

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA,	.	
	.	
Plaintiff,	.	
	.	CA No. 10-0651 (JDB)
v.	.	
	.	Washington, D.C.
ERIC H. HOLDER, JR.,	.	Friday, February 14, 2014
	.	2:00 p.m.
Defendant,	.	
	.	
v.	.	
	.	
EARL CUNNINGHAM, et al.,	.	
	.	
Intervenor-Defendants.	.	
.	.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JOHN D. BATES
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, we have Civil Action 10-651, Shelby County, Alabama, versus Eric H. Holder, Jr. Will counsel please identify yourselves and those at your respective tables.

MR. REIN: Hi. I'm Bert Rein, counsel for Shelby County. My colleagues are with me; that is Brendan Morrissey and Michael Connolly.

THE COURT: Good afternoon to you all.

MR. SHAPIRO: Thank you, Your Honor. Good afternoon. My name is Avner Shapiro, appearing for the United States, and I'm here with my colleagues Richard Dellheim and Ernest McFarland with the Civil Rights Division of the U.S. Department of Justice.

MR. HO: Good afternoon, Your Honor. My name is Dale Ho from the American Civil Liberties Union on behalf of the defendant-intervenors. With me is my colleague Mark Posner of the Lawyers' Committee for Civil Rights.

THE COURT: Good afternoon to all of you.

Now, I had indicated 45 minutes per side. You don't need to use it all if you don't want to use it all, but has a decision been made between the United States and the intervenors in terms of splitting that time?

MR. SHAPIRO: Yes, Your Honor.

THE COURT: And what is that decision, just so I'm aware of it?

1 MR. SHAPIRO: Thirty-five minutes and 10 minutes.

2 THE COURT: And with that, let's proceed. It's Shelby
3 County's request, so let's hear from you first.

4 MR. REIN: Good afternoon, Your Honor.

5 THE COURT: Good afternoon again.

6 MR. REIN: I don't want to belabor our points that
7 we've made in brief; I'm sure the Court's very familiar with
8 them. So what I'd like to do is kind of crystallize where we
9 see the differences between the parties on this threshold issue
10 as to whether Shelby County is eligible under the Fees Provision
11 of the Voting Rights Act to have its fees assessed against the
12 government. That's the principal argument.

13 There's a separate question which has been raised by the
14 intervenors as to whether the standard for the assessment of
15 fees should be different for the intervenors because they were
16 not the active party for enforcing that which Shelby complained
17 against.

18 Our position is premised squarely on the words of the
19 statute, the enabling words, which says that in a case brought
20 to enforce the guarantees of the Fourteenth or Fifteenth
21 Amendment, the prevailing party is entitled to attorney's fees.
22 The one exception in that statute which Congress included was
23 that the federal government is not entitled to collect attorney's
24 fees even if it is a prevailing party.

25 So Congress was quite conscious of the special role in this

1 kind of litigation that its actions are proceeding to enforce
2 voting guarantees, but specifically said that the government is
3 not entitled to attorney's fees.

4 I think it's important just to note that Congress saw the
5 role of the government, considered it, and created through the
6 statute an exception to the collection for the government, but
7 did not exempt the government from the payment of attorney's
8 fees where the government was the responsible party for the
9 action against which enforcement was sought. And I think that
10 says something to the Court.

11 So the question is why do we think we're entitled under the
12 words of the statute, and I think what we've explained is quite
13 straightforward. Shelby viewed its case, its challenge to
14 preclearance -- and I stress this was a challenge to preclearance.
15 That is the formula which triggered preclearance and Section 5
16 itself, and Your Honor will recall that, because we had extensive
17 argument.

18 Shelby believed that what it was doing was not to challenge
19 the way people exercise their right to vote, because we did not
20 challenge Section 2 of the Act. We did not challenge any
21 constitutional doctrine about what is equal. What we were
22 challenging was a procedure, a procedure by which Shelby's right
23 to change its election process was conditioned on going through
24 either preclearance by the Attorney General or pursuing a case
25 in this court for judicial preclearance. We said that's an

1 unusual burden and it goes beyond the limitations that are
2 inherent in the Fourteenth and Fifteenth by their language.

3 THE COURT: I understand that. I guess the argument
4 there would be is it nonetheless an action to enforce the voting
5 guarantees of the Fourteenth or Fifteenth Amendment.

6 MR. REIN: Yes. And that's a question we tried to
7 answer in our briefing, in the following way: As early as
8 Allen, the question was what are the guarantees of the Fifteenth
9 Amendment, where the Supreme Court had to decide whether a
10 change in voting procedure was in and of itself cognizable under
11 those amendments and under the VRA.

12 There was a narrow position advanced which was said, no,
13 it's the right to register, the right to vote, the right to have
14 your vote counted, and the rest doesn't count. But in Allen the
15 Supreme Court said, no, any change in voting process falls
16 within the power of Congress to regulate under the Fourteenth
17 and Fifteenth Amendments.

18 Therefore, voting rights have been broadly defined by the
19 Supreme Court to go beyond the right to register, vote, and have
20 the vote counted. It is the right to have a process in which
21 you meaningfully vote and have, in the government's words, the
22 opportunity to elect the candidate of your choice.

23 Well, that's what Shelby County was aiming at. Shelby
24 County said that our citizens have the right to regulate the
25 electoral process on a local basis. That's inherent in the

1 constitution, and it is protected under the amendments by the
2 limitation to appropriate enforcement. We want that right, and
3 we think that's being stripped from us by preclearance which
4 imposes both a cost and a time barrier to the implementation of
5 changes that our citizens believe are essential.

6 THE COURT: But what does the term "voting guarantees"
7 add to the language of the Attorney's Fees Provision? Your
8 argument, it seems to me, would be pretty powerful based on
9 language that said "action or proceeding to enforce the
10 Fourteenth or Fifteenth Amendment."

11 What is it that the term "the voting guarantees," which is
12 a limitation, a specific portion of the Fourteenth and Fifteenth
13 Amendment, how does that change things? It seems to me that
14 that limits it to certain enforcements and perhaps -- I'm not
15 saying it doesn't -- but perhaps doesn't include the kind of
16 action that Shelby County brought.

17 MR. REIN: I think it's a very fair question and one
18 that we have certainly thought about a great deal. That term
19 "voting guarantees" is not defined in the Act.

20 THE COURT: No, it is not.

21 MR. REIN: And so one reading -- and we think it's a
22 fair reading -- is it encompasses all that which is subsumed in
23 the Act, and when the Court broadened out, as early as Allen,
24 the whole notion of what you are guaranteed -- you know, what
25 voting rights are guaranteed to you, which is a means of

1 participating in the electoral process that's meaningful and
2 fairly protects the underlying power of your vote -- that, in
3 effect, can't be read out of the voting guarantees, because when
4 one side asserts it -- that is to say, in a preclearance case
5 where an intervenor says, I've contributed substantially to
6 defending against a change in a voting procedure -- that voting
7 procedure might have nothing to do with registration, voting,
8 counting of the vote, yet the courts have seemed to say, well,
9 that litigation involved a contest over voting guarantees.

10 So that term has been read broadly in the award of
11 attorney's fees to mean those rights which are incorporated in
12 the statute by virtue of their being encompassed within the
13 Fourteenth and Fifteenth Amendments. So we're simply saying,
14 if that's the construction, and if Allen was right and the
15 subsequent case law is right and the awards to intervenors have
16 been right, then we're on equal footing.

17 Where the government differs with us is they tend to say,
18 well, you know, we were the ones -- we're the good guys; we were
19 enforcing the voting guarantees, because preclearance, in their
20 view, is a means of enforcing the voting guarantee. And we say,
21 that's what you've argued.

22 We said we were enforcing the limitations of the Fifteenth
23 Amendment, which is a guarantee within that same scope, to the
24 local citizenry that they can regulate that locally unless
25 there's a basis for an intervention, and you don't have one at

1 the present time on the record before the congress. And the
2 plain fact is, we won. There's no doubt who the prevailing --

3 THE COURT: There's no question of the prevailing
4 party here.

5 MR. REIN: Right.

6 THE COURT: How do I assess this action or proceeding
7 question? Do I assess it from the perspective of the plaintiff
8 bringing the case, the prevailing party in the case, or in some
9 other way that is perhaps more neutral in neither of those two
10 ways? And why the choice you make?

11 MR. REIN: I think you cannot say plaintiff, although
12 here the plaintiff and the prevailing party were the same,
13 because Shelby was the plaintiff and the prevailing party.

14 THE COURT: But there would be the argument as to
15 whether the plaintiff brought an action or proceeding to enforce
16 the voting guarantees as we've just been discussing.

17 MR. REIN: Right. That was the subject of our
18 discussion, and so I think --

19 THE COURT: Whereas, if you discuss it from the
20 perspective of the prevailing party --

21 MR. REIN: Right. And the courts have certainly said
22 it has to be a proceeding which, independently construed -- that
23 is, from the point of view, let's say, of the court rather than
24 the prevailing party or the other party -- involves the
25 statutory phrase "the enforcement of voting guarantees."

1 I don't think you can have an asynchronous result necessarily
2 in a case of this kind, and let me explain what I mean.

3 An asynchronous result might occur where Jurisdiction A
4 sought preclearance within the terms of the VRA and said, we've
5 made a change, we think it's consistent with the standards of
6 the VRA, we don't contest the VRA, we don't challenge the
7 standards, but we don't think our specific conduct infringes
8 those standards. The other side says, yes, we believe that your
9 conduct infringes the standards of the VRA and, in fact, the
10 standards of the Fourteenth and Fifteenth Amendments.

11 So in that situation, you may have an asynchronous posture.
12 That is to say the plaintiff/proponent of the change is saying
13 change is consistent with law, I'm not trying to change the law,
14 I think the facts fall my way; and the other side is saying, no,
15 to enforce these substantive guarantees -- because you've moved
16 beyond the question of is preclearance permissible. You're in
17 preclearance, I'm right. So there you might see an asynchronous
18 result, but in a case of this kind --

19 THE COURT: And there, there's no question, because
20 whatever perspective you view it, it's an action or proceeding
21 to enforce the voting guarantees of the Fourteen and Fifteenth
22 Amendments.

23 MR. REIN: Well, I think that, again, we would say
24 that. I don't think the government would agree to that, because
25 they would say the party seeking preclearance is opposing the

1 guarantees; they're always the bad guys. I think that's the way
2 they view it. I don't think that's right, but that's where we're
3 in difference, if you will. And we're saying this case also.

4 But if you look even at the government's past conduct in
5 which they sent a letter in 2006 to Mr. Sensenbrenner talking
6 about all the times that the Civil Division had agreed to
7 payment, one pattern of cases in which they settled and paid
8 were cases in which the party challenged took the position that
9 the way the Act was going to be enforced would violate the equal
10 protection guarantee; in other words, a Fourteenth amendment
11 guarantee. So you were setting right against right.

12 One side said, we have the right to equal protection. The
13 other said, no, to protect voting rights, we have got to enforce
14 what they were calling their Max Black policy. And leaving
15 aside the merits of that, when the government was not successful
16 in those cases, the government agreed to pay. So if you look
17 for comparability, that's about as close as you can get, setting
18 right against right.

19 We say Shelby County is entitled to the protection
20 that Congress built into the amendments by using the word
21 "appropriate." It was debated at the time. There's a real
22 debate as to whether they simply cede the power to the congress,
23 whether to allow Congress to regulate voting procedures
24 statewide as they did for federal elections, and the framers
25 said, okay, we're going to concede a great deal of power,

1 substantive limitation on what the states can do, but only by
2 appropriate legislation.

3 Of course, that was the central issue in our complaint and
4 as the case was litigated was preclearance still appropriate
5 within the meaning of the amendments, and we said no. That
6 infringes these rights to govern the electoral process. Those
7 have been deemed to be part and parcel of voting, better or
8 worse, by the Supreme Court.

9 Now if you look, one of the cases that we cited dealt with
10 this question of what is the nature of a challenge that invokes
11 the Tenth Amendment, because that question was raised. The
12 government says, look, you guys were not really talking about
13 voting rights; you were talking about Article IV and the Tenth
14 Amendment, and therefore your position is quite different.

15 We said, well, if you look at the complaint and the way the
16 litigation was framed from the beginning to the end, we were
17 talking about the words of the Fourteenth and Fifteenth
18 Amendments and the word "appropriate." What we said was, other
19 policies that are in the Constitution need to be considered when
20 you look for the appropriate limitation, and the Supreme Court
21 said as much.

22 THE COURT: You're talking about the limitations.
23 So that turns me to the question of what this term "voting
24 guarantees" means. If it means something less than the entirety
25 of the two amendments, what is it?

1 MR. REIN: Well, the Fourteenth Amendment, which is --

2 THE COURT: Focus on the Fifteenth. The Fourteenth is
3 sort of a tag-along. Focus on the Fifteenth for a minute.

4 MR. REIN: I don't ignore it only because, Judge Bates,
5 that has many guarantees which are totally independent of voting.
6 So if Congress had simply said, oh, this is a Fourteenth
7 Amendment, and incorporated in the Voting Rights Act a general
8 fees provision for any Fourteenth Amendment litigation, including
9 translating the Fourteenth through the Fifth --

10 THE COURT: Focus on the Fifteenth for a second.
11 Maybe you can explain that language because of the existence of
12 the Fourteenth Amendment, but for a second, focus on the
13 Fifteenth.

14 MR. REIN: That's one explanation, but if you look
15 even at the Fifteenth Amendment, that's kind of been a vexing
16 question. From the very beginning, if you go back to the great
17 debate in Allen, and it was -- it split the Court, and there
18 were dissents from Allen.

19 Justice Harlan, who I treasure and honor because I worked
20 for him, had a different view, and he viewed the Fifteenth
21 Amendment as an amendment which said you've the right to
22 register to enable yourself to vote, you've a right to cast your
23 ballot, you have a right to have that ballot counted and not
24 thrown out; and that is the sum and substance of your rights
25 under the Fifteenth Amendment, and you cannot then use the power

1 of the Fifteenth Amendment to go beyond that. And Chief Justice
2 Warren said, yes, you can. However that came out.

3 And we had made, to be fair, an argument of the same kind
4 in the course of this case that this was exceeding the bounds of
5 the Fifteenth Amendment, that the VRA was not properly founded
6 under that amendment, and the court did not take that argument.

7 The court looked instead, assuming that under the Fifteenth
8 Amendment you could regulate voting procedures prophylactically --
9 because remember, you're regulating procedures which oftentimes
10 pass preclearance. So it's a prophylactic measure that that
11 intervention intervened with the states, infringed on rights
12 that could not be deemed an appropriate limitation.

13 If you look at the cases that we've cited, none of them --
14 aside from the fights over Max Black, which have been settled so
15 we can't say they're precedential, I don't think either party
16 has come up with a case that's like this.

17 THE COURT: No, I don't think there's a -- you would
18 agree there's not a case that deals with this issue precisely.

19 MR. REIN: Right. It didn't happen before. And we
20 cited Bond. That's a Commerce Clause case, but there the court
21 incorporated a general description of why the protection of the
22 great division of powers between the federal government and
23 states is not simply a matter of structure but a matter of
24 liberty, that federalism is intended to protect individual
25 liberties to ensure that people have rights to organize at a

1 local level and not be subject to a remote government.

2 What preclearance did was not to expand the rights as such,
3 because they are the same rights that are set forth in the VRA;
4 what preclearance did was to say we're going to change the power
5 division, we're going to inhibit the ordinary right of citizens
6 to organize locally and regulate their voting affairs, and we're
7 going to do that by subjecting them to a process that may limit
8 them in ways, even if what they want to do runs afoul of no
9 voting guarantee. In many cases it doesn't, because the
10 preclearance is exercised.

11 But the fight was not about who's right and wrong on the
12 substance; it was about whether that process, preclearance as
13 such, infringed a voting guarantee that passed through to the
14 citizens by the drafting of the two amendments. And I think
15 that's essentially the nub of our case, because if that's true,
16 if we meet that language, then all that's left are certain
17 arguments the government made which we think really have limited
18 substance.

19 They said, oh, sovereign immunity. You can't come against
20 the United States in the face of the EAJA, which is an enabling
21 act that says if you're entitled to those fees by statute and
22 the government is not excluded, then the government will pay.
23 So we don't understand. I mean, I think we did not anticipate
24 the sovereign immunity to be fair, because it seemed so remote
25 when you have an act of general waiver, the AJA, and a specific

1 entitlement in which the government was considered and was
2 considered by the congress not to be a fee recipient but not
3 excluded as a fee payer.

4 So that's one of their arguments. The second is that --
5 and this is the one where I think it really crystallizes our
6 difference because they say, well, fees ought to follow
7 violation. The fees should be assessed against the wrongdoer,
8 and of course in their view, what they were doing was right, even
9 though the Court said it was wrong. I think we come apart on
10 that.

11 THE COURT: No. Right and wrong, if you're going to
12 Christiansburg, the actual language is "violator of federal
13 law," isn't it?

14 MR. REIN: Well, I think Christiansburg was a
15 statutory case.

16 THE COURT: Are you really arguing that the
17 United States here was a violator of federal law? In other
18 words, a violator of the Voting Rights Act? Is that part of
19 your argument?

20 MR. REIN: No, because the statute reaches
21 constitutional violations, and what we said is, by the exercise
22 of preclearance, when it was not constitutionally justified, the
23 United States, through the Attorney General, was enforcing an
24 improper restriction.

25 THE COURT: You mean Congress violated the constitution.

1 MR. REIN: And we are entitled --

2 THE COURT: Isn't that the point, that Congress
3 violated the constitution?

4 MR. REIN: Well, we are not saying the Attorney
5 General was departing from the statutory framework. He was
6 constrained by the statute to exercise preclearance. There is
7 no question about that. That isn't the issue. And I think
8 you're right to say, well, he can say, "I'm the servant of the
9 congress." That's why we sued him in his official capacity.

10 We were challenging the constitutionality of the Act, but
11 if the Act is unconstitutional, whether or not you're individually
12 blamed for it, whether you take -- because certainly in civil
13 rights cases, one distinguishes between conduct which is in an
14 official capacity. I'm enforcing state law.

15 THE COURT: All those cases which are talking about
16 whether the losing party was a violator of federal law are
17 talking about whether the employer violated Title VII, the
18 police department violated some civil rights law. They're not
19 talking about the United States because of its position in
20 enforcing a statute that Congress has written has violated
21 federal law. That seems to me to be a bit of a stretch, at
22 least a common-sensical stretch.

23 MR. REIN: But I think it's the government's argument
24 that, after all, they were doing nothing that would offend the
25 courts, that is to say. And we were saying, yes, you are. You

1 may be doing it not only under color of law but mandate of law,
2 but still you are responsible because we are permitted to sue
3 the Attorney General in his official capacity, as the Court
4 recognized, to challenge the underlying statute.

5 No question we were challenging the statute. We're not
6 saying Mr. Holder was a maverick who was enforcing the law, but
7 in civil rights cases, the fact that I might be acting directly
8 under state law to enforce a segregation law does not mean you
9 can't challenge the law and be a prevailing party.

10 So I think that in our view, that dispute where the
11 government really wants to take the position, we were the ones
12 who were trying to enforce voting rights and you were the ones
13 who were against it, really doesn't square with the Supreme
14 Court's decision that said, no, Shelby was trying to enforce a
15 right held by local citizens to organize their election
16 procedures in a manner they deemed appropriate, subject to review,
17 as they are under Section 2 or directly under the Fourteenth and
18 Fifteenth Amendments.

19 THE COURT: Let's assume for a second that you are
20 successful on the entitlement issue under the language of the
21 provision. Talk to me now about the Christiansburg standard and
22 why the government is not correct that that standard should be
23 applied here. We'll get to further questions as you go.

24 MR. REIN: I think that if you look at the legislative
25 history, which does talk Piggie Park, it indicates that the

1 person who successfully enforces the right is presumed to be
2 entitled, absent special circumstances, to fees. And that
3 theory has been used by the courts.

4 Christiansburg is a case in which a defense was raised,
5 statute of limitations within the confines of a law, and there
6 was nothing in that case in which the party defending established
7 any special right. The party said the facts will not, because
8 of passage of time, allow a challenge to my conduct. So their
9 premise was, we just prevailed.

10 Here, as that footnote in Dorn discusses, Shelby did
11 something more. It wasn't defending its individual conduct,
12 not at all. It was an on-face challenge. It stood in the shoes
13 of all of those who were subject to this intervention by
14 preclearance and established a boundary under the Fourteenth and
15 Fifteenth Amendments which we think is appropriate, to use the
16 language of the amendments, and meaningful.

17 So this is a broader achievement from the point of view of
18 those who support local authority and autonomy.

19 THE COURT: Because this was a facial constitutional
20 challenge that succeeded.

21 MR. REIN: Yes. If Shelby had merely said --

22 THE COURT: So because of that, of the kind of claim
23 that was made, even though there could be lots of similar cases
24 with not as broad a claim, the breadth of the claim here
25 entitles Shelby County to attorney's fees more in a Piggie Park

1 analysis than on a Christiansburg analysis.

2 MR. REIN: That is the position we've taken.

3 We believe Christiansburg is a rule that says even if language
4 in the statute of entitlement is pretty broad, it's not a total
5 departure from the American rule. A successful person defending
6 their own position pays their own cost. So if we had come in
7 and said there was something special about Shelby which entitled
8 Shelby to relief that nobody else could get and we weren't
9 challenging, really, the constitutional boundary, that might --

10 THE COURT: Or you were making an as-applied challenge?

11 MR. REIN: If we were doing that, which we didn't.

12 THE COURT: But if you had, you would be in the
13 Christiansburg setting, and I take it that your position with
14 respect to Christiansburg is that you don't meet that standard.

15 MR. REIN: Well, we did not advocate the Christiansburg
16 standard.

17 THE COURT: But if it applied, what is your position,
18 that you meet or don't meet it?

19 MR. REIN: I don't think we claimed the government's
20 conduct met the standard of Christiansburg. That's not our
21 claim. As to an as-applied, it might depend on the nature of it
22 and the relief obtained, but that wasn't the case. We're only
23 talking about this case. So it wasn't as-applied.

24 We challenged the statute on its face. We succeeded on
25 reinforcing a boundary that had been set in the language of the

1 amendments to the benefit of the people who want to regulate
2 their affairs locally. That's the sum and substance of it. And
3 as I say, I think the arguments on the other side, I don't think
4 the statute of limitations can really impose a barrier.

5 THE COURT: But it seems to me that the Supreme Court,
6 and to a certain extent the D.C. Circuit, not in cases directly
7 dealing with this issue, but when you talk about Medina County
8 and Donnell and cases like that, it seems to me that courts are
9 saying, with this discretionary portion of the provision or
10 other attorney's fees provisions, that discretion is not
11 unlimited and there have got to be rules limiting that discretion.

12 Piggie Park sets out a rule. It doesn't really reduce the
13 number of cases that attorney's fees are available in, but it
14 limits the discretion of the courts to deny attorney's fees
15 claims. So too does Christiansburg. Why, here, shouldn't this
16 court, in looking at the statute and these Supreme Court and
17 D.C. Circuit expressions, come to the conclusion -- taking into
18 account the purpose of the statute, et cetera -- come to the
19 conclusion that fees are not appropriate?

20 MR. REIN: Yes. I think that if fees are not
21 appropriate, we would certainly like the opposite conclusion.

22 THE COURT: Well, I'm framing the question for you so
23 you can answer it. I'm not telling you what my view is; I'm
24 just giving you a question to answer.

25 MR. REIN: I'm just trying to be explicit and fair in

1 answering it. And we thought about that quite a bit, because
2 clearly on its face the statute just says "in the discretion of
3 the Court." So it could be anything.

4 The courts have adhered to the legislative history that
5 said, look, it's so important to protect the rights accorded by
6 those amendments that we believe that the prevailing party
7 should have the opportunity to recover fees unless there are
8 special circumstances, and I don't think anybody has said
9 "special circumstances" obtained here.

10 So the question is, well, this is a different kind of case.
11 As I said, the only cases that are comparable are the so-called
12 Max Black cases, because they said "right against right."
13 Constitutional right against constitutional right.

14 We believe that there ought to be the same incentive for
15 fighting over the legitimate boundaries of federal intervention
16 as there is for fighting over the application of the substantive
17 guarantees, because when you look at the intervenor cases,
18 that's what they're saying. Congress wanted people to vigorously
19 protect the rights they were accorded by the amendments,
20 vigorously protect the rights that were established under the
21 VRA. So Piggie Park is an incentive.

22 We believe that when Congress broadened the language here
23 and talked about voting guarantees of the amendments, it was
24 saying, we're not being discriminatory. Anybody who seeks to
25 enforce what they consider their rights under those statutory

1 provisions and/or the constitutional text ought to be
2 incentivized to do it, because that's the way we advance to a
3 better understanding of how this federal-state relationship and
4 individual relationship in the area of voting rights should be
5 done. So that's the way we look at it, and I think we have an
6 argument and a case of first impression.

7 THE COURT: It is a case of first impression, I agree
8 with you. It's a little easier to deal with this kind of case
9 in the context of Title VII, or even the traditional civil rights
10 cases, because there the plaintiff and the defendant -- I mean,
11 the roles are a lot clearer. It's hard to say that the employee
12 isn't in one position and the employer in another position.

13 MR. REIN: Yes.

14 THE COURT: And the same thing for the individual
15 who's had a run-in with the local police and has a civil rights
16 claim. It's hard to say that they aren't in clearly identified
17 positions. Here, though, you have circumstances where the
18 procedural role can easily shift.

19 MR. REIN: And it does, even under the Act, because in
20 a preclearance action -- it's not easily regulated by saying the
21 plaintiff has a certain claim and the defendant doesn't, because
22 that would undermine the logic of the way that proceedings are
23 destined to arise in this circuit. I don't think you can come
24 to a conclusion based on who was the plaintiff.

25 THE COURT: It does return somewhat to the point we

1 were talking about before. If you look at Medina County, there's
2 a passage there that says, "It is thus clear from the case law
3 and the legislative history that when the procedural posture of
4 a case places the party who seeks to vindicate rights guaranteed
5 by the constitution in the position of defendant, the
6 restrictive Christiansburg Garment rule is not applicable."

7 The question, then, is whether -- that's when that party is
8 seeking attorney's fees. The question is whether the D.C.
9 Circuit is also implicitly stating the converse, that when the
10 procedural posture of the case places the party who opposes
11 individual voting rights -- the government would argue that's
12 what Shelby County was doing -- in the position of a plaintiff,
13 the restrictive Christiansburg Garment standard should apply
14 when that party seeks attorney's fees.

15 MR. REIN: Right. And I'm not sure I would read that
16 into it, but I think even more fundamentally what you had in
17 this case was both parties believed they were coming forward for
18 the protection of voting rights.

19 Our belief was, as construed by the Court, those rights
20 encompass the right to regulate the electoral process. The view
21 on the other side was, no, those rights, from the point of view
22 of those against whom discrimination might lie, encompass having
23 a procedure which ensures that the substance will be protected.

24 And in one sense, their position was more remote, because
25 they were protecting not a substantive right but a procedure,

1 and rights were I think more squarely in collision in the Miller
2 case where one party was saying, well, this legislature is
3 improperly constituted, the state has gone out of bounds, it's
4 not properly giving some citizens the right to elect candidates
5 of choice.

6 The other side said, no, you're trying to enforce upon us
7 the use of a racial characteristic in redistricting, and that
8 defies equal protection. So you have collisions of rights, both
9 parties asserting rights, and the question is which has more
10 justification in this specific instance. That's really the
11 nature of this case.

12 THE COURT: Well, if you try to do that balancing,
13 why wouldn't you look to the congressional purpose of the Voting
14 Rights Act and which side was acting more consistently with what
15 Congress had set out in the Voting Rights Act? And if you did
16 that, I think you'd probably lose, because you were challenging
17 what Congress did. You were opposing what Congress had put into
18 place as the law. Were you not?

19 MR. REIN: Yes. I think in one sense, sure, we were
20 challenging whether Congress had exceeded its powers in that
21 specific procedure. That was the nature of the case. I think
22 that had Congress wanted to do that, it could have said in this
23 language "any action or proceeding to enforce the voting
24 guarantees accorded by this Act." Then you're entitled to fees
25 because that would have limited it right there. But that's not

1 the language they chose.

2 THE COURT: That's not what they did, but we're
3 still stuck, if you will, with Supreme Court and, to a certain
4 extent, D.C. Circuit case law that says, look, there's got to be
5 limitations in here about attorney's fees. The court's discretion
6 is limited, and so there are these principles that are applied
7 through these cases, through Piggie Park going one way, through
8 Christiansburg going another way, and through other cases, Zipes,
9 et cetera.

10 So you can't just say, oh, Congress could have written
11 the statute differently, because the Supreme Court has said,
12 even with the statute written the way it is, there's still going
13 to be limits on the court's discretion to award fees.

14 MR. REIN: I think that's fair, but you might ask the
15 question, would Congress have intended to foreclose those who
16 wanted to assert that the Act, as construed, should not properly,
17 because of the limitation, exceed the boundaries of what is
18 appropriate, because, you remember, it's a court construction in
19 Allen that broadened it out.

20 So when the congress is looking at it, they might well have
21 considered, look, yes, we pass laws; we usually don't incentivize
22 people to overturn the laws we pass, although one could say a
23 responsible congress would say these laws need to be tested
24 under the amendments.

25 There's nothing really that told us in the legislative

1 history which way they went, but even leaving that aside, that
2 question may have been foreclosed in Allen by the expansion of
3 the notion of voting guarantees, and I think in fairness, I'm
4 not sure that Congress really believed when it was writing the
5 Act that Allen was going to come out the way it did. But it
6 did, and that of course sets the whole boundary of this case.

7 So I think that it's not improper to say Congress should
8 accord an incentive to those who seek to ensure proper balance
9 in its activities, ensure that it stays within the limits of its
10 power and doesn't abuse that power, and that's what we were
11 fighting about. And I think I will shut up after that.

12 THE COURT: Do you want to say anything -- I'll give
13 you five minutes of rebuttal. If you want to take any time on
14 the issues you need to the defendant-intervenors, you could, or
15 you could save that for --

16 MR. REIN: Well, I think the intervenors -- we see
17 them under Zipes in a different posture, because in a sense they
18 are not defending some individual action of theirs. They're
19 not the acting party. The Attorney General enforces preclearance.

20 We understand the intervenors' position, which is, look,
21 we're really more in the nature of an amicus; we're fighting the
22 broad issue because it's an on-face challenge, but we cannot
23 individually exercise preclearance. That's the role of the
24 Attorney General. So I think we had always focused this on the
25 government, and we understand Zipes.

1 THE COURT: If the government had sovereign immunity,
2 what would your position be?

3 MR. REIN: That would be different because, as we
4 said, Zipes says if the government is responsible, you don't
5 chase the intervenors, and we respect that principle. We don't
6 believe the government has sovereign immunity here. It should
7 be settled on that basis.

8 THE COURT: All right. Thank you, Mr. Rein.

9 MR. REIN: Thank you.

10 THE COURT: Mr. Shapiro?

11 MR. SHAPIRO: Thank you, Your Honor. Your Honor asked
12 the question a number of times what was meant by the phrase "the
13 voting guarantees."

14 THE COURT: Is that where you want to start? You want
15 to skip sovereign immunity? I'm happy if you want to skip
16 sovereign immunity, but take your shot if you want to take your
17 shot.

18 MR. SHAPIRO: Well, I'm happy to start with a concern
19 that Your Honor had raised.

20 THE COURT: Because I would have to address that
21 first. If the government's continuing to say that there is
22 sovereign immunity here, isn't that the first issue I have to
23 deal with? That's a jurisdictional argument you're making.

24 MR. SHAPIRO: I think the eligibility issue can also
25 decide the case, Your Honor.

1 THE COURT: So I may be able to decide the case, but
2 I can't reach that issue unless I reject your sovereign immunity
3 argument, can I?

4 MR. SHAPIRO: Your Honor, to some extent, the
5 eligibility issue comes together with the sovereign immunity.

6 THE COURT: Oh, let's not do that. I mean, there are
7 jurisdictional issues and there are issues that are not
8 jurisdictional, and the Supreme Court has been very clear lately
9 -- lately, meaning the last decade -- to say don't call things
10 jurisdictional if they're not jurisdictional. I don't see the
11 eligibility issue as a jurisdictional issue, whereas is there
12 any doubt that the sovereign immunity issue is jurisdictional?

13 MR. SHAPIRO: Your Honor, with regard to the -- there
14 is a jurisdictional issue with regard to the sovereign immunity
15 issue. There's also a question as to whether there's a waiver
16 of sovereign immunity with regard to the fee provision itself.

17 THE COURT: It's not a waiver of sovereign immunity,
18 because sovereign immunity can't be waived. Sovereign immunity
19 isn't their claim, so they can't waive it. So it's not a waiver
20 of sovereign immunity; it's a waiver of their objection to your
21 sovereign immunity claim. Quite frankly, I don't understand
22 that argument. I mean, I understand it, but I don't see how it
23 has any legs. Sovereign immunity has been stated to be in the
24 nature of a defense. Why are they obliged to anticipate every
25 defense that you may or may not raise? Why are they?

1 MR. SHAPIRO: Well, in this case, this is a fundamental
2 defense, Your Honor.

3 THE COURT: Calling it a fundamental defense doesn't
4 answer the question. Why are they obliged to anticipate and
5 brief every defense that you may raise? Is there any case law
6 that you rely on?

7 MR. SHAPIRO: No, Your Honor. And I think, Your Honor,
8 we would concede that is not -- while it was mentioned in the
9 brief, we would not rest our hat on that point.

10 THE COURT: Then why does the Equal Access to Justice
11 Act not constitute, in combination with the attorney's fees
12 statute under the Voting Rights Act, a waiver of sovereign
13 immunity?

14 MR. SHAPIRO: Your Honor, there are two reasons.
15 Number one, for the waiver in EAJA 2412(b) to apply to this fee
16 provision, by its own terms a fee provision itself must
17 encompass this action. The fee provision must be one -- this
18 action must be one to enforce the voting guarantees of the
19 Fourteenth and Fifteenth Amendment. That's where this
20 eligibility issue comes up, because this is just not an action
21 to enforce the voting guarantees of the Fourteenth and Fifteenth
22 Amendment.

23 The second issue is there needs to be an underlying merits
24 liability which runs with the fee liability that has a direct
25 relationship with the fee liability.

1 THE COURT: All right. Why don't you move on. I'm sorry.

2 MR. SHAPIRO: Returning to the issue of whether this
3 is an action to enforce the voting guarantees of the Fourteenth
4 or Fifteenth Amendment, the government's answer to that is that
5 voting guarantees refers to the historic commitment promise
6 guarantee of the federal government to address discrimination in
7 voting, as enunciated in Section 1 of the Fifteenth Amendment
8 and the Equal Protection Clause, and not to the language in the
9 enforcement provisions of those amendments and the appropriate
10 legislation.

11 THE COURT: And, therefore, this is not an action or
12 proceeding to enforce the voting guarantees of the Fourteenth
13 and Fifteenth Amendment?

14 MR. SHAPIRO: Yes, Your Honor. That's correct.

15 THE COURT: Now, there are several D.C. Circuit cases
16 that proceed on the assumption that a case like this is an
17 action or proceeding to enforce the voting guarantees of the
18 Fourteenth or Fifteenth Amendment. Aren't there?

19 MR. SHAPIRO: Is Your Honor referring to Medina,
20 Donnell --

21 THE COURT: Medina, Donnell, Castro County. Aren't
22 those all proceeding -- I know that they're not cases in which
23 the precise same party as here is seeking the fees, but they're
24 cases that are the same kind of action and they proceed without
25 addressing or giving any hint that this would not be an action

1 or proceeding to enforce the voting guarantees of the Fourteenth
2 or Fifteenth Amendment. Don't they?

3 MR. SHAPIRO: Your Honor, the government's position
4 is that those cases can be distinguished from this one. Those
5 cases were actions to enforce the voting guarantees, because in
6 each of those cases, those were cases where the Department of
7 Justice objected to actual changes that were discriminatory,
8 violations of the statute, and the defendant-intervenors were
9 also involved in the process of objecting to those changes.
10 There were allegations of discriminatory voting practices, and
11 that is what instigated the litigation.

12 THE COURT: Well, actually, factually that underlies
13 this litigation too, which is not what was being litigated.

14 MR. SHAPIRO: Your Honor, respectfully, in this case
15 Shelby has emphasized from the outset that there was no
16 discriminatory changes involved, in fact, that there was no
17 change involved. For them, this is about the imposition of the
18 preclearance regime. So in that respect it is different. This
19 is not a case that involves, as they have emphasized throughout,
20 discrimination in voting.

21 THE COURT: When you get to the application of
22 limitations like Christiansburg, they're arguing that the
23 breadth and nature of their case is what keeps them out of
24 Christiansburg, but your argument is that the breadth and nature
25 of this case and the kind of case that was brought is what keeps

1 them out of being an action or proceeding to enforce the voting
2 guarantees of the Fourteenth or Fifteenth Amendment in the first
3 instance.

4 MR. SHAPIRO: Yes, Your Honor. I would agree with that.

5 THE COURT: Very case-specific assessment.

6 MR. SHAPIRO: Well, Your Honor, yes. It is specific
7 to this case, and this case is distinguishable for the reason
8 that we stated. This is not a case that involves allegations of
9 discrimination in voting, which is what one needs for it to fall
10 in the ambit of this provision. This provision involves cases
11 involving allegations of violations of federally protected
12 voting rights, particularly discrimination in voting.

13 THE COURT: The fact that those D.C. Circuit cases
14 were, like this case, all actions under Section 5 of the Voting
15 Rights Act, brought by a covered jurisdiction against the
16 Attorney General, is not enough because this is a little bit
17 different kind of case under Section 5, brought by a covered
18 jurisdiction against the Attorney General.

19 MR. SHAPIRO: Your Honor, the government would
20 maintain the difference is very significant. All of those cases
21 involved -- while you had nominal plaintiffs in those cases,
22 what brought them to the D.C. District Court was the federal
23 government and the Justice Department objecting to changes that
24 were determined to be violations of federal protections against
25 discrimination in voting, namely Section 5 of the Voting Rights

1 Act. That is not the case in this instance.

2 THE COURT: Okay.

3 MR. SHAPIRO: Your Honor, Shelby County has pointed to
4 Allen as illuminating.

5 THE COURT: Seems to be relying on Allen quite a bit.

6 MR. SHAPIRO: Quite a bit. And understandably,
7 Your Honor, because there is actually a reference to the
8 guarantees of the Fifteenth Amendment in Allen. Allen predates
9 the adoption of the fee provision in '75 and is a seminal case,
10 and it is fair to assume that Congress was thinking about Allen
11 and the language in Allen when it adopted this provision.

12 What is massively clear from the reference to the
13 guarantees of the Fifteenth Amendment in Allen is that, in
14 point of fact, the court was talking about the need to have
15 broad protections against discrimination in voting and to
16 address the historical problem of discrimination in voting on
17 the basis of race.

18 That's why it said it was necessary to have a powerful
19 federal answer like Section 5 and Section 4 of the Voting Rights
20 Act and a broad understanding of what Section 5 preclearance
21 meant. That's the context under which the reference to
22 guarantees of the Fifteenth Amendment was made in the Allen case.

23 And to the extent that there's any ambiguity about what is
24 meant by the phrase "voting guarantees," there's also the 76
25 cases that we attached to our opposition where there were

1 actually fee awards. In every single one of those cases, every
2 single one, they dealt with allegations that there had been
3 violations of federally protected voting rights. Without
4 exception. That's not this case.

5 THE COURT: They say there are cases. They
6 attached to their brief the 2006 letter saying that you've
7 paid attorney's fees in lots of cases that are just like this.

8 MR. SHAPIRO: So with regard to that letter, a couple
9 points, Your Honor. Number one, it is a fact that the United
10 States has never paid an award under 19731(e) to any party.

11 THE COURT: What do you mean when you say that?
12 I guess I don't understand.

13 MR. SHAPIRO: There's never been an award under
14 19731(e) by the --

15 THE COURT: You mean none of the cases referenced in
16 this letter would have been cases dealing with attorney's fees
17 entitlement under 19731(e), or do you mean something different?

18 MR. SHAPIRO: If I may be precise, no court has
19 awarded fees under 19731(e) against the United States.

20 THE COURT: All right. That's different from the
21 United States has never paid.

22 MR. SHAPIRO: I'm sorry if I mangled that. Let me be
23 precise about the cases that are listed there. Many of those
24 cases, Your Honor, are housing cases, so they do not relate to
25 19731(e). There are six voting cases. One of them is a Section

1 2 case where there was an award of fees by a court on the basis
2 of EAJA 2412(d). It wasn't a 19731(e) case, and the court
3 determined the government's position was not substantially
4 justified, it's not relevant to this matter.

5 Then the remaining cases are all under the sort of
6 analytically distinct framework of the Shaw v. Reno litigation
7 involving individual voters who are claiming discrimination
8 under the Equal Protection Clause, and each of those cases also
9 involve claims under EAJA 2412(d), as well as an array of other
10 claims. We know of only one that also had within it embedded a
11 19731(e) claim. All of those cases were settled, and in no case
12 was there an admission of liability by the United States.

13 THE COURT: The fact that they were settled without an
14 admission of liability, I'm not sure which way that cuts. Why
15 is that important if you paid fees?

16 MR. SHAPIRO: Well, Your Honor --

17 THE COURT: I mean, if the government pays fees where
18 they settle Case A, but they resist paying fees where they lose
19 Case B, but there's no distinction between those two cases, then
20 why isn't the fact that you paid fees of some importance to
21 whether you should pay fees in Case B?

22 MR. SHAPIRO: Yes, Your Honor. Had the United States
23 admitted liability, let's say under 19731(e), that I guess would
24 be informative here, but in this instance there were a number of
25 claims that the plaintiffs were making as to why they were

1 entitled to fees, including claims that the government's position
2 was not substantially justified under EAJA 2412(d), claims under
3 1988 --

4 THE COURT: So there's a different potential basis for
5 the attorney's fees claim.

6 MR. SHAPIRO: Yes, Your Honor. And again, all those
7 cases involved individual voters with claims that were squarely
8 under the Equal Protection Clause of the Fourteenth Amendment.

9 THE COURT: All right. Go ahead.

10 MR. SHAPIRO: Your Honor, returning to the entitlement
11 issue, the United States' position is that Shelby is not
12 eligible for fees, but were the Court to determine it was
13 eligible to fees, then it's not the simple formula that Shelby
14 County has suggested.

15 THE COURT: Let me ask you this question: Assume for
16 a moment that the Attorney General had succeeded in the Supreme
17 Court and had won this case. What's your position on whether
18 the defendant-intervenors could have sought attorney's fees from
19 Shelby County?

20 MR. SHAPIRO: Our position is that it would be
21 ineligible for fees.

22 THE COURT: Is that consistent with Donnell and
23 Medina County?

24 MR. SHAPIRO: Yes, it is, because again, in those
25 cases --

1 THE COURT: Because those cases are slightly
2 distinguishable, and I know I threw the term "slightly" in.

3 MR. SHAPIRO: Yes. That would be our position.

4 With regard to the entitlement issue --

5 THE COURT: Now, that's not going to be the defendant-
6 intervenors' position, I'm sure, with some confidence -- I'll let
7 them address that -- but with some confidence. So they would be
8 arguing that they could seek fees there, and their entitlement
9 to fees would necessarily rest on a determination that the action
10 or proceeding was one to enforce the voting guarantees of the
11 Fourteenth or Fifteenth Amendments. Otherwise, they couldn't
12 get fees.

13 MR. SHAPIRO: Yes, Your Honor.

14 THE COURT: And if the action is one that fits that
15 statutory language when they're seeking fees -- I know this is a
16 hypothetical -- is there some reason that it wouldn't fit when
17 Shelby County's --

18 MR. SHAPIRO: Yes, Your Honor.

19 THE COURT: Can you have a situation where it's an
20 action or proceeding to enforce the voting guarantees of the
21 Fourteenth or Fifteenth Amendment if the United States wins the
22 case but not if the United States loses the case?

23 MR. SHAPIRO: Your Honor, the United States would
24 answer the question in this way: We believe the defendant-
25 intervenors would not be able to get fees in this matter, were

1 the United States to prevail, because of the eligibility issue.

2 But there are two other barriers here that don't apply to
3 defendant-intervenors were the Court to conclude that eligibility
4 is not an issue, and that is the sovereign immunity issue, which
5 obviously would not have been relevant but yet a significant
6 barrier, and the other one would be the entitlement barrier.

7 Clearly, were the Court to conclude that the eligibility
8 barrier had been surmounted, defendant-intervenors do fall more
9 into sort of a category of a type of a party that would get fees
10 under the Piggie Park standard. They're representing individual
11 voters.

12 THE COURT: On a purposive analysis.

13 MR. SHAPIRO: Yeah. And Shelby County is trying to
14 suggest on the entitlement standard there's sort of a simple
15 formula; that is, if you are a plaintiff and you prevail, then
16 you're entitled to fees. But that is not --

17 THE COURT: That's consistent with the language of
18 Piggie Park, which is --

19 MR. SHAPIRO: Your Honor, the government's --

20 THE COURT: -- the bare language.

21 MR. SHAPIRO: Your Honor, the government's view is
22 that's consistent with a reading of Piggie Park that relies on
23 extracting just a part of that case. There's just some of the
24 language from that case. The case emphasizes the importance of,
25 first of all, looking at Congress's purpose behind the fee

1 provision. The case emphasizes the fact that in the ordinary
2 case the plaintiff is going to be acting as a private attorney-
3 general seeking to -- acting as an instrument of Congress to
4 vindicate the highest priorities of Congress in addressing
5 discrimination.

6 THE COURT: Except for the "instrument of Congress"
7 part of it, why didn't Shelby County write that they were sort
8 of acting on behalf of a broad category and indeed achieved a
9 result that benefitted thousands of municipalities and states?

10 MR. SHAPIRO: There are a number of answers to that
11 question. Number one, Shelby County was --

12 THE COURT: And therefore the voters, at least some of
13 the voters, in those places.

14 MR. SHAPIRO: Firstly, Your Honor, to the extent that
15 they were advancing the public good generally or helping voters
16 generally, that does not go to advancing the federal civil rights
17 commitment related to discrimination in voting and the guarantees
18 of the Fourteenth and Fifteenth Amendments. That's a more
19 diffuse general good. That was what Congress was focused on.

20 This fee provision, in point of fact, was passed at the
21 very moment that Congress came together with legislation to
22 reauthorize Section 5 and Section 4 of the Voting Rights Act
23 and to add additional protections for language minorities in
24 1975. The impetus behind this provision was in fact to
25 encourage litigation by private attorney generals on behalf of

1 these federal protections, and that is not this case.

2 The point also needs to be made, Shelby has mentioned cases
3 like Bond v. U.S. where there is a recognition by the Supreme
4 Court that the beneficiaries of federalism may not be just state
5 actors but also could be individuals. But those cases were
6 brought by individuals. Shelby County doesn't have standing
7 here to assert that it's benefiting individual rights.

8 This case, first and foremost, was about Shelby's rights
9 and the injury to Shelby. Shelby argued for three years that
10 it had been injured because of violations of states'-rights
11 principles, principles such as the equal sovereignty of states,
12 and principles that it said were embedded in the Tenth Amendment
13 Article IV and the framework of --

14 THE COURT: It frequently referred to the Fourteenth
15 and Fifteenth Amendments as well.

16 MR. SHAPIRO: It referred to them. But, Your Honor,
17 it did not state that the rights that had been violated were
18 located in the Fourteenth and Fifteenth Amendment. Nowhere --

19 THE COURT: But on the eligibility question, this
20 again is sort of the prevailing party-based analysis, and I know
21 you think those D.C. Circuit cases don't matter because they're
22 distinguishable. But it seems to me that what does matter is
23 the statute, and there's nothing in the statute that gives any
24 hint that this analysis of whether it is an action or proceeding
25 to enforce the voting guarantees of the Fourteenth or Fifteenth

1 Amendment turns on looking at the prevailing party. There's
2 nothing in the statute that would indicate that.

3 MR. SHAPIRO: Your Honor, I was not suggesting that it
4 turns on looking at who's the prevailing party or the character
5 of the party, but what I was suggesting in the three cases --
6 Medina, Donnell, and Castro -- is that in all those cases, those
7 actions, they were instigated by allegations of discrimination
8 in voting. There was an effort to enforce the voting guarantees
9 of the Fourteenth and Fifteenth Amendment in those cases, and
10 that's a very clear distinction.

11 THE COURT: I know that, but I thought you were just
12 making an argument that it was really a party-specific focus for
13 determining whether it's an action or proceeding to enforce the
14 voting guarantees of the Fourteenth and Fifteenth Amendments --

15 MR. SHAPIRO: My last argument --

16 THE COURT: -- that it matters and may be different
17 depending upon the prevailing party.

18 MR. SHAPIRO: My last argument was that this was not
19 an action brought by Shelby County to enforce not just the
20 voting guarantees of the Fourteenth and Fifteenth Amendment.
21 I don't believe this was even an action to enforce the
22 Fourteenth or Fifteenth Amendment on any level, because you
23 enforce the law to prevent violations. Shelby County identified
24 violations in its complaint: violations of the Tenth Amendment,
25 violations of Article IV, violations of the framework of the

1 Constitution.

2 Nowhere in its complaint does it identify a violation of
3 the Fourteenth and Fifteenth Amendment, and that's true all the
4 way through this litigation until we get to this fee dispute.
5 In the last hour, the last moments of the litigation, they are
6 trying to re-imagine their case as one about the Fourteenth and
7 Fifteenth Amendment, which they are not free to do.

8 If I may, in closing, if there are no further questions,
9 the Seventh Circuit put it simply in the King case that 19731(e),
10 as with Section 1988, its purpose is to encourage citizens to --

11 If I may read the language: Its purpose is "to encourage
12 private citizens to initiate court actions to address violations
13 of the nation's civil rights laws." That's the way they simply
14 put it. That purpose has not been served by this litigation.
15 In that respect, it's very clear that Shelby County's claim for
16 fees in this matter is debarred.

17 THE COURT: You mean because they're not eligible, or
18 they're not entitled? Is that an argument that goes to whether
19 this is an action or proceeding to enforce the voting guarantees
20 of the Fourteenth or Fifteenth Amendments, or is that an
21 argument that goes to whether the Christiansburg standard
22 applies and whether it's met here?

23 MR. SHAPIRO: Your Honor, I believe that ultimately
24 goes to both issues.

25 THE COURT: Focusing on the second issue, let's assume

1 for a second that you've been unsuccessful on the eligibility
2 issue. Is there any precedent that you want to point me to for
3 why the Christiansburg standard applies?

4 MR. SHAPIRO: Why the Christiansburg -- well, if the
5 standard were -- if eligibility were to be found here, then the
6 more rigorous standard in Christiansburg would be the standard
7 that Shelby County would have to meet.

8 Shelby has essentially said that its situation's analogous
9 to the Section 5 preclearance actions and the other actions
10 presumably brought under 19731(b) by state actors. There's not
11 a single one of them -- there have been roughly 150 such cases
12 before the D.C. District Court, and there have been many cases
13 where changes have been precleared. Not in a single one of them
14 has there been fees awarded.

15 THE COURT: That may be a weighty argument here, but
16 there are circumstances where all of a sudden a light goes off
17 in a particular attorney's mind, and they bring a novel
18 application and it turns out to be accepted by the courts. So
19 aside from the fact that it's never occurred before, why is it
20 that the fees should be denied on an entitlement basis by
21 applying Christiansburg?

22 MR. SHAPIRO: Your Honor, the reason is because,
23 ultimately the Court, in our view, should look to that standard
24 which is asking is the party acting as the instrument of
25 Congress in vindicating high priorities of Congress related to

1 civil rights. Is the party that's prevailed upon a violator of
2 the law. These are the sorts of questions that, once they're
3 answered, it's clear that Shelby's not entitled to the Piggie
4 Park standard, and the situation is much more analogous to a
5 state actor that is opposing cases brought by private attorney
6 generals seeking to vindicate federal civil rights laws.

7 THE COURT: All right. Thank you, Mr. Shapiro.

8 MR. SHAPIRO: Thank you, Your Honor.

9 THE COURT: Mr. Ho.

10 MR. HO: Good afternoon again, Your Honor. You've
11 already heard at some length from the Department of Justice on
12 the threshold questions in this case, that is, Shelby County's
13 eligibility and entitlement to fees. So I won't belabor those
14 points except to say --

15 THE COURT: Is this an action, in your view, or
16 proceeding to enforce the voting guarantees of the Fourteenth or
17 Fifteenth Amendment?

18 MR. HO: No. We would agree with the Department of
19 Justice that it's not an act to enforce the voting guarantees of
20 the Fourteenth and Fifteenth Amendments.

21 THE COURT: So you would agree that if the United
22 States had prevailed in the Supreme Court, you would not have
23 been entitled to seek attorney's fees from Shelby County?

24 MR. HO: Well, unfortunately, we're not in that
25 situation, so we're not confronted with that.

1 THE COURT: I know, but I'm asking you a question.

2 MR. HO: I understand. It's not something that we
3 have taken a firm position on, Your Honor, in this brief, and
4 I can't say here today --

5 THE COURT: You have sought attorney's fees in similar
6 contexts, have you not?

7 MR. HO: Well, other clients represented by the
8 American Civil Liberties Union have, Your Honor, before I was
9 counsel there, so unfortunately I can't speak from personal
10 experience about those cases. But here's what I would say about
11 those kinds of cases, Your Honor.

12 The first question that the Court would have to confront
13 is the D.C. Circuit's ruling in Donnell, that in order for
14 defendant-intervenors to be able to obtain fees, we would have
15 to have contributed substantially to the outcome of the
16 litigation, because the need to encourage private citizens to
17 enforce the civil rights statutes diminishes when the Attorney
18 General is already a party to a case.

19 Now, that being said, the closest analogy I can think of in
20 which defendant-intervenors may have been eligible for fees in a
21 case would be the preclearance cases, which is what Shelby County
22 points to. But that would go, I think, to the question of their
23 entitlement to fees, and if we're really going to adopt and take
24 seriously the preclearance cases, Donnell, Medina County, which
25 did not squarely confront the question presented here, I think

1 what's key about those cases is that they would only demonstrate
2 that the Christiansburg standard should apply here.

3 The defendant-intervenors were determined to be eligible
4 for fees in those cases because they were the party which the
5 D.C. Circuit had understood to be enforcing the voting guarantees
6 of the Fourteenth and Fifteenth Amendments and the provisions of
7 the Voting Rights Act itself.

8 That's consistent with the 1975 Senate Report, when
9 19731(e) was added to the statute, that defendant-intervenors
10 may in fact, in some cases, really be in the position of a
11 plaintiff in a normal Voting Rights Acts case and should obtain
12 fees under the normal Piggie Park standard.

13 Now, if that tells you anything, it would mean that the
14 plaintiff jurisdiction in a preclearance case is really more --
15 although nominally the plaintiff, is really more like a
16 defendant who's interests are adverse to the statute itself and
17 the voting guarantees of the Fourteenth and Fifteenth
18 Amendments. If that's the cases that Shelby County would like to
19 analogize this one to, then that would only suggest that the
20 Christiansburg standard should apply here.

21 The purpose of fees provisions is to incentivize enforcement
22 of federal law. The Seventh Circuit case that Mr. Shapiro cited,
23 the King v. Illinois State Board of Elections case, actually,
24 the exact language in that case is even better than Mr. Shapiro
25 stated. It's not simply to encourage private citizens to

1 initiate court action to correct violations of the nation's
2 civil rights laws. The Court actually specifically says "the
3 nation's civil rights statutes."

4 If that's in fact the case, then what Shelby County has
5 sought to do here, in tearing down a civil rights statute and
6 acting adverse to express congressional policy, would really
7 place it more in the position of a defendant. But what I'd like
8 to spend the bulk of my time addressing, Your Honor, specifically
9 is the question of defendant-intervenors' potential liability
10 for fees.

11 Now, under Zipes, our clients -- Mr. Pierson, ten other
12 private individuals, the nonprofit Alabama NAACP -- cannot be
13 liable for fees absent a showing their position was frivolous,
14 objectively unreasonable, or without foundation, and the
15 government's sovereign immunity here is really irrelevant to the
16 determination.

17 THE COURT: It can't be because of what case?

18 MR. HO: Zipes, Your Honor. The issue of the
19 government's sovereign immunity is really irrelevant to the
20 principal rationale in Zipes, which is that there is, in the
21 majority opinion's words, "a crucial connection between
22 liability for violations of federal law and liability for
23 attorney's fees." Here, obviously, Mr. Pierson and the Alabama
24 NAACP haven't violated any federal statutes or constitutions.
25 The Court's judgment isn't binding on them in any way.

1 Assessing any fees against them certainly would not deter any
2 future violations of constitutional rights. So that's really
3 the principal rationale in Zipes.

4 THE COURT: So if sovereign immunity were successful
5 in this case as a bar to any attorney's fees against the United
6 States, you would argue that, under Zipes, fees cannot be
7 collected against the defendant-intervenors.

8 MR. HO: That would be our position, Your Honor.
9 I mean, Zipes does, of course, reference the fact that fees can
10 be available from the actual defendant in a case, but it's not
11 the only or even principal rationale in the case. The only
12 thing that awarding fees against the defendant-intervenors in
13 this case would accomplish, potentially, is discouraging
14 intervention in future cases concerning the constitutionality of
15 federal civil rights statutes. I don't think that that is --

16 THE COURT: Well, I suppose an argument can be made --
17 indeed, I think it has been made -- that this case should
18 actually be an encouragement to those who want to challenge
19 the constitutionality of some government provision, that it
20 shouldn't discourage anyone from asserting their rights;
21 especially asserting rights here by the plaintiff should be an
22 encouragement.

23 MR. HO: It would certainly encourage challengers to
24 the constitutionality of federal civil rights statutes, but I
25 think that would actually run counter to the very purpose of

1 establishing the fees provision. In the normal American system
2 of civil litigation, we don't just assess fees in favor of the
3 winners of cases, even if the winners have worthy goals of
4 advancing constitutional rights.

5 Congress creates fee provisions specifically to encourage
6 private attorneys-general to enforce congressional objectives.
7 Here that's the Voting Rights Act. I think it would be contrary
8 to the purposes of the fees provision to incentivize actions
9 that seek to defeat congressional imperatives.

10 There are really only two arguments that Shelby County
11 raises in its reply brief in response to our assertion that
12 Zipes applies here. The first is that, according to Shelby
13 County, determining whether or not the defendant-intervenors
14 can be liable for fees would be premature at this time.

15 But the Court's bifurcation order I think very clearly
16 states that the issue that we're confronted with right now is
17 whether or not Shelby County has a legal entitlement to an award
18 of fees, leaving only the question of the amount of fees for a
19 later time. So determining defendant-intervenors' liability
20 I think is no more premature at this stage than would be
21 determining whether or not sovereign immunity prohibits the
22 recovery of fees against the Department of Justice.

23 The other argument that Shelby County makes in its reply
24 brief is that Zipes, if it applies here, would suggest that the
25 Piggie Park standard would be available here for Shelby County

1 because that is, in fact, what the plaintiff obtained fees under
2 in Zipes.

3 I think the difference here, though, as I think Your Honor
4 noted, is that in a case like Zipes, the plaintiff was a normal
5 Title VII plaintiff that was suing for a violation of a statute
6 against a violator of the statute, and that's obviously not the
7 case here. Zipes didn't really have an occasion to confront the
8 question of what sort of legal standard would be applicable in
9 this sort of unique procedural posture of this case.

10 If I may, Your Honor, the last point that I would make is
11 that your question earlier today, your very first question was
12 what are the voting guarantees of the Fourteenth and Fifteenth
13 Amendments. I think the Fifteenth Amendment is quite clear that
14 it prohibits the denial or abridgment of any citizen's right to
15 vote on account of race, color. Whatever interests Shelby County
16 sought to advance in this case, however valid they may be, those
17 interests are of a very, very different nature than the ones
18 protected --

19 THE COURT: Why is it reasonable to conclude that what
20 Congress meant or the reason that it put in voting guarantees is
21 because the Fourteenth Amendment has a number of guarantees in
22 it and so it was trying to make it clear that attorney's fees
23 were only available with respect to actions or proceedings to
24 enforce the voting guarantees? That may be the only guarantee
25 in the Fifteenth Amendment, but not in the Fourteenth Amendment.

1 So why isn't it reasonable to say that's why that language was
2 inserted?

3 MR. HO: Well, I think the prohibitions in the
4 Fourteenth Amendment with respect to voting are certainly --
5 obviously, the prohibition on racial discrimination like in the
6 Fifteenth, Rogers v. Lodge, I think makes that clear. There's
7 also the prohibition on malapportionment, the Reynolds v. Sims
8 line of cases. There's a prohibition on unequal treatment of
9 citizens from the Bush v. Gore line of cases.

10 These are all interests that are of a very different kind
11 and nature than the interests that Shelby County has advanced in
12 this case, and I think it would turn the reconstruction
13 amendments on their head. These are amendments which, by
14 design, expand federal and particularly congressional power at
15 the expense of the states.

16 It would turn those amendments on their head to suggest
17 that they are enforced by an action which seeks to preserve
18 state prerogatives against federal intrusion, and that's not in
19 any way to diminish the interest that Shelby County sought to
20 advance in this case; they're just not the interests that
21 Congress sought to incentivize the enforcement of in adopting
22 19731(e).

23 THE COURT: All right. Thank you, Mr. Ho.

24 MR. HO: Thank you, Your Honor.

25 THE COURT: Mr. Rein.

1 MR. REIN: Thank you, Your Honor.

2 Your Honor, the Court gave me five minutes, so I'll try
3 to use them judiciously. I just want to clear up one thing.
4 We're talking here, well, what was the nature of Shelby's
5 complaint and what did it invoke? If you look at the document,
6 the complaint, it says, "The preclearance obligation of Section 5
7 exceeds Congress's enforcement authority under the Fourteenth
8 and Fifteenth Amendments, and therefore violates the Tenth
9 Amendment."

10 So the authority of Congress to regulate voting procedures
11 in derogation of local authority was squarely in the case. We
12 raised it with both Section 5 and Section 4(b). Section 5
13 became moot, but there's no doubt how the complaint was framed.
14 It speaks for itself. So I think that's one point to indicate
15 that, yes, we always saw this was a case about enforcing what
16 were the appropriate limits.

17 This case was also brought under the Voting Rights Act
18 jurisdictionally, and nobody objected to that. So, again,
19 there's the situation where Congress provided a special forum
20 for the very action that Shelby was bringing, and that was not
21 disputed at any level -- not by the government, not all the way
22 up through the Supreme Court. This court had jurisdiction of
23 the action under the Voting Rights Act. So I think those are
24 something to consider in looking at the nature of this action
25 and the rights at issue.

1 Your Honor, you've raised a number of hypotheticals. One
2 thing that I think would be an interesting question is, suppose
3 that Shelby County, acting on its own, said, you know what, we
4 think that the congress has exceeded its power in preclearance,
5 so we're going to start implementing changes to our voting
6 procedures that have been democratically agreed to by the
7 majority of the citizens here, acting through their government.
8 So we're going to do it.

9 Now somebody brings an action for violation of the
10 preclearance obligation. Says you've got to enforce this;
11 they're violating the law. Would that action be one in which
12 there was fee eligibility? Would the intervenors of the
13 government say, well, there's no fee eligibility in that case
14 because it's not about the protection of voting rights? I think
15 the answer would be clearly no. They would say that that's a
16 case in which voting rights are being protected, the very
17 protections that Congress put in place.

18 So I think if you're looking for the characteristic of the
19 action, a fight over preclearance is a fight about a procedure
20 that's an impediment to the exercise of local sovereignty over
21 voting decisions, which the Supreme Court has said are
22 absolutely part and parcel of guarantee. So it is a fight of
23 voting guarantees. We just happen to be on different sides of
24 it, but change the character of the action.

25 The government has said, and said again, well, this wasn't

1 on behalf of individual voters. I think if you look at what the
2 Court said in Bond, if you look at the way this case was argued,
3 it was all about the rights of the citizens of Shelby.

4 THE COURT: Even if it was, was it an action to
5 enforce or advocate the purposes that were behind Congress's
6 enactment of the Voting Rights Act? Seems to me that that's
7 where your argument is weakest. If you get to that point and we
8 get into that analysis on the entitlement, it's hard to
9 conclude, it seems to me, that Shelby County's action was really
10 consistent with Congress's purpose.

11 MR. REIN: Well, Your Honor, Congress's purpose is
12 always best set forth in the words that it used. So if you look
13 at the words that are enforcing the guarantees of the Fourteenth
14 and Fifteenth Amendments, I think we squarely fit within that.
15 I don't think that you can override those by saying, well, in
16 the ordinary case, what Congress wanted to encourage were people
17 to come forward and say, look, these rights have been enumerated
18 and put into statute and I want my rights enforced, to be sure.

19 But Congress created a broader jurisdictional foundation
20 and used words in drafting which went beyond, and I think that
21 the government says, well, settlement cases don't count. But I
22 think they indicate that there has not been a consistent view,
23 even in the Department of Justice, about situations where rights
24 are in collision, and I think Congress has as much an interest
25 in staying within constitutional boundaries as it does in

1 enforcement within those boundaries.

2 THE COURT: That may be, as an abstract matter, but in
3 terms of a fee provision, the cases really look at it as, okay,
4 what's the purpose of this fee provision? The purpose of the
5 fee provision is to encourage actions to be brought to enforce,
6 apply, and uphold Congress's statutory determinations.

7 Here, that's not the case, because you -- Shelby County,
8 that is -- was not bringing an action to really enforce and
9 apply the provisions of the Voting Rights Act. It was bringing
10 an action to eliminate them.

11 MR. REIN: Your Honor, I mean, as we said, that's a
12 fair question, and if Congress had drafted this to say that one
13 who takes action to enforce the rights granted under the Voting
14 Rights Act is entitled to fees, and limited it that way, that's
15 what it would be, and that's how the civil rights statutes are
16 framed.

17 THE COURT: You're right. That's not the way the
18 Act is written, the fee provision of the Act. The question is
19 whether the gloss that the cases have put on it -- Supreme Court
20 cases, including cases by very conservative justices of the
21 Supreme Court, saying that discretion has its limits, and there
22 have to be these kinds of limitations that are expressed in
23 Zipes, even expressed in Piggie Park, expressed in Christiansburg,
24 on the discretion that courts have in awarding fees.

25 MR. REIN: Again, this is a case of first impression.

1 THE COURT: It is.

2 MR. REIN: It's unusual, but I think as far as we're
3 concerned, I think we have a clear chain of, if you will, steps
4 under the language of the Act itself that says the characteristic
5 of this proceeding was one to enforce. It was a struggle over
6 enforcing potentially conflicting rights: one, the right of
7 preclearance, which may or may not be, but I think the government
8 would say is a voting right. The right to have the Attorney
9 General supervise and to stop things absent a judicial
10 determination is a right, a derivative right.

11 It protects other rights and the rights of the citizens of
12 Shelby County who were represented here, and you'll remember the
13 government initially challenged Shelby's standing saying, oh, it
14 should be individuals. I think here we were the private
15 attorney general. We were acting on behalf of a constituency.
16 Just as the government has said in its papers it acts on behalf
17 of citizens, Shelby County acts on behalf of its citizens and
18 brings a broader action for the benefit, as you said, of
19 thousands of other constituencies and their citizens.

20 So I think that the question is, as I think you said in
21 questioning, you know, is this something that Congress would
22 have contemplated or encompassed within the language, or is it
23 so detrimental to the purposes that the language should be
24 ignored. We're saying the language is what Congress passed.
25 They could have passed it differently. They could have

1 restricted it in different ways.

2 It's worthwhile that in Northwest Austin, which was a
3 prior challenge on the same ground, the intervenors asked for
4 fees. Same question, you know, which way is the shoe pinching.
5 I don't think that any of these things really determine it.
6 It's got to be determined --

7 THE COURT: There are interesting little points along
8 the way, but not necessarily determinative, I agree.

9 MR. REIN: And I think, you know, what we believe here
10 is central is that Shelby asserted rights on behalf of its
11 citizens and other citizens. It said that what we are relying
12 on is limiting language in the Fourteenth and Fifteenth
13 Amendments, and we believe both Allen and Bond are pertinent.

14 One says those issues under that amendment, the rights that
15 are at issue are the rights of governing the process as well as
16 the simple right to register and vote, and Bond I think
17 emphasizes that individuals have a protected interest in
18 ensuring mechanisms that prevent overriding federal supervision
19 in matters that go to the states.

20 So unless you have any further questions, Your Honor,
21 I think I've used my five minutes.

22 THE COURT: I think that'll do it, Mr. Rein.

23 MR. REIN: Thank you very much.

24 THE COURT: I thank you all for the quality of the
25 briefing and the arguments today. The issues are submitted, and

1 I will have something out in the future. I won't even say "near
2 future" because I'm not sure exactly what my schedule is, but it
3 shouldn't take all that long. Thank you all.

4 (Proceedings adjourned at 3:23 p.m.)
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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify
that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

Bryan Wayne
BRYAN A. WAYNE