys' fees are
7 reasonable. If an attorney came in and charged 500 dollars
8 an hour for this work or tried to get the agency to pay for
9 that, it's patently unreasonable, no one's going to say
10 that you were acting outside of your specific powers that
11 were set out in the statute.

12 But if you were to say they shall not get any
13 because there's a form that they can rely on from another
14 not-for-profit agency, that doesn't seem to be your call,
15 under the statute.

16 MR. DEMUTH: Well, I respectfully disagree.
17 Again - - -

18 JUDGE FAHEY: Why is that?

19 MR. DEMUTH: Because - - -

20 JUDGE FAHEY: How do you get around the "shall";
21 and where do you get the authority to say "may"?

22 MR. DEMUTH: I - - - it's - - - again, "shall" -
23 - - reasonable attorneys' fees, as we view it, as the
24 Office interpreted, means not just on a case-by-case basis,
25 is the amount too much or is it too little. It - - - there



1 is nothing in the statute that prevents them from also - -
2 - based - - - as long as they have a rational explanation
3 for it, based on their experience, and of course with the
4 Victim Assistance Programs pitching in to help - - - from
5 also determining that look, we've done thousands of these
6 claims. It's four - - - it's a four-page - - - all it asks
7 for is basic factual information - - -

8 JUDGE FAHEY: No, no. I understand that. I'm
9 not - - - actually, your policy argument makes all the
10 sense in the world. I'm not dis - - - I'm not arguing with
11 you about that.

12 MR. DEMUTH: Okay.

13 JUDGE FAHEY: What I'm saying is this is a matter
14 of pure statutory interpretation for this court and - - -

15 MR. DEMUTH: Right.

16 JUDGE FAHEY: - - - that requires us to say that
17 if we're to agree with you, I think we would be saying that
18 the word "shall" can be substituted with the word "may".
19 And that seems to be something that we don't normally do.
20 Can you - - -

21 JUDGE FEINMAN: If I may?

22 JUDGE FAHEY: Can I just get an answer from - - -

23 JUDGE FEINMAN: I'm sorry.

24 JUDGE FAHEY: - - - Mr. Demuth first?

25 CHIEF JUDGE DIFIORE: Yes.



1 MR. DEMUTH: You're - - - you're right, Your
2 Honor. If we were stuck with 626(1) by itself - - -

3 JUDGE FAHEY: Um-hum.

4 MR. DEMUTH: - - - it'd be a tougher argument to
5 make. But we're reading it in conjunction with 623.

6 JUDGE FAHEY: Um-hum.

7 MR. DEMUTH: And the fact that - - - that
8 there's, you know, reasonable attorneys' fees, and Office,
9 you will decide - - - you will promulgate the regulations,
10 when such attorneys' fees may be approved.

11 Now, this - - - as we argue, it extends not just
12 to individual claims, which of course was the old regime,
13 but there's nothing in the statute that compels them to
14 impose a categorical limit.

15 And the case law - - - I think the two cases that
16 - - - that we cited in our brief that best support this,
17 even though they don't talk about attorneys' fees - - -
18 they're a different issue - - - are the Bernstein v. Toia
19 case and the Sigety v. Ingraham case.

20 In both of those cases - - - it was a very
21 similar argument. And Sigety was - - - no, I'm sorry - - -
22 in Bernstein, it was a Department of Social Services
23 regulation that imposed a flat grant for shelter allowances
24 across each - - - uniformly applied within each district
25 across the state.



1 And the argument the petitioners made to
2 challenge the reg is very similar to what they're making
3 here: no, you can't do that. You don't have the statutory
4 authority. You have to apply it on a case-by-case basis.

5 This court flatly rejected that. So - - - said
6 no, the statute may be silent, but silence alone does not
7 create a conflict between the statute and the regulation.
8 So - - -

9 JUDGE FAHEY: Um-hum. Thank - - - thank you for
10 your answer.

11 MR. DEMUTH: Okay.

12 CHIEF JUDGE DIFIORE: Judge Feinman? Judge
13 Feinman?

14 JUDGE FEINMAN: So following up on Judge Fahey's
15 question, if I understand your argument, it's not that
16 you're trying to read out the word "shall", it's that - - -
17 it's how you're interpreting "reasonable"?

18 MR. DEMUTH: Yes.

19 JUDGE FEINMAN: Okay.

20 MR. DEMUTH: Yes, absolutely. We're not just
21 looking at reasonable attorneys' fees as - - - as - - - you
22 know, as it previously was looked at, on a - - - on an
23 individual case-by-case basis.

24 JUDGE FEINMAN: Right.

25 MR. DEMUTH: But we're using - - -



1 JUDGE FEINMAN: So you're looking at - - -

2 MR. DEMUTH: - - - an - - - right - - -

3 JUDGE FEINMAN: You're looking at "reasonable" in
4 a different way.

5 MR. DEMUTH: Right, it's - - -

6 JUDGE FEINMAN: But I just want to come back to
7 the point that Judge Rivera made at the outset, which is
8 can you point to any other examples where there has been a
9 sort of determination that a category of fees or claims are
10 not going to be reasonable?

11 MR. DEMUTH: I - - - if you're asking me for
12 another attorneys' fees case, I couldn't provide you with
13 one. But I don't think that provides - - - the standard of
14 review being an ultra vires claim would be the same. You
15 first look at the statute. Is there anything in there
16 that's completely contradictory - - - anything in the reg
17 that's contradictory to statute, and then having decided
18 that there isn't, you then look and say, well, is there a
19 rational basis.

20 And here, we've checked both of those boxes,
21 because we have the language - - - it - - - again, the
22 Third Department read so much into the fact that it was
23 silent, and - - - and they - - - they didn't like the fact
24 that there was nothing one way or the other talking about
25 the stages of the claim. But the reality is - - - and



1 agency experience does count - - - the reality is, they do
2 these claims on a regular basis, and it's been their
3 determination that it simply doesn't require - - - in
4 general, attorneys' fees are not awarded for routine
5 clerical tasks. And that's what the completion of this
6 form entails.

7 And to the extent that there's a special claim, a
8 rare claim, a vulnerable claimant, who needs extra help,
9 the Office specifically contemplated that situation when it
10 created and built up this incredibly successful network of
11 of VAPs.

12 And - - - and the Third Department simply gave
13 short shrift to these VAPs. They simply said, well, you
14 know, they may help in some cases, but for them to
15 determine that they're important in - - - in helping with
16 the claim process - - -

17 JUDGE RIVERA: Judge, if I could ask a - - -

18 MR. DEMUTH: - - - as a policy determination - -
19 -

20 JUDGE RIVERA: - - - question, please?

21 CHIEF JUDGE DIFIORE: Yes, Judge Rivera.

22 JUDGE RIVERA: Counsel, what - - - if you know,
23 what percentage of the victim applicants apply by using the
24 VAP?

25 MR. DEMUTH: It's quite a lot. Over the last



1 five years it's about eighty-five percent, I'm told, of all
2 claims, are submitted by Victim Assistance Programs. Not
3 to mention a thousand - - -

4 JUDGE RIVERA: And did I - - - did I correctly
5 read the annual reports that the main - - - or the largest
6 number of the denials are based on either the failure or
7 the lack of sufficient documentation to support the claim?

8 MR. DEMUTH: I think that's correct. They had -
9 - - they had a breakdown in the report - - -

10 JUDGE RIVERA: Does that - - - does that differ
11 between someone applying through - - - by using services at
12 a VAP or a lawyer; do you know?

13 MR. DEMUTH: No, I'm afraid I don't know that.
14 But right, that is - - - that is the main reason why it's
15 denied. A person - - - there's not a lot - - - you could
16 put the claim in first. And I think it's also important to
17 point out, this - - - this is not - - - this is not like a
18 claim filed against the State. This is not an adversarial
19 process.

20 This - - - the Office is only interested - - -
21 especially at the initial stage of the claim - - - in
22 obtaining information. Proof of a - - -

23 JUDGE WILSON: Chief, I have a question, if I
24 might, on this point?

25 CHIEF JUDGE DIFIORE: Judge Wilson?



1 JUDGE WILSON: Counsel, the way I read your
2 regulation 525.13, it would allow or does allow and - - -
3 an applicant to - - - whose claim is denied, to submit
4 additional evidence. Is that right?

5 MR. DEMUTH: That's correct. The - - - if a
6 claim is - - -

7 JUDGE WILSON: So in theory, I, an
8 unsophisticated person, could file your four-page form. My
9 claim might be denied. I can engage counsel. Counsel
10 could provide whatever, you know, counsel deemed was
11 missing, and you would have to reconsider that evidence on
12 the motion; is that right?

13 MR. DEMUTH: That's right. You could put in any
14 - - -

15 JUDGE WILSON: And I could - - - and I could get
16 fees for that?

17 MR. DEMUTH: Right. That's the so-called
18 reconsideration stage. And yes, fees are available at that
19 stage. That's - - - you know, that - - - that's obviously
20 - - - you know, that's when the hearings take place, if
21 there is one. That's - - - no one - - - no one's saying
22 that you wouldn't - - - a hearing - - - an attorney would
23 not be a valuable resource - - -

24 JUDGE GARCIA: Chief, may I ask a question?

25 CHIEF JUDGE DIFIORE: Yes, Judge Garcia.



1 JUDGE GARCIA: Just quickly. Would this
2 regulation pass muster if you had prohibited all fees,
3 including for this reconsideration motion? Would that
4 violate your statutory authorization?

5 MR. DEMUTH: I think we'd have a real problem,
6 Your Honor, because the phrase "representation before the
7 Office" contemplates that there would be, you know, some
8 kind of proceeding that would be eligible for attorneys'
9 fees, in which case, here it's reconsideration.

10 So right, I - - - I don't think - - - I don't
11 think the Office could - - - could lawfully - - - it would
12 be a real problem defending that, if they cut out fees - -
13 -

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

15 MR. DEMUTH: - - - except for judicial review.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 Counsel?

18 MR. CARPINELLO: Yes, Your Honor. George
19 Carpinello, Boies Schiller Flexner, for the respondents.

20 Your Honor, I think the Appellate Division got it
21 exactly right when it said that the Office has literally
22 rewritten the statute. And we put a chart in our brief
23 that shows how they took words out of the statute and put
24 words in the statute.

25 And I think Judge Rivera is correct, when they -



1 - - when she - - - the question posed - - - I think it was
2 Judge Rivera that said wouldn't this eliminate the vast
3 majority of claims? And absolutely, it would, and counsel
4 conceded as much.

5 At one fell swoop, they're limiting the vast
6 majority of claimants getting attorneys' fees, despite the
7 fact that the legislature was very clear that attorneys'
8 fees are allowed - - - reasonable attorneys' fees are
9 allowed for representation before the Office.

10 JUDGE STEIN: Chief, may I ask a question?

11 MR. CARPINELLO: Yes, Your Honor.

12 CHIEF JUDGE DIFIORE: Yes.

13 JUDGE STEIN: Counsel, is this case
14 distinguishable - - - Judge Feinman, I believe, asked
15 whether there were any other cases of this nature, where
16 some - - - something was categorically precluded. And I'm
17 wondering if you can distinguish this case from Regan, in
18 which the statute directed the Crime Victims Board to
19 consider all the claimant's financial resources, but the
20 Board adopted rules which exempted various resources from
21 consideration? And I believe that was upheld. How is this
22 different from that?

23 MR. CARPINELLO: Right. I - - - Regan is
24 directly on point. Regan - - - the court said in Regan - -
25 - this court said in Regan that the predecessor of this



1 agency had a statute that says in order to get - - - in
2 order to be qualified for the award, you had to establish
3 financial hardship.

4 And the Board said, okay, well we're going to say
5 we're not including the following categories of income and
6 property in hardship. And the court said, where did you
7 get that from? And the court said that's not in the
8 statute.

9 You - - - you're acting ultra vires because
10 you're adding - - - you're changing the definition in the
11 statute for whatever administrative convenience or for
12 whatever reason. You're changing the plain language of the
13 statute.

14 And by the way, there's no deference to the
15 agency in this case, because what we're talking about here
16 is plain English. There's no technical issue here.
17 They're changing the terms of the statute.

18 JUDGE STEIN: Well, the term "reasonable", would
19 - - - would you not agree, might require some expertise in
20 terms of what is reasonable in this scheme, in this
21 reimbursement scheme with - - - of this agency? I - - -

22 MR. CARPINELLO: Exactly.

23 JUDGE STEIN: So - - - so I guess, you know - - -
24 it's whether you're talking about "shall" or whether you're
25 talking about "reasonable". But if you're talking about



1 "reasonable", it seems to me that the expertise of the
2 agency, you know, has - - - has some relevance here.

3 MR. CARPINELLO: Well, two points. Number one,
4 the term "reasonable", chosen by the legislature, has some
5 meaning in the law. And "reasonable fees" have always been
6 interpreted under the common law, as we say in our brief,
7 as a case-by-case determination, based upon the difficulty
8 of the case, based on the experience of the person, based
9 upon the - - -

10 JUDGE STEIN: Well, would - - - would you agree
11 that if you sought fees in the case that - - - that a judge
12 reviewing your request for fees might say, you know, this
13 work that you're charging X dollars an hour for, or
14 whatever, this can be done - - - it doesn't have to be done
15 by a lawyer. It can be done, say, in this case, by a
16 Victim Assistance person. It's just - - - it's not legal
17 work, per se. And - - -

18 MR. CARPINELLO: If - - -

19 JUDGE STEIN: - - - and based upon the nature - -
20 - well, the nature of the work, really, is what we're
21 talking about here.

22 MR. CARPINELLO: I have several responses to that,
23 Judge. First of all, let's take, for example, CPLR Article
24 86, which says if you bring certain cases against State,
25 you're entitled to attorneys' fees. Let's say the



1 administrative board adopted a regulation that said you
 2 know what, election law cases, by their very nature, are -
 3 - - are - - - you don't need to - - - you don't - - -
 4 that's not reasonable, because the statute said if it's
 5 unjust, or the State's position is substantially justified,
 6 that - - - that begs for an individual determination in
 7 each case.

8 And if the administrative board said we're going
 9 to cut out a whole category of cases, that would be ultra
 10 vires. If the judge in the case you gave said what you did
 11 in this is - - - does not merit attorneys' fees, that would
 12 be reasonable.

13 By the way, what people do in these cases does
 14 merit attorneys' fees. The form may be four pages long;
 15 the statute is forty pages long.

16 And if you look at the statute, and if you look
 17 at the qualifications for getting - - - getting recompense
 18 under the statute, you definitely need a law degree to
 19 figure it out. For example, you cannot make a claim a - -
 20 - one year after the commission of a crime or discovery of
 21 the commission of the crime.

22 JUDGE STEIN: Well - - - well, Mr. Carpinello,
 23 how about the fact that here - - - I - - - I understand
 24 that one of the claimants had some extraordinary emergency
 25 expenses that went to over 1,000 dollars. But the other



1 claimant was seeking fees of, you know, a couple of hundred
2 dollars, or that's what the Board determined was
3 appropriate.

4 So you know, isn't that something that can be
5 considered in terms of the - - - the difficulty of the work
6 and - - - and can't - - - can't they make a determination
7 that it just isn't that difficult to file this form.

8 There may be other considerations, and yes, if
9 you get denied because you don't understand the whole
10 statute, then you go to the next level and you get a
11 lawyer.

12 MR. CARPINELLO: Well, first - - -

13 JUDGE STEIN: And it doesn't seem that there's
14 any prejudice to the victim for doing that.

15 MR. CARPINELLO: Well, first of all, the very
16 examples you gave prove our point. In the Soriano case,
17 you'll see all the different things the lawyer did. He got
18 HIPAA statement, he got crime victim statements, he got
19 domestic relations stuff. Under this law - - - under the
20 statute, he gets nothing, just like the person who submits
21 a claim for 250 dollars gets nothing.

22 Now, if the Board said the person who submits 250
23 dollars gets nothing but the other person gets up to 1,000,
24 that would be reasonable fees. It's not reasonable to say
25 none of them get nothing under any circumstances, which is



1 - - -

2 JUDGE STEIN: But - - -

3 MR. CARPINELLO: - - - clearly inconsistent with
4 the statute.

5 JUDGE STEIN: - - - but would it be reasonable to
6 say that the cost of determining - - - eighty-five percent
7 of these are decided on the initial claim, right?

8 MR. CARPINELLO: No, no.

9 JUDGE STEIN: No?

10 MR. CARPINELLO: What he - - - this eighty-five
11 percent statistic he gave you was the number of people who
12 go through the VAP, which is - - - which is, by the
13 spectacularly unsuccessful.

14 We cite in our papers the fact that the VAPs - -
15 - almost every VAP has less than fifty percent success,
16 some as low as ten, fifteen percent success. And they're
17 getting millions of dollars.

18 In any event, whether the VAPs are there or not
19 is a policy decision for the legislature. Here the ones -
20 - -

21 JUDGE GARCIA: Judge, can I ask a question?
22 Chief?

23 CHIEF JUDGE DIFIIORE: Judge Garcia.

24 JUDGE GARCIA: Counsel, what if the rule were to
25 have been they capped attorneys' fees at this stage for



1 fifty dollars - - - fifty-dollar cap for filing an
2 application. Would that violate the statute?

3 MR. CARPINELLO: Absolutely. Because the statute
4 says it's 1,000. And by the way - - -

5 JUDGE GARCIA: Yeah, but it just says it's 1,000
6 overall, for everything. I mean, what if they said fifty
7 dollars for this initial phase of filing is the cap?

8 MR. CARPINELLO: It - - - there's no statutory
9 authorization for that. If the legislature - - -

10 JUDGE GARCIA: But it's not authorization, really
11 so much we're talking about here, right? It's is this
12 inconsistent? Would that be inconsistent with the
13 authorization they have?

14 MR. CARPINELLO: Yes. Because the legislature
15 said - - - it said two things. Number one, you can get
16 attorneys' fees - - - reasonable attorneys' fees. And they
17 said up to 1,000 dollars.

18 And by the way, Judge Wilson asked a question
19 about if I lose, can I get an attorney and can I reapply?
20 Yes. But under this regulation, if you lose, you get
21 nothing for attorneys' fees.

22 How many attorneys are going to retain a client
23 on a reconsideration where they're going to get zero if
24 they lose? And if they go to the Appellate Division and
25 they lose, they get zero. That - - -



1 JUDGE GARCIA: I think, counsel, what I'm
2 struggling with here, though, is there does seem to be - -
3 - I think Judge Fahey was speaking to this earlier - - -
4 some flexibility built into the language of the statute, a
5 reasonable amount here. And we can disagree on what that
6 means.

7 But I think the court has been hesitant to jump
8 into that dispute or policy call where there's
9 authorization that gives the agency some flexibility. And
10 it seems to me, it has to be particularly clear that it's a
11 violation. And once you - - - you know, that it's not
12 authorized. And once you accept that there - - - and I
13 take your point on reasonableness and the legal definition
14 of reasonableness with respect to fees.

15 But it becomes harder to line-draw, I think, for
16 this court, once we accept some level of flexibility in the
17 - - - at the agency level to determine what's reasonable.

18 MR. CARPINELLO: I guess - - -

19 JUDGE GARCIA: And I think that's what we're
20 struggling with here.

21 MR. CARPINELLO: I guess I would - - - I guess I
22 would - - - just respond - - -

23 JUDGE FAHEY: Judge, can I - - - go ahead, Mr.
24 Carpinello. You can - - - I'm sorry.

25 MR. CARPINELLO: I guess that would - - - thank



1 you, Your Honor.

2 I guess I would respond by saying how else is the
3 legislature supposed to say that you're entitled to fees up
4 to 1,000 dollars? Of course they're going to limit it to
5 reasonable, because they don't want an automatic right to
6 get fees based upon the facts of the individual case.

7 Just like Article 86 says you get reasonable
8 fees. That doesn't mean you can say there's a whole
9 category of cases - - - if some judge in New York City said
10 there's a whole category of cases, I'm not going to give
11 any fees to, because as a matter of category, I don't agree
12 with that; unless you want the legislature to say: when we
13 say 1,000 dollars, we mean 1,000 dollars; we don't mean you
14 can't do - - - you can do this; we don't mean you can do
15 that.

16 The - - - the legislative directive - - -

17 JUDGE FAHEY: Chief, can I follow up with - - -
18 just a point here, for Mr. Carpinello?

19 CHIEF JUDGE DIFIORE: Judge Fahey.

20 JUDGE FAHEY: Thank you.

21 It seems to me in listening to the arguments that
22 we're really talking about the way we determine what is
23 reasonable. Is it a blanket determination by the type of
24 claim that's brought or a blanket determination made
25 initially by the agency for all of a certain kind of a



1 claim? Or is it a determination that must be made on an
2 individual basis for each claim that's made on the basis of
3 the fees - - - not on the basis of the claim, but on the
4 basis of the fees?

5 And I'd like you to address that, Mr. Carpinello,
6 and then Mr. Demuth, when you get a chance, if you could
7 tell me what you think about narrowing this question down.
8 Is it really the question of - - - of how we determine the
9 application of the word "reasonable"? Is it a case-by-case
10 basis, or does it go to categories?

11 All right, Mr. Carpinello?

12 MR. CARPINELLO: First let me say that it's got
13 to be on a case-by-case basis. That's traditionally the
14 way any - - - any statute that provides for award of fees
15 and talks about reasonable fees, expects there to be a
16 determination based on a number of factors.

17 In fact, if you look at this agency's own
18 regulations, it has in subsection (d) of the regulation
19 they changed - - - it lists twelve factors to look at. And
20 they ignored that and said we're going to have a blanket
21 rule that covers all the cases.

22 Let me also say that you have to look at this
23 case in context. For forty years they had no problem
24 assigning fees on an individual basis. What happened? In
25 2015, a law firm down in Staten Island started advertising



1 to represent victims of crimes. It was extremely
2 successful in submitting claims. And the agency didn't
3 like it.

4 And what they did - - - and this is undisputed in
5 the record - - - is they started calling the clients of
6 this law firm and threatening them with liens - - -
7 wrongfully - - - if they continued to have - - - be
8 represented by this client.

9 And it was in that contact that this agency
10 finally - - - they finally decided, because it was so much
11 more administratively efficient to have this blanket rule -
12 - - what did it do? It decided - - - it designed to put
13 the Gordon firm out of business.

14 And at the same time, they filed a claim with the
15 Second Department against the firm for alleged violations
16 of ethics, which was - - -

17 JUDGE RIVERA: Judge, if I may ask a question a
18 question, please?

19 CHIEF JUDGE DIFIORE: Judge Rivera.

20 JUDGE RIVERA: Counsel, I just want to circle
21 back to a - - - a question asked by Judge Garcia. I'm
22 going to put a slightly different spin on it.

23 He asked if they just said, look, for filling out
24 the form you get fifty dollars, it caps at fifty dollars,
25 no more than that, and you said no, that would not be



1 acceptable. What if they looked at what they have
2 otherwise paid - - - looking at all the factors for that
3 process of applying for compensation, and determined that
4 it falls within a range, and that's why they reach a
5 particular number; but they allow for anyone to request
6 above that number if they can substantiate the request?

7 Why wouldn't that be a way of thinking about the
8 exercise of their authority and how they can determine what
9 is reasonable, based on their experience, without, as you
10 point out, eliminating an entire class of fees?

11 MR. CARPINELLO: And if I understand your
12 question, in other words, if they adopted a regulation that
13 said where claims are within this range, we're going to
14 allow an attorney's fee of X; within this range, we're
15 going to allow an attorneys' fee of Y; is that - - -

16 JUDGE RIVERA: Correct.

17 MR. CARPINELLO: Okay. Well, first of all, the -
18 - - the lower court already held - - - they did that, in
19 fact. They - - - they said - - - well, in a more butchered
20 way, they said you're never going to get a fee larger than
21 the award - - - larger than the victim award. The courts
22 below said - - - and the State did not challenge this - - -
23 said that's ultra vires. There's nothing in the statute
24 that allows you to do that.

25 If the - - - and let me just also add that



1 there's no direct relationship between the amount of the
2 award and the difficulty of the form or the reasonableness
3 of the fee. It - - - you may vindicate a person's very
4 important rights by getting 250 dollars for their watch,
5 and it may cost the attorney five hours to do that, or ten
6 hours to do that. And - - -

7 JUDGE RIVERA: Well, I understood - - - I
8 understood your point before that whatever one may think
9 about what on its face appears to be the simple accessible
10 aspects of the form, there's a great deal of work and
11 research that may go behind that to ensure you have
12 properly represented the client.

13 MR. CARPINELLO: Absolutely.

14 JUDGE RIVERA: And the fact that a client, if
15 they would do it on their own and was successful, doesn't
16 mean that they were successful at getting the full amount
17 that they could have, because they did it on their own. So
18 I understood all of that point.

19 But I am finding it difficult to understand sort
20 of your pushback on this that if they relied on their
21 experience and expertise to choose a range, but
22 nevertheless allow an attorney to argue for more if they
23 could show, as you say, look, this took X number of hours,
24 because I - - - we had to do this and we had to do that.
25 Why wouldn't that, again, be within the scope of the



1 authority and - - - and within the spirit of what the
2 legislature is trying to do? Because in part, through
3 attorneys' fees, you're trying to encourage lawyers - - -
4 whatever the agency may think, you're trying to encourage
5 lawyers to do this. That's the point.

6 MR. CARPINELLO: And they're - - - exactly. And
7 they're trying to dis - - - they're actively trying to
8 discourage lawyers from doing this. That's the genesis of
9 the rule.

10 But some - - - I'd have to see the guideline,
11 because I'm not sure - - -

12 JUDGE STEIN: Why would - - - Mr. Carpinello, why
13 would they want to discourage giving awards to help
14 victims? I don't - - -

15 MR. CARPINELLO: No.

16 JUDGE STEIN: - - - I guess I don't understand
17 the premise of the argument that the - - - that the Office
18 is out to do harm to the very victims that they're - - -
19 that they're assigned to protect. That's their whole
20 purpose. Why - - - I don't understand the - - -

21 MR. CARPINELLO: They're out to - - - what - - -
22 they're out to put the law firms out of the business of
23 doing it.

24 JUDGE STEIN: Why? Why?

25 MR. CARPINELLO: Well, you'd have to ask them.



1 But they - - - I think they said in their papers - - - or -
2 - - or they said right in their papers, we like the VAPs.
3 We think they're better than private lawyers. We don't
4 like - - - we don't - - - we think this is not an economic
5 relief act for lawyers. They didn't like the fact that
6 this law firm was doing this and they had to award fees to
7 the lawyers.

8 And again, keep in mind, Judge Rivera and Judge
9 Stein, we're talking about 1,000 dollars, maximum, even if
10 you have to take this case to the Appellate Division.

11 CHIEF JUDGE DIFIORE: But Mr. Carpinello, is it
12 not reasonable for the agency to consider the assignment of
13 dear taxpayer dollars to the substance of a - - - to the
14 actual harm that is attempted to be recovered by the crime
15 victim, as opposed to, maybe in their view, they don't want
16 to line lawyers' pockets?

17 MR. CARPINELLO: Well, no - - -

18 CHIEF JUDGE DIFIORE: Is that not a - - -

19 MR. CARPINELLO: No, I think any - - - any - - -
20 any - - - first of all, any - - - any system that sets up
21 an award of attorneys' fees is designed to encourage
22 lawyers to help the victims. So I don't think there's a
23 dichotomy between helping the lawyers and helping the
24 victims.

25 There is - - -



1 CHIEF JUDGE DIFIORE: Thank you - - - thank you,
2 counsel.

3 JUDGE WILSON: Chief, I'm sorry - - -

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 JUDGE WILSON: - - - I have a couple of
6 questions, if I might?

7 CHIEF JUDGE DIFIORE: For Mr. Carpinello?

8 JUDGE WILSON: Yes, for - - -

9 CHIEF JUDGE DIFIORE: Certainly.

10 JUDGE WILSON: - - - Mr. Carpinello, yes.

11 CHIEF JUDGE DIFIORE: Yes.

12 JUDGE WILSON: So first, let me vary Judge
13 Garcia's question a little bit. Suppose the intake form,
14 instead, just said provide your name, address, and phone
15 number, that was it, and we'll contact you for all the
16 additional information. And the agency promulgated a rule
17 saying you can't get attorneys' fees for filling out that
18 form. Do they have the statutory authority to do that?

19 MR. CARPINELLO: Yes, because I don't think you
20 need legal advice to get your name, address, and phone
21 number, unlike these forms - - -

22 JUDGE WILSON: So in - - - so in some measure,
23 the statutory advice turns on either your, I guess, or the
24 agency's determination as to the necessity of legal advice
25 in completing whatever the initial form is?



1 MR. CARPINELLO: Well, the legislature made the
2 determination that you may need legal advice to - - - to
3 file a claim, and that's what these - - -

4 JUDGE WILSON: Well, but the legislature didn't
5 know what the form would contain, right?

6 MR. CARPINELLO: No, actually the legislature
7 knew very much what the form would contain, because they
8 wrote a forty-page statute that said the following people
9 are eligible under the following circumstances with the
10 following sections, within the following time frame.

11 And they gave - - - they gave - - - and it would
12 - - - it would literally take a lawyer, two hours to three
13 hours to read the statute and to figure out whether a
14 particular claim came within the scope. That's what a
15 lawyer has to do.

16 And it's not filling out a four-page form. It's
17 figuring out whether - - -

18 JUDGE WILSON: But - - -

19 MR. CARPINELLO: - - - the rights here are
20 allowable. And the legislature realized that - - - and the
21 legislature realized that when they wrote the statute, and
22 they said you need to - - -

23 JUDGE WILSON: But it didn't specify what the
24 initial form had to ask for, is that right?

25 MR. CARPINELLO: No, but they - - - but they said



1 you can get 1,000 dollar for representing somebody in - - -
2 in front of the Board.

3 JUDGE WILSON: Right.

4 MR. CARPINELLO: And that's what - - -

5 JUDGE WILSON: Right. Let me move on - - -

6 MR. CARPINELLO: - - - that's what the - - -

7 JUDGE WILSON: - - - let me move on to my second
8 - - -

9 MR. CARPINELLO: I'm sorry. If I may - - -

10 JUDGE WILSON: I think I've got - - - I've got
11 your answer there, I think.

12 So there's a different way, I think, to read
13 Section 626, which is it's a definitional section. And it
14 says, "Out-of-pocket losses shall mean", and it includes a
15 bunch of things that are within the universe of what the
16 agency may compensate people for, but it doesn't say that
17 the agency must do so.

18 And just as an example, instead of focusing on
19 the provision about attorneys' fees, there's a - - - the -
20 - - I guess it's the second sentence says, "Such expenses
21 or indebtedness shall include the cost resulting from" - -
22 - sorry, "the cost of counseling for", among other things,
23 "guardians of a homicide victim."

24 But I take it your position is not that whatever
25 the costs are for counseling the guardian of a homicide



1 victim, the agency must pay those. Is that right? It can
2 some restrictions around that even though the word
3 "reasonable" doesn't appear there.

4 MR. CARPINELLO: Well, first, yes, they do have
5 to pay them. They have to make a determination as to
6 whether the claim is substantiated, and they have to pay
7 within the limits of the statute.

8 But if they have - - -

9 JUDGE WILSON: Whatever - - - whatever the claim
10 is, even if it - - - even if the counseling is not
11 legitimate, even if there's really no need for it, they
12 can't investigate that?

13 MR. CARPINELLO: Certainly they can. As they - -
14 - as they - - - they can certainly do that. I mean, if
15 they find the claim to be a fraud or illegitimate - - -

16 JUDGE WILSON: Or unnecessary.

17 MR. CARPINELLO: Or unnecessary. But they can
18 also do that with attorneys on a case-by-case basis.

19 But to take your example, it would be illegal for
20 them to say we're - - - no counseling fees are going to be
21 awarded unless you go seven visits to a counselor. Where
22 would you get that in the statute? That's exactly what
23 they're saying - - -

24 JUDGE WILSON: Could they - - -

25 MR. CARPINELLO: - - - here.



1 JUDGE WILSON: - - - could they say no counseling
2 fees for guardians of homicide victims are available for
3 more than one of counseling?

4 MR. CARPINELLO: They could not.

5 JUDGE WILSON: They could not.

6 MR. CARPINELLO: They could not. Because - - -
7 and that's exactly my point. They cannot, because the - -
8 - because if the legislature wanted to limit it to one
9 year, they would. And if the - - - and - - - and to take
10 your - - -

11 JUDGE WILSON: So the way - - - just so I'm
12 clear. The way you read this definitional section is it
13 requires them to operate on a case-by-case basis, not to
14 construct any kind of rule disallowing certain types of
15 claims, based on their experience?

16 MR. CARPINELLO: Yes, they cannot make a per se
17 rule excluding classes of people. That's - - - because - -
18 - and this court has said that in many, many cases. You
19 cannot create a per se rule to exclude a class or to limit
20 - - - for example, the statute goes into great detail about
21 the - - - the monetary limit for medical expenses,
22 counseling, and all - - - and the - - - and the Board
23 cannot say we're going to limit it to 10,000 - - - or to
24 take your example, after one year. That would be ultra
25 vires, just like this is ultra vires.



1 It doesn't mean they can't actual - - - can't - -
2 - cannot exercise reasonable judgment in an individual
3 case, which I urge them to do. But they can't exclude a
4 whole class.

5 JUDGE WILSON: Thank you.

6 CHIEF JUDGE DIFIORE: Thank - - - thank you,
7 counsel.

8 MR. CARPINELLO: Thank you.

9 CHIEF JUDGE DIFIORE: Mr. Demuth? And please
10 remain mindful that - - - of Judge Fahey's pending
11 questions.

12 MR. DEMUTH: Yes, I - - - I'll start with that.
13 I think you said - - - I'd resolve the question - - - and
14 the question is - - - and that's where the Third
15 Department, you know, had the most trouble, is does the
16 statute - - - does reasonable fees in connection with the -
17 - - with the authority of the Office to promulgate rules,
18 does it allow them to cut out an initial stage?

19 And I think under the standard ultra vires
20 review, under, again, the two cases that are - - - that - -
21 - no case - - - this court has never held that you could
22 never do an exclusionary rule under any circumstances.
23 Obviously you get skeptical of them.

24 But at least in Bernstein and Sigety, you upheld
25 those because what happens is you - - - the two - - - it's

1 basically a two-part analysis. You look at the statute,
2 you look at the reg, okay, maybe there's some things that
3 aren't explicitly addressed in the statute, but is there a
4 conflict? Is there something that's completely
5 contradictory?

6 There isn't anything contradictory here in
7 626(1), 623(3) or anywhere else in the statute and the reg
8 that just says based on our experience, to which this - - -
9 the court may not defer to the statutory interpretation,
10 but it certainly should defer to the agency experience - -
11 - you do not need specialized legal services to complete a
12 four-page claim.

13 A claimant does not need to internalize a forty-
14 page statute to fill out a four page form which asks, in
15 essence, who are you, what crime was committed against you,
16 and what injuries or loss of property did you suffer?

17 JUDGE FAHEY: I think - - -

18 JUDGE RIVERA: May I ask a - - -

19 JUDGE FAHEY: - - - the question - - - go ahead.

20 CHIEF JUDGE DIFIORE: Judge Fahey?

21 JUDGE FAHEY: Yes. I - - - I think the question
22 is, is whether the determination has to be made on an
23 individual basis, case-by-case, based on the facts of that
24 case, or you can make a blanket rule to say for this
25 category, you don't need anything at all?



1 My understanding of what you're doing is you're
2 making a blanket determination. Normally the - - - our
3 application of the word "reasonable" as a matter of law, is
4 an objective reality for an individual - - - a reasonable
5 person. And that sounds like that's not taking place in
6 each determination.

7 Instead you're saying all of these are per se
8 unreasonable, and we're not doing it.

9 MR. DEMUTH: Well, per se unreasonable. And if
10 there is a problem - - -

11 JUDGE FAHEY: Well, I guess - - -

12 MR. DEMUTH: - - - it can be addressed by the
13 Victims - - -

14 JUDGE FAHEY: - - - I never did this. I never
15 did this particular work. Even - - - and I worked for a
16 carrier. I never really ran across it that much. The
17 statute post-dates my - - - my trial career.

18 But I don't know if you have, but it seems to me
19 that these are snowflakes. Each one of these crimes are
20 individual to the people there. The damages are certainly
21 individual to them. You know, the effects of an assault on
22 a person are different for each person.

23 And so the claims themselves will naturally be
24 different. And whether or not they need legal help and
25 whether or not the fees charged for that legal help are



1 reasonable, would - - - I just - - - I'm having a hard time
2 understanding why that wouldn't be a case-by-case
3 determination. How you can - - -

4 MR. DEMUTH: Well, you can - - -

5 JUDGE FAHEY: - - - make a rule just saying all
6 of them are this way?

7 MR. DEMUTH: It can be case - - - in fact, it has
8 been, to this point, a case by (audio interference)
9 determination. But the - - - but the answer is - - - but
10 the - - - but the - - - all the review requires is that
11 there's something in the statute that prohibits the Office
12 from using its experience and saying that we just don't see
13 how a specialized legal services are needed to complete a
14 four-page form.

15 It - - - it's - - -

16 JUDGE FAHEY: I thought your determination of
17 reasonableness had to do not with the type of a claim
18 that's being made, but instead the amount of the attorneys'
19 fees - - - to determine whether or not those fees were
20 reasonable; not whether or not you should have a right to
21 an attorney, but whether or not that attorney that you have
22 a right to is a reasonable - - - is charging you a
23 reasonable fee?

24 MR. DEMUTH: Well, I think it's both, Your Honor.
25 Reasonable fees - - -



1 JUDGE FAHEY: Does it say that in the statute, or
2 am I missing something?

3 MR. DEMUTH: Reasonable - - - well, no, it
4 doesn't address it in the statute. But again, silence
5 doesn't create the conflict - - -

6 JUDGE FAHEY: Um-hum.

7 MR. DEMUTH: - - - that the petitioners are
8 trying to create.

9 Reasonable fees means the amount. But it also
10 means - - - there's nothing preventing the Office from
11 doing what it's doing and - - - and applying it to a
12 perfunctory initial stage of a claim where an attorney's
13 services are not necessary.

14 JUDGE STEIN: Can I ask a question - - -

15 JUDGE RIVERA: Judge, I have - - - I have a
16 question - - -

17 MR. DEMUTH: Again, Sigety and Bernstein support
18 that.

19 JUDGE RIVERA: Judge, I have question.

20 CHIEF JUDGE DIFIORE: Judge Rivera.

21 JUDGE RIVERA: Or three, then I'll be done, I
22 think. So let me ask you first, counsel, is - - - did I
23 correctly understand the website to mean that the only way
24 that a victim can apply is by use of the form; is that
25 correct?



1 MR. DEMUTH: Yes, that's what starts the claim
2 process, to - - - to fill out - - - which they can do on
3 the website, and which many do. In fact, one of the
4 petitioners in this case - - -

5 JUDGE RIVERA: Okay, so that's - - - I got your
6 answer.

7 MR. DEMUTH: - - - did fill one.

8 JUDGE RIVERA: So just to quickly follow up on
9 that. So then - - - so then if - - - if I'm a victim, I go
10 to a lawyer, and the lawyer believes that they can make the
11 strongest case and the best demand for what I want is not
12 through the form but through some other written
13 documentation, you would reject it; is that correct?

14 MR. DEMUTH: I don't know if the - - - again, the
15 Office - - - I think the term - - - the - - - one of the
16 judges (audio interference).

17 JUDGE RIVERA: I lost you. Can't hear you. I
18 lost it.

19 MR. DEMUTH: (Audio interference).

20 JUDGE RIVERA: I don't hear, counsel.

21 MR. DEMUTH: As I mentioned - - -

22 CHIEF JUDGE DIFIORE: Okay.

23 JUDGE STEIN: It's going in and out.

24 CHIEF JUDGE DIFIORE: Counsel, you're going in
25 and out.



1 (Audio interference)

2 CHIEF JUDGE DIFIORE: Counsel. We can't hear
3 you.

4 MR. DEMUTH: I'm not sure how to - - -

5 CHIEF JUDGE DIFIORE: Oh, you're on. You're on.

6 JUDGE RIVERA: Okay, you're back.

7 MR. DEMUTH: We're back. I'm sorry.

8 I guess, to answer your question. I don't know
9 what the Office would do. I - - - but the Office is
10 traditionally very flexible. You know, it's not like the -
11 - - if a claimant misses information or doesn't provide a
12 police report right away, that they always have an
13 opportunity to submit that documentation.

14 JUDGE RIVERA: Okay.

15 MR. DEMUTH: So if they've - - - if an attorney -
16 - - no argument need be made at the initial stage. It's an
17 information-gathering process. But if this attorney
18 decided to do that, you know, I - - - I can't really say
19 what the Office would do. I don't think it would kick the
20 claim out.

21 JUDGE RIVERA: So let me ask this. Since - - - I
22 assume - - - perhaps I'm wrong; you can correct me - - -
23 that the Office has run the numbers and internalized the -
24 - - the additional funds necessary so that VAPs - - - so
25 that the VAP personnel - - - excuse me - - - can provide



1 this services. You've worked those numbers, yes?

2 MR. DEMUTH: Yes.

3 JUDGE RIVERA: Okay. So why can't you just use
4 those numbers to decide what would be the appropriate
5 amount to pay a lawyer to do it, since you're already
6 paying the VAP to do it?

7 MR. DEMUTH: Well, I guess, they could. But the
8 question is - - - I mean, that's not really the analysis
9 here. That's - - - it's - - - was it unreasonable for - -
10 - to proceed a different route, which is to use that same
11 experience - - -

12 JUDGE RIVERA: Yes, but to de - - - to determine
13 whether or not you have the authority to do that, I mean,
14 you're- - - the Office is relying, in part, on this
15 argument that we have figured out the best way is to have
16 these VAPs that are going to provide many services - - -
17 they're not limited to this service. This is but one of
18 the services.

19 And so lawyers are unnecessary for this service,
20 because the VAPs are doing that. So all I'm saying is
21 you've worked those numbers; you know what that amount is.
22 If someone chooses to go to a lawyer instead, and they may
23 do that for a variety of reasons, rather than going to a
24 VAP, why should the lawyer not be able to be reimbursed?

25 MR. DEMUTH: I - - - you know, I guess, that's



1 not really the question that the court needs to decide here
2 to uphold the regulations.

3 I understand your point that maybe they could
4 have done it another way. But it - - - that doesn't make
5 what - - - the way that they chose here irrational. I'm
6 sorry, I just - - -

7 JUDGE RIVERA: No, I was just asking why they
8 didn't do that. Okay. Last question, because I said I had
9 about three.

10 Why not allow - - - why not do it in a different
11 way, which would be to have the rule that you have, but to
12 allow an attorney to seek attorneys' fees by showing that
13 this is not the run-of-the-mill - - - what - - - what you
14 all, in your experience, say is the run-of-the-mill,
15 there's no complexity to this, you can do this easily, it
16 doesn't take a lawyer to do this?

17 Why not allow lawyers to make that argument, that
18 yes, it did take a lawyer; this is how the lawyer added
19 value to this application?

20 MR. DEMUTH: The lawyer could still make that
21 argument. They can't - - - they wouldn't get - - - you
22 know, they put in the initial claim form.

23 JUDGE RIVERA: Yes.

24 MR. DEMUTH: Which even though claimants may
25 defer, the form is really still the same, basic factual



1 information. But - - - but if they're denied, that's when
2 you get the real attorney - - - the value of an attorney's
3 services. They now have a decision in hand that I agree a
4 claimant may not have - - - be in the best position to find
5 error with, but the attorney can. That's the opportunity
6 for the attorney to do that.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 Judge Stein, do you have a final question?

9 JUDGE STEIN: Yes, very quick question. Can you
10 just clarify something for me? When it gets to a stage at
11 which the agency has determined that counsel fees are
12 awardable, do you apply the factors that are - - - were and
13 continue to be in your regs to determine whether those fees
14 are reasonable?

15 MR. DEMUTH: Yes. That's why they're no
16 conflict, because they still apply, but for the - - - you
17 know, the - - - at the reconsideration stage.

18 May I make one more point, Your Honor?

19 CHIEF JUDGE DIFIORE: You may, sir. You may.

20 MR. DEMUTH: Thank you very much.

21 Counsel for petitioners had talked about Victims
22 Assistance Programs having a success rate of only fifty
23 percent and - - - as if it was proof that - - - that
24 they're not efficient and not effective.

25 I'd submit that the answer for that is obvious,



1 because unlike a private attorney, they can't turn anyone
2 down. They accept every person who comes to them for
3 assistance in filling out a claim, unlike an attorney who
4 would, of course, cherry-pick their clients and find the
5 ones who might get them the most - - - the biggest payday.

6 So the idea that they're spectacularly
7 unsuccessful is completely false. And I'd like to point
8 out that that number - - - the fifty percent success rate,
9 has - - - has risen significantly over the years.

10 In - - - it's up to sixty-five percent in the
11 fiscal year 2019/2020. And even though this year isn't
12 over yet, there's a seventy-one percent acceptance rate.

13 So as the VAPs - - -

14 CHIEF JUDGE DIFIIORE: Thank you - - -

15 MR. DEMUTH: - - - improve, we - - - we will see
16 improved representation at every point. Thank you very
17 much.

18 CHIEF JUDGE DIFIIORE: Thank you, counsel. Thank
19 you.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Wenceslao Juarez, et al. v. New York State Office of Victim Services, et al., No. 5, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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