

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-767

TITLE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners V. CREST STREET COMMUNITY COUNCIL, INC.,
ET AL.

PLACE Washington, D. C.

DATE October 7, 1986

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 NORTH CAROLINA DEPARTMENT OF :

4 TRANSPORTATION, ET AL., :

5 Petitioners, :

6 v. :

No. 85-767

7 CREST STREET COMMUNITY COUNCIL, :

8 INC., ET AL. :

9 -----x

10 Washington, D.C.

11 Tuesday, October 7, 1986

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 12:59 p.m.

15 APPEARANCES:

16 LACY H. THORNBURG, ESQ., Attorney General of
17 North Carolina, Raleigh, North Carolina;
18 on behalf of Petitioners.

19 RICHARD J. LAZARUS, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington,
21 D.C.; on behalf of the United States as amicus
22 curiae in support of petitioners.

23 MICHAEL DAVID CALHCUN, ESQ., Durham, North
24 Carolina; on behalf of respondents.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument first this afternoon in No. 85-767, North Carolina Department of Transportation versus Crest Street Community Council.

You may proceed, General Thornburgh.

ORAL ARGUMENT OF LACY H. THORNBURG, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. THORNBURG: Mr. Chief Justice, and may it please the honorable Court:

This is a case arising under The Civil Rights Attorney's Fees Award Act of 1976, 42 USC 1988.

It raises the question as to whether or not attorneys' fees are appropriate in Federal Administrative procedures under Title VI, when there's no connected court action in which the fees are recoverable.

And more narrowly stated: is a recipient liable for fees to private complainants for time spent in resolving their complaint by the voluntary informal means that are provided in Title VI and implementing regulations.

Here no private right of action to enforce Title VI was ever brought in court, and no formal administrative hearings or actions in course to enforce

1 Title VI were instituted by the United States Department
2 of Transportation.

3 The essential facts in this action developed
4 as follows. From the early 1950s the state and
5 municipal and federal officials had been engaged in
6 planning for an east-west expressway through the city of
7 Durham, North Carolina, in compliance with federal laws
8 and procedures. And from time to time the expressway
9 appeared on the plan and was shown in a broad ribbon
10 showing to pass through the Crest Street community,
11 which was a predominantly black community.

12 Construction -- it was agreed that the
13 expressway would be constructed in segments. By
14 December, 1971, three segments were either completed or
15 were under construction. And at that time an
16 incorporated group known as ECCS, Incorporated, and Duke
17 University students, and some others, filed an action in
18 the Middle District Court of the State of North Carolina
19 against the Department of Transportation, the
20 Commissioner of -- North Carolina Highway Commissioners,
21 and others, seeking injunctive relief in that they asked
22 that the construction of the entire expressway be
23 enjoined.

24 The present respondents were not party to that
25 action. The grounds for relief alleged in that action

1 were: failure to hold public hearings; failure to comply
2 with protection for park lands; failure to prepare an
3 appropriate environment impact statement.

4 On February 20th of 1973, the Court enjoined
5 construction on the expressway past those three segments
6 that were then in progress, in construction, until the
7 compliance was had in full with the statutes that were
8 alleged to have been violated.

9 No Title VI issues were raised in the ECCS
10 action, or contended at that time.

11 Then for approximately three years, nothing
12 further was done toward additional construction. But in
13 late '77, the highway authorities began public meetings,
14 and interest was renewed. And at that time they began
15 receiving information to prepare a draft environmental
16 impact statement and holding public meetings.

17 And one of these meetings was held in the
18 Crest Street community which was attended by various
19 parties that were interested in the construction.

20 Now, these meetings continued through '77 and
21 '78, and in '77 counsel were sought by the Crest Street
22 group, and began their representation in these informal
23 proceedings. Of course, other groups were attending
24 these meetings at the same time.

25 And then in September of '78, the attorneys

1 for the respondents filed an administrative complaint
2 with the U.S. Department of Transportation alleging that
3 this -- if construction were completed in accordance
4 with the plans that were being proposed, that this would
5 constitute a violation of their Title VI rights.

6 The highway project then continued in the
7 planning stage. And in October of that same year,
8 October of '78, a draft environmental impact statement
9 was filed by the transportation authorities.

10 And at that time, after the filing of the
11 administrative complaint, the Department of
12 Transportation said to the parties: See if you can't
13 settle your differences by voluntary dispute
14 resolution. And the parties did continue at that time
15 with their informal meetings.

16 QUESTION: This was the United States
17 Department of Transportation you referred to, General
18 Thornburg?

19 MR. THORNBURG: Yes, Your Honor. And that was
20 the Civil Rights Office of the U.S. Department of
21 Transportation.

22 These informal meetings continued as they had
23 before the complaint was filed. And in February of '80,
24 the -- after an investigation, the U.S. Department of
25 Transportation did send the Department of Transportation

1 of North Carolina a letter saying: If you complete this
2 construction in accordance with your proposed plans, we
3 think it would constitute a violation of Title VI.

4 So in June of '80, pursuant to this, and
5 pursuant to the request from the U.S. Department of
6 Transportation, the parties, various parties including
7 Duke University, VA Hospital, and all the others there,
8 formed a steering committee. And they began to
9 address, in earnest, the differences between the Crest
10 Street Community and the other parties as to where this
11 expressway was to be located.

12 And by September of 1981, tentative agreement
13 was reached as to what would be done. And by March,
14 1982, a preliminary agreement, final environmental
15 impact statement incorporating the agreement, had been
16 reached. And the details were finalized.

17 And by April of 1982, everyone agreed that for
18 all practical purposes the dispute had been resolved.

19 Now during this entire period, the respondents
20 had filed no court action --

21 QUESTION: General Thornburg, when you say
22 that had been resolved, is it more or less conceded that
23 the bulk of the relief requested had been obtained?

24 MR. THORNBURG: I would say that the bulk of
25 the relief requested was obtained in the sense that what

1 they sought, if your Honor please, it dealt with
2 primarily -- their complaint dealt with the relocation
3 of parties that lived in the Crest Street community that
4 were being moved as a result of the building of the
5 road.

6 And we certainly concede that, for all
7 practical purposes, it was obtained. And everybody was
8 in agreement. And they had decided what would be done,
9 how it would be done, the plan that would be
10 implemented. And this was in April of 1982.

11 Now all the participants, at this time, from
12 the beginning, had known and continued to be aware of
13 the fact that there was an injunction outstanding in
14 ECOS that dealt with the construction of this
15 expressway, and proscribed it, absent its dissolution.

16 So in August of 1982, the state highway
17 authorities --

18 QUESTION: Who -- what court issued that
19 injunction?

20 MR. THORNBURG: That was the Middle District
21 Court, Federal Middle District Court for North Carolina,
22 Your Honor.

23 QUESTION: That was back in '75?

24 MR. THORNBURG: '73.

25 QUESTION: '73.

1 MR. THORNBURG: Yes, Your Honor.

2 QUESTION: So it's been outstanding for ten
3 years.

4 MR. THORNBURG: Exactly. Roughly ten years.

5 And then the petitioners, we, went into court
6 and asked that it be dissolved. Now, the reason for
7 that was so that we could implement this plan. And
8 everybody knew that that had to be resolved before the
9 plan could be implemented.

10 And then in October, after our filing to
11 dissolve the injunction, the respondents, for the first
12 time then, filed a motion with the Middle District Court
13 asking to be permitted to intervene.

14 And in their proposed complaint, they asked
15 for the same relief essentially that had been filed in
16 the administrative complaint filed with the federal --
17 with the United States Department of Transportation;
18 that being that no further construction be permitted,
19 and that -- or that the construction be completely
20 removed from the area.

21 This was after the agreement had been reached
22 by the parties. And everybody in April had said that
23 the dispute was resolved.

24 Now, the respondents were never allowed to
25 intervene in the ECOS action. But they did sign a

1 consent judgment in the case when the -- when the
2 injunction was dissolved and the action --

3 QUESTION: I suppose -- did they want to,
4 without having intervened? Or did you want them to? Or
5 both?

6 MR. THORNBURG: We really had no serious
7 objection. Because the judgment referred to them as
8 applicants for intervention, Your Honor. And their
9 purpose, primarily, we felt, was to see that the -- be
10 there in case the plan -- we failed to implement the
11 plan.

12 And so they were referred to as applicants to
13 intervene. And they reserved in this judgment the right
14 to seek their attorneys' fees.

15 One of the things that happened during the
16 course of this series of meetings was, that we were
17 getting nowhere on the attorneys' fees matter, but were
18 able to get down to the crux of the issues, and that
19 was, what was best for the Crest Street community.

20 So all the parties agreed that they would just
21 set aside the attorneys' fee issue. So when this
22 judgment was entered, it reserved the right to proceed
23 in case the plan was not implemented; and secondly,
24 reserved to them the right to seek attorneys' fees.

25 On December 15th, the day after the consent

1 judgment was filed -- that was in 1982 -- then the
2 parties formally executed the mitigation plan. And the
3 implementation program is on schedule as of this date.

4 Now this fairly lengthy recitation of the
5 facts points up the accuracy of the District Court's
6 crucial findings of fact. And I would like to review
7 those briefly for the Court, by reason of this Court's
8 deference to what the District Court does.

9 And in this case, the District Court held, in
10 its findings of fact, that the respondents never
11 intervened in ECOS; that only 37 of the 1,261 hours that
12 were spent in dispute resolution process involved
13 preparation of pleadings concerning ECOS, or
14 negotiations toward and review of the final mitigation
15 plan; and included in the consent judgment that the ECOS
16 injunction prohibited construction pending compliance
17 with laws other than Title VI; that by motion to
18 intervene the respondents sought to enjoin extension of
19 the highway; and a declaration that the petitioners'
20 practices violated Title VI; that they obtained neither;
21 that the ECOS injunction only prohibited construction
22 pending compliance with laws other than Title VI; went
23 on to hold that there was no showing that their ECOS fee
24 efforts contributed to the execution of the final
25 mitigation plan; that final settlement seemed imminent

1 when the motion to intervene was filed; and that
2 respondents did not show that their efforts in ECOS, in
3 an action where they never parties, was a catalyst to
4 the plan.

5 Now those are the things that the District
6 Court found in its crucial findings of fact. Most of
7 those start on page 29 of the Joint Appendix.

8 1988 provides that in any action or proceeding
9 to enforce the provision of Title VI, the court, in its
10 discretion, may allow the prevailing party a reasonable
11 attorney's fee as a part of the cost.

12 2000s-1 directs promulgation of rules. 49 CFR
13 21.1 is a set of rules that the U.S. Department of
14 Transportation promulgated pursuant to that statutory
15 mandate.

16 The complainants, or the respondents in this
17 action, filed their administrative complaint under
18 Section 21.1 et seq. And under that section, they are
19 required -- or the U.S. Department of Transportation is
20 required to seek resolution of disputes by informal
21 means, if possible.

22 That was as far as the parties ever got in
23 this action, was the resolution of the dispute by these
24 informal means that the act refers to.

25 Now 2113 provides that if the informal means

1 don't work, then what can be done after that. But --

2 QUESTION: The provision for informal
3 disputes, where is that to be found? In what -- is that
4 in the --

5 MR. THORNBURG: Informal dispute resolution?

6 QUESTION: Yes.

7 MR. THORNBURG: That's in 2149c.

8 QUESTION: What statute is that?

9 MR. THORNBURG: 21 -- it's the Code of Federal
10 Regulations, 49 CFR 21.1 et seq., a series of provisions
11 there.

12 QUESTION: And that -- expressly refers to the
13 Department of Transportation?

14 MR. THORNBURG: Yes, Your Honor. It was --

15 QUESTION: Is it limited to that department?

16 MR. THORNBURG: Yes, sir. This specifically
17 -- these are rules that they adopted pursuant to the
18 Congressional direction.

19 As emphasized in -- by Congress in its
20 enactment of 2000d-1, and the U.S. Department of
21 Transportation in its adopted rules, informal dispute
22 resolution and voluntary compliance was hopefully to be
23 realized without the necessity of court actions.

24 The parties -- the respondents never became
25 parties to any proceeding to enforce Title VI. They

1 did, in fact, become involved in the administrative
2 enforcement process by calling to the attention of the
3 U.S. Department of Transportation a potential violation.

4 And thereafter, they, along with various
5 others, participated in this dispute resolution
6 process. And they participated in the informal
7 discussions that were initiated by the agency. And the
8 negotiations, we contend, did not amount to private
9 enforcement proceedings under the act; and that their
10 role was participants, simply in this voluntary dispute
11 resolution process; and that from the time the complaint
12 was filed, their participation was permissive.

13 Now, this Court, in Cannon, recognized the
14 limited and permissive nature of a complainant's role in
15 its holding concerning Title IX, and therefore Title VI,
16 where exhaustion of administrative remedies is not
17 required before the filing of a private right of action.

18 Now in the context of this case, the
19 Congressional design for administrative enforcement
20 relies on the federal agency as the enforcer. And the
21 main thrust is to obtain recipient compliance by
22 voluntary means.

23 At this point I would like to reserve my
24 remaining time, if I may.

25 QUESTION: Well, could I just ask you --

1 MR. THORNBURG: Yes, Your Honor.

2 QUESTION: -- do the regulations, or
3 something, anticipate the filing of complaints?

4 MR. THORNBURG: Yes, Your Honor.

5 QUESTION: Administrative complaints.

6 MR. THORNBURG: I'm sorry?

7 QUESTION: The filing of complaints with the
8 administration?

9 MR. THORNBURG: Yes, Your Honor. That's what
10 the respondents did in this case. Pursuant to these
11 rules, they did file their administrative complaint.
12 And then the --

13 QUESTION: So they were following the
14 administrative procedure?

15 MR. THORNBURG: Oh, yes.

16 QUESTION: And you think this was a proceeding?

17 MR. THORNBURG: I think it was a process, a
18 voluntary dispute process, that does not raise to the
19 level of a proceeding that's required by 1988, if Your
20 Honor please.

21 QUESTION: Well, it isn't required, but it's
22 permitted.

23 MR. THORNBURG: This form --

24 QUESTION: Do you think this is a proceeding?
25 It isn't a proceeding that's required, I guess.

1 MR. THORNBURG: Ch, no.

2 QUESTION: But it's a proceeding,
3 nevertheless, isn't it?

4 MR. THORNBURG: It is a procedure, or
5 proceeding. But what we're saying in this case, Your
6 Honor, is, that this is something that is informal in
7 which these folks are not really parties, as such.
8 They're participants.

9 QUESTION: Well, they filed a complaint and
10 participated.

11 MR. THORNBURG: They filed a complaint simply
12 calling to the attention of the U.S. Department of
13 Transportation the fact that this potential violation --

14 QUESTION: Well, they told the Department what
15 they objected to.

16 MR. THORNBURG: Yes, Your Honor.

17 QUESTION: And the Department addressed those
18 complaints.

19 MR. THORNBURG: The Department, as required by
20 these same regulations, then said: We'll have an
21 investigation. And they did have an investigation. And
22 that was what precipitated their letter in 1980,
23 February of '80, saying: If you go the way you're going
24 right now, then you are going to have a -- probably have
25 a violation.

1 You see, this whole process, nothing was
2 finalized at this point. The subject was still open to
3 debate as to where this road was going to be located.

4 QUESTION: You're not suggesting that Crest
5 Street and the state highway department were not
6 antagonists in these discussions?

7 MR. THORNBURG: You know, I don't think that
8 you would say that any of these folks were antagonists.
9 They were -- they had different ideas as to how to work
10 this out, Your Honor. But they came -- this is an
11 excellent example of voluntary dispute resolution with
12 the involvement of a court.

13 QUESTION: Right, right.

14 MR. THORNBURG: Because they couldn't have
15 done it in a court proceeding.

16 QUESTION: Well, I know. There wouldn't have
17 been anything to resolve if there hadn't been
18 differences of opinion.

19 MR. THORNBURG: Oh, difference of opinion,
20 sur. But not --

21 QUESTION: Voluntary dispute. So there was a
22 dispute between Crest Street and the Department?

23 MR. THORNBURG: Yes, Your Honor.

24 Thank you, Your Honor.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 Thornburg.

2 We'll hear now from you, Mr. Lazarus.

3 ORAL ARGUMENT OF RICHARD J. LAZARUS, ESQ.,
4 FOR THE UNITED STATES, AS AMICUS CURIAE,
5 IN SUPPORT OF THE PETITIONERS

6 MR. LAZARUS: Mr. Chief Justice, and may it
7 please the Court:

8 Respondent's claim for attorney's fees fails,
9 on our view, for two principal reasons.

10 First, their claim misapprehends the role of
11 private enforcement in Title VI. Because of Title VI's
12 inherently consensual basis, Congress fashioned an
13 administrative enforcement scheme for Title VI different
14 than that provided for in other civil rights laws, such
15 as Title VII.

16 To best achieve the purposes of Title VI,
17 Congress chose not to confer upon persons claiming
18 discrimination the status as parties in the
19 administrative enforcement scheme; and consequently,
20 Section 1988 does not apply to their activities in that
21 setting.

22 The second defect in respondent's claim is
23 that it rests on an unduly expansion construction of the
24 term "proceeding", as that word is used in Section
25 1988.

1 They claim that agency investigations and
2 informal negotiations urged on by the federal agency
3 constitute proceedings to enforce Title VI within the
4 meaning of Section 1988.

5 We do not believe that Congress intended such
6 an expansive meaning for the term.

7 Of the two defects in respondent's claim, the
8 more troubling to the United States is the first. And
9 that is, their misapprehension of the role of private
10 enforcement in Title VI.

11 Title VI's nondiscrimination mandate is
12 uncompromising, yet simultaneously, it's fragile. It
13 depends, therefore, for its ultimate accomplishment, on
14 the maintenance of a bilateral relationship between the
15 federal agency and the recipient of federal funds.

16 Unless that relationship remains intact, Title
17 VI's nondiscrimination mandate is frustrated and
18 becomes meaningless.

19 We believe for this reason Congress
20 established an administrative enforcement scheme in
21 Title VI notable in two primary respects: first, the
22 lack of party status for persons claiming
23 discrimination; and second, a heavy dependence on
24 voluntary means of resolving charges of discrimination
25 as reflected in the statutory language, 42 USC 2000d-1,

1 which refers to the words of voluntary meanings of
2 resolution.

3 We think that application of Section 1988
4 would undermine the Congressional scheme. Federal
5 recipients might be less likely to participate in the
6 informal process.

7 Or, even if they were willing to participate,
8 less willing to compromise their position, for fear of
9 opening themselves up to liability for attorneys' fees.

10 Sure, in other settings, it might be said that
11 the threat of imposition of attorneys' fees might
12 promote settlement. But in Title VI, it also increases
13 the chances that the recipient will circumvent, indeed,
14 frustrate Title VI's mandate by decline of receipt of
15 federal funds.

16 Indeed, the absence of attorneys' fees in the
17 informal process encourages the recipient to settle a
18 case in that process rather than waiting.

19 The balance, we agree, is a difficult one to
20 strike. We believe the language and structure of Title
21 VI, in 602 and 603 of the statute, suggest that Congress
22 intended to err on the side of informality, at least in
23 the initial stages of agency enforcement.

24 Congress determined, we believe the language
25 reflects, in contrast to Title VII, Congress determined

1 that a more formal role for respondents, persons
2 claiming discrimination in an administrative setting,
3 would impeded and not further.

4 In effect, Congress erected a safe harbour
5 within Title VI to allow for the promotion of voluntary
6 settlement in informal negotiations.

7 QUESTION: Mr. Lazarus, if the parties had not
8 reached total agreement, and litigation had been
9 proceeded with the counsel, would attorneys' fees be
10 available for any portion of the work done in the
11 administrative proceeding under Webb?

12 MR. LAZARUS: They might be. The analysis
13 would change. They would not automatically be entitled,
14 because those activities would not have occurred in a
15 proceeding to enforce.

16 But they would be entitled to the extent that
17 the effort they spent in those activities was reasonably
18 expended on the litigation.

19 QUESTION: Under the holding in Webb; that
20 kind of approach?

21 MR. LAZARUS: Precisely. Under the second
22 half of the holding in Webb. Essentially looking for
23 the incorporation --

24 QUESTION: Do you think that your approach is
25 likely to cause people to file more lawsuits, then, to

1 make sure that they have that as a means of getting
2 attorneys' fees, rather than settling these things
3 informally?

4 MR. LAZARUS: We don't think so. Because
5 there's no clear incentive to just file a preemptive
6 lawsuit at the outset.

7 For instance, in this case, if a lawsuit had
8 been filed at the outset, at the same time the
9 administrative complaint had been filed, under our
10 analysis they still would not be entitled to attorneys'
11 fees.

12 Filing a lawsuit changes the analysis, but it
13 wouldn't change the result. You would still have to
14 look to see whether the lawsuit was the catalyst for the
15 agreement reached.

16 In this case, the catalyst for the agreement
17 reached was the administrative process, and would not
18 have been a lawsuit.

19 So absent an incentive to just go ahead and
20 file a preemptive lawsuit, because it wouldn't change
21 the result, we don't believe that people would
22 necessarily file those lawsuits. And if they did, they
23 would be going against, in certain respects, the best
24 interests of their client, which would be to participate
25 in the informal administrative process, and to achieve,

1 as respondents did in this case, an agency preliminary
2 finding of reasonable cause, which no doubt helped
3 considerably in the negotiation process.

4 QUESTION: I don't understand how you
5 encourage people to use the administrative process, and
6 then deny them money.

7 MR. LAZARUS: Well, encourage -- to use the
8 administrative process -- provided them with relief.
9 And that is ultimately what I presume that they're
10 seeking.

11 QUESTION: I'm talking about their attorneys'
12 fees.

13 MR. LAZARUS: Attorneys' fees are only
14 necessary -- entitled in the Congressional scheme --
15 Congress could have passed a statute, Section 1988, a
16 rule which said that whenever you do anything which
17 modifies the behavior of another in a manner which
18 furthers the policies of Title VI, you're entitled to
19 fees; but they drew a line.

20 QUESTION: I can think of three or four other
21 hundred things that could have. I'm talking about what
22 it did.

23 MR. LAZARUS: And here it drew a line, and it
24 required that there be an action or proceeding to which
25 the person complaining of discrimination --

1 QUESTION: Well, isn't it a proceeding?

2 MR. LAZARUS: No, we believe it is not a
3 proceeding.

4 QUESTION: Well, what is it?

5 MR. LAZARUS: Here, it was merely an informal
6 process within the agency.

7 QUESTION: Informal process is not a
8 proceeding?

9 MR. LAZARUS: It's not a proceeding to which
10 they were a party.

11 QUESTION: It didn't say, a proceeding to
12 which they were a party. It said a proceeding. One
13 word.

14 MR. LAZARUS: Section 1988 says that there has
15 to be --

16 QUESTION: In order for you to prevail, don't
17 we have to find that this was not a proceeding/

18 MR. LAZARUS: No, in order for us to prevail,
19 you have to find that they were not -- it was not a
20 proceeding to enforce Title VI with which -- in which
21 they were a party that prevailed. And we do not believe
22 they were a party. And we also do not believe it's a
23 proceeding.

24 I see that my time is up.

25 CHIEF JUSTICE REHNQUIST: I think you can go

1 until the red light. Or are you reserving?

2 MR. LAZARUS: Reserving time for Mr.
3 Thornburg's remarks.

4 CHIEF JUSTICE REHNQUIST: Okay, thank you, Mr.
5 Iazarus.

6 QUESTION: May I ask one question?

7 MR. LAZARUS: Yes.

8 QUESTION: How do you define a proceeding?

9 MR. LAZARUS: A proceeding, in our view,
10 within 1988, would require more indicia of formality,
11 such as an adjudicatory proceeding.

12 We would believe that in Title VI there is one
13 activity which constitutes a proceeding, and that is,
14 the adjudicatory proceeding between the federal agency
15 and the recipients if the federal agency is considering
16 the cutoff of federal funds.

17 Of course, under the statute and implementing
18 regulations, the respondents would not have been a party
19 to that proceeding, which confirms --

20 QUESTION: Well, wholly apart from not being a
21 party, I'm curious on how you define a proceeding to
22 exclude what happened here.

23 MR. LAZARUS: It requires more indicia of
24 formality. Such as a hearing with witness, adjudicatory
25 hearing. I think the Equal Access to Justice Act

1 provides a good touchstone to what would be a
2 proceeding.

3 The recipient is entitled to some notice that
4 it is now participating in a setting where the
5 controversy has reached, we believe, a sufficient stage
6 of concreteness, that attorneys' fees may be liable.

7 At some level, it's a matter of fairness. And
8 we believe Congress drew the line.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Thornburg.

11 We'll hear now from you, Mr. Calhoun.

12 ORAL ARGUMENT OF MICHAEL DAVID CALHOUN, ESQ.,

13 ON BEHALF OF THE RESPONDENTS

14 MR. CALHOUN: Mr. Chief Justice, and may it
15 please the Court:

16 Section 1988 provides for prevailing party to
17 recover attorney's fees in, quote, any action or
18 proceeding, end quote, to enforce a provision of one of
19 the laws specified in Section 1988.

20 In particular, Title VI is one of the laws
21 particularly set out in Section 1988.

22 Plaintiffs in this case sought, and recovered
23 on remand from the Court of Appeals below, fees for
24 representation in a federal administrative proceeding,
25 and a related court action, in which they did enforce

1 their rights under Title VI.

2 QUESTION: Mr. Calhoun, while we're on the
3 text of the act, it doesn't say that you're entitled to
4 fees with respect to any action or proceeding. It says,
5 in any action or proceeding to enforce a certain number
6 of provisions, among which is not 1988. In such an
7 action or proceeding, the court, in that proceeding, may
8 award reasonable attorneys fees.

9 Now, it is possible, when there is an appeal
10 from a Title VII denial, or even from denial of some
11 action under Title VI, perhaps even the very action at
12 issue here, where there is an appeal to the court from
13 that, one could regard that as being one entire
14 proceeding.

15 So that the court, in that proceeding, could
16 award attorneys' fees not just for the participation in
17 court but even for the participation at the
18 administrative stage.

19 But this suit before us here is not an action
20 or proceeding to enforce a provision of Sections 1981,
21 1982, 1983, 1985 and 1986. It just isn't. It's a
22 totally separate proceeding to get attorney's fees under
23 1988.

24 MR. CALHOUN: First of all, I want to make
25 sure I understand the question. The defendants in this

1 case have argued that the statutory language saying that
2 the court is to make the award of the fees indicates an
3 intent by Congress to exclude fees for administrative
4 proceedings.

5 QUESTION: No, that's not the argument I'm
6 suggesting. What troubles me is that the statutory
7 language clearly envisions that it is the court in the
8 action or proceeding that can award the fees.

9 And we are not -- or the courts below were not
10 -- the court in an action or proceeding to enforce 1981,
11 82, 83, 85 or 86. They were a court in a proceeding to
12 get attorney's fees.

13 MR. CALHOUN: This same issue came up in the
14 case of New York Gaslight Company v. Carey, where the
15 issue was, can you get fees in an independent action to
16 recover fees?

17 And there the Court explicitly stated that it
18 would be utterly anomalous, and contrary to the intent
19 of Congress, to say that if you go through the
20 administrative proceeding and you win and then don't
21 have to go to court, you get no fees; but if you go
22 through the administrative proceeding and lose and have
23 to go to court, then you can get fees.

24 The unsuccessful administrative complainant
25 gets fees, while the successful one is denied that.

1 I would note that the very language regarding
2 that was cited with approval by this Court unanimously
3 in the subsequent case of White v. the State of New
4 Hampshire Department of Employment Security.

5 QUESTION: Why is that so anomolous? Doesn't
6 it happen all the time under the Equal Access to Justice
7 Act? If you hire an attorney, got to the agency,
8 negotiate very actively with the agency to get what you
9 want; the agency finally says, okay, you have it,
10 you're not entitled to your attorney's fees.

11 But if the agency says no, and then you have
12 to sue the agency, you are entitled to attorney's fees.

13 Doesn't it happen all the time whenever -- you
14 can't avoid that problem under any system of attorney's
15 fees?

16 MR. CALHOUN: In this case, the threshold of
17 formality was reached. And I think it's important to
18 clarify the record of what did happen here.

19 When the defendants proposed this freeway,
20 initially we did as any counsel would; we informally
21 approached them and said, will you change the decision?
22 Will you provide benefits to mitigate the impact?

23 After we had contacted them, the record shows
24 they continued with the same design, which would totally
25 displace this low income black community; and in terms

1 of mitigation efforts, their relocation report, which
2 was attached to the administrative complaint, showed
3 that there rehousing plan was to use vacancies that they
4 thought would exist in public housing sites scattered
5 around the city.

6 That was the starting point when the
7 administrative complaint was filed in December, 1978.
8 They cast the idea, and would like you to believe, that
9 everybody was in agreement. No adversarial position
10 here.

11 These were extensive adversarial proceedings.

12 QUESTION: May I ask you, Mr. Calhoun: The
13 complain you refer to was filed before the Federal
14 Department of Transportation; is that correct?

15 MR. CALHOUN: That's correct.

16 QUESTION: Did the Federal Department of
17 Transportation ever enter any formal orders in that
18 proceeding?

19 MR. CALHOUN: They issued a preliminary
20 finding stating that -- in effect, they issued a
21 probable cause determination equivalent to that of --

22 QUESTION: And asked the parties to talk to
23 one another about a settlement.

24 After that, did they enter any formal order?

25 MR. CALHOUN: They urged the parties to

1 conciliate and that the parties did --

2 QUESTION: I know they urged them. But my
3 question is, did the Department of -- Federal Department
4 of Transportation enter any final order in what you
5 describe as a proceeding?

6 MR. CALHOUN: No, the proceeding was
7 determinated -- was terminated by the complaints
8 withdrawing their complaint, which was explicitly the
9 quid pro quo in the final settlement document. Just as
10 it's done frequently in the EEOC context.

11 QUESTION: Well, was there a final settlement
12 document before the DOT -- which was approved by the DOT?

13 MR. CALHOUN: The DOT accepted the withdrawal
14 of the complaint after the plaintiffs and defendants
15 entered into a formal settlement document. The
16 defendants in this -- it applies both to the court and
17 the administrative proceeding -- the defendants did --
18 we would have preferred as plaintiffs to have had the
19 order -- either an order of the court or the agency to
20 come back for contempt.

21 The defendants resisted that, and we agreed to
22 their position, because of the extensive duties, and
23 complicated duties, they undertook in this mitigation
24 plan, which sets out in some 15 pages --

25 QUESTION: What you're saying is that the

1 settlement agreement was not approved by the DOT; is
2 that right?

3 MR. CALHOUN: It was, and that they then
4 accepted withdrawal of the complaint and termination of
5 the proceeding upon execution of the settlement
6 agreement.

7 I think the settlement agreement reflects --
8 and the whole negotiations between the parties reflect
9 -- that this settlement agreement was essential to
10 ending the administrative proceeding.

11 QUESTION: Who were the parties to the
12 settlement agreement?

13 MR. CALHOUN: The parties -- there were three
14 parties -- there were three entities that signed the
15 settlement agreement: the plaintiffs, the defendants,
16 and the City of Durham.

17 QUESTION: And was that then submitted to the
18 DOT for its approval?

19 MR. CALHOUN: It was submitted to DOT saying,
20 we have reached this agreement and therefore we are
21 withdrawing our complaint, and there was --

22 QUESTION: And what was DOT's response?

23 MR. CALHOUN: There was no objection, and the
24 complaint was --

25 QUESTION: But there was no approval or

1 ratification either?

2 MR. CALHOUN: That's -- no explicit approval
3 in terms of --

4 QUESTION: Well, was there implicit approval?

5 MR. CALHOUN: Yes. If they'd been allowed the
6 complaint to be withdrawn?

7 QUESTION: Well, is this something that's
8 quite difficult to get the DOT to do, to allow a
9 complaint to be withdrawn.

10 MR. CALHOUN: I don't have experience in other
11 cases to know. But I would say, this situation is the
12 same as would occur in EEOC proceedings, which this
13 Court has held, you are entitled to fees for
14 administrative representation.

15 For example, in the statutory scheme of EEOC,
16 North Carolina, for example, is a nondeferral state. If
17 this had been in the Title VII context, it would have
18 proceeded exactly the same way.

19 QUESTION: Except under -- you would have had
20 to go to the state agency.

21 MR. CALHOUN: North Carolina is a nondeferral
22 state, so there is approved state agency. So in North
23 Carolina you would file a complaint with the EEOC, just
24 like we filed a complaint with the DOT.

25 The essence of the dispute resolution would be

1 conciliation. And they would urge the parties to
2 conciliate. And typically -- and I have done this
3 myself -- when there is a successful agreement, part of
4 the agreement is to withdraw the complaint from EEOC,
5 and that is typically approved.

6 But this Court has said, you would get fees
7 there.

8 QUESTION: Isn't it true, Mr. Calhoun, under
9 Title VII, whether a deferral or nondeferral state, you
10 must go to the agency before you can go to court?

11 MR. CALHOUN: Yes, and --

12 QUESTION: And wasn't that part of the
13 reasoning of our opinion in New York Gaslight, was that
14 the mandatory nature of the administrative proceeding is
15 a prerequisite to court action?

16 MR. CALHOUN: It was part of the reasoning in
17 Carey, but it was a different issue in Carey. In Carey,
18 the plaintiff prevailed totally under state law. As in
19 Carey -- Chief Justice, you and Justice White,
20 dissented, and referred with approval to Judge
21 Mulligan's decision in the Court of Appeals.

22 His dissent there went to the issue of, those
23 were not federal rights. Just like in Webb, the
24 proceeding did not concern federal rights. As Justices
25 Blackmun and Brennan have pointed out explicitly in

1 Webb, the issue of whether a proceeding is mandatory or
2 optional goes to whether or not it is a proceeding under
3 one of the titles specified in Section 1988.

4 It doesn't go to the question of whether or
5 not it is a proceeding. In this case there is no
6 question that this was a proceeding to enforce Title
7 VI. The administrative --

8 QUESTION: In your view, there's no question.
9 But your opponents certainly question it.

10 MR. CALHOUN: They would say, quite, it's not
11 a proceeding.

12 (Inaudible.)

13 MR. CALHOUN: But they would contest that the
14 purpose of what we were doing was to enforce Title VI.
15 This Court has looked at, both in Webb and in Carey, two
16 separate issues.

17 It's not: Is it a proceeding? In fact,
18 implicit in all this Court's decisions regarding
19 recovering fees for administrative representation, it
20 has been implicit, and the Court has rejected on several
21 occasions, the argument that the word "proceeding" in
22 Section 1988 does not include administrative
23 proceedings.

24 In Webb and in Carey, the issue was, was that
25 proceeding one to enforce one of the rights set out in

1 the attorney's fees statute?

2 That's also shown by this Court's decision in
3 Robinson -- in Smith v. Robinson. That was a case under
4 the Education of the Handicapped Act. There you found
5 that the proceeding, the administrative proceeding, was
6 mandatory. But it was mandated by a nonfee statute.

7 So even though it was mandatory, the Court
8 held that you could not get fees for representation
9 there. Because the issue was not, is it optional or
10 mandatory; the issue was, is it a proceeding to enforce
11 the rights that Congress enacted? And Congress decided
12 it should be accompanied with an attorney's fee award.

13 QUESTION: Mr. Calhoun, could I ask you a
14 question? A great deal of importance, as I understand
15 it, attaches to the fact that you actually did file a
16 complaint with the Federal Department of Transportation
17 which precipitated all of this.

18 Supposing instead of filing a formal
19 complaint, you had made known more informally -- written
20 them a letter, and said, we think a violation is
21 occurring here. And they said, okay, we'll take a look
22 at it. But you hadn't complied with any formal
23 regulations.

24 They looked at it and asked you to do just
25 exactly what you did. And everything else followed the

1 same.

2 Would you be entitled to fees?

3 MR. CALHOUN: There has to be a threshold
4 requirement of a proceeding. And here --

5 QUESTION: And it's the filing of the
6 complaint?

7 MR. CALHOUN: It's the filing of a complaint.
8 Just as the threshold in litigation is, between
9 informally complaining to a party and filing a
10 complaint.

11 The filing of that complaint triggered a
12 process, and it also triggered legal rights for the
13 complaint.

14 QUESTION: But did it trigger proceedings
15 before the Department of Transportation?

16 MR. CALHOUN: Yes. And the proceeding was, to
17 investigate, first of all, and determine whether there
18 was probable cause; which they did.

19 This wasn't a case where we filed the
20 complaint, and the next day, they turned around and
21 changed their practices. Quite to the contrary. A year
22 and a half elapsed between the time we filed the
23 administrative complaint and the administrative agency
24 issued its finding of a Title VI violation.

25 In the interim the agency had met --

1 QUESTION: Finding of a Title VI violation?

2 MR. CALHOUN: A preliminary finding of -- they

3 QUESTION: A probable cause finding, wasn't it?

4 MR. CALHOUN: The wording used in the letter
5 sent certified mail, return receipt requested, to the
6 secretary of the state Department of Transportation was
7 that they made a preliminary finding that a violation of
8 Title VI would occur if the road was built in this
9 manner.

10 The -- first of all, on the proceeding, the
11 defendants are turning on its head the Congressional
12 preference for conciliation. These points are clear:
13 first, that Congress intended, by enacting Section 1988,
14 to provide attorney's fees to victims of civil rights
15 violation; second, it is also extremely clear from both
16 Congress as this Court that there is a strong preference
17 for resolution or conciliation.

18 The legislative history of 1988 specifically
19 states that Congress thought that a fee claimant should
20 not be penalized for reaching a settlement. It would
21 serve no public policy for -- to require a fee claimant
22 to go through a court hearing.

23 The legislative history is explicit to say
24 that if, after filing a complaint, the party changes its
25 practices, that a fee recovery would still be proper.

1 Congress has addressed this issue. So from
2 the two points that Congress intended for victims of
3 civil rights violations to recover fees; and second,
4 that they encouraged and went out of their way to urge
5 that these disputes be conciliated; how does it follow
6 that Congress intended to deny fees for conciliation?

7 QUESTION: Would it make some sense to say
8 that if the agency gives you the relief that you want,
9 you don't get fees; if they deny it, and you later get
10 it in court, in addition to paying court costs, as part
11 of the costs, which is the way the statute reads, as
12 part of the costs in that proceeding, you will also get
13 your administrative costs?

14 Isn't that a thoroughly rational scheme? It
15 encourages the agency to give you what you're entitled
16 to at the administrative stage, because if it doesn't do
17 so and is forced to do so by a court, you're going to
18 pick up your fees. Otherwise, you don't get your fees.

19 MR. CALHOUN: This Court considered that exact
20 same argument in Carey, and rejected it under Title VII

21 --

22 QUESTION: No, Carey involved the same
23 proceeding. It was not a simple proceeding for
24 attorney's fees. In Carey, this Court was reversing the
25 agency's denial -- or the lower courts were -- reversing

1 the agency's denial of the relief, weren't they? In a
2 free-standing action for attorney's fees.

3 MR. CALHOUN: In Carey, I would not that this
4 case is in virtually the same position procedurally as
5 Carey, and as a case cited in the legislative history in
6 the House report.

7 And in all cases, fees for administrative
8 proceedings were granted.

9 In Carey, the party filed an administrative
10 complaint. And then, near the end, near the very end of
11 the administrative process, they filed a federal court
12 action.

13 Before anything was done in the federal court
14 action, they received all of the relief that they had
15 asked for in the administrative forum. But the issue --
16 the substantive issue was resolved in the administrative
17 forum. And this Court awarded fees.

18 And that follows. In the House report on
19 Section 1988 --

20 QUESTION: The federal court action was
21 dismissed, because the defendant had agreed to abide by
22 the state ruling; isn't that true? In Gaslight?

23 MR. CALHOUN: In Gaslight, that's correct.

24 QUESTION: And then -- but the suit
25 nevertheless was allowed to continue for the purposes of

1 attorney's fees?

2 MR. CALHOUN: That's correct. The same thing
3 happened --

4 MR. CALHOUN: And this Court said that a
5 separate suit for attorney's fees was accepted --
6 acceptable, didn't it, or not?

7 MR. CALHOUN: It did explicitly say that in
8 Carey. And then it referred, in a unanimous opinion of
9 this Court subsequently, in the case of White v. the New
10 Hampshire Director of Employment Security, it stated
11 with approval, quoted from Carey, an independent action
12 would be permitted.

13 But even if a related court action is
14 required, as the Court of Appeals found in this case,
15 there was such an action.

16 Now the defendants have put this gloss of
17 friendliness on everything. But this was -- we start
18 from very adversarial positions. And we end up, through
19 this process, at a result far from what defendants
20 originally offered.

21 Defendants started out offering not to change
22 their plans and provide no mitigation plan. The final
23 result is, the defendants substantially modified their
24 highway plan, so to preserve the community, and out of
25 pocket spend more than \$5 million to improve this

1 community and mitigate the impacts of the road.

2 The magnitude of that settlement indicates the
3 strength of the civil rights claims that we had here.

4 In terms of the position of the court
5 proceeding here vis-a-vis the administrative proceeding,
6 we reached, in the Spring of 1982, a framework for
7 future negotiations. Specifically, the major
8 breakthrough was the DOT for the first time said they
9 would discuss last-resort housing.

10 No enforceable agreement was entered until
11 after the court action and the motion to intervene in
12 this case had been filed.

13 At the time we moved to intervene into ECCS,
14 the plaintiffs had no enforceable agreement with the
15 defendants.

16 Furthermore, it is clear that we were parties
17 to the ECOS action.

18 QUESTION: Well, now, the motion to intervene
19 was denied, though, wasn't it?

20 MR. CALHOUN: The motion to intervene was not
21 explicitly ruled on. But we were made parties to the
22 final judgment. And among other things, that final
23 judgment dismissed with prejudice our Title VI claim.

24 If we were parties, how could it dismiss with
25 prejudice our claims?

1 QUESTION: But it referred to you, I thought,
2 as an applicant for intervention?

3 MR. CALHOUN: I think that may be the label on
4 our signature, but it -- the substance of that --

5 QUESTION: The substance of what?

6 MR. CALHOUN: Of the order, of the consent
7 judgment, explicitly dismisses claims with prejudice.

8 And this issue was clarified, I think, in the
9 Court of Appeals below. There, Chief Judge Winter asked
10 defendants' counsel, he said, what if the plaintiffs had
11 turned around the next day and filed a Title VI court
12 action? Could they do it?

13 And defendants' counsel, Mr. Richmond, argued
14 the case there, said no. Res judicata would bar that.

15 The only way that we could be barred, and the
16 intent of the agreement was to bar and bury our claims.
17 And it did so.

18 The only way it can do that is if we were
19 parties to that action.

20 From a practical standpoint, the position
21 argued by defendant produces anomalous results. First
22 of all, as mentioned, they argue, if you succeed at the
23 administrative proceeding, no fees whatsoever. But if
24 you went to court and -- and without going at all to the
25

1 administrative forum, if you went to court and did
2 exactly the same thing as we did here, you would get
3 fees.

4 QUESTION: Were you entitled to do that, by
5 the way?

6 MR. CALHOUN: I think at the time --

7 QUESTION: Could you have filed a Title VI
8 suit?

9 MR. CALHOUN: At the time that we filed the
10 administrative complaint, we believed that there was a
11 substantial chance that it would be found that you had
12 to exhaust that remedy.

13 There were the Wilmington, Delaware cases,
14 other cases, that held, as we've cited in the brief,
15 that at that time it appeared that you might have to
16 exhaust administrative remedies.

17 This Court, I believe, has clarified that
18 question since then. And we would say, it appears now
19 that you do not have to exhaust administrative remedies
20 under Title VI.

21 QUESTION: Under Title VI there is a private
22 right of action that you can bring; is that right?

23 MR. CALHOUN: This Court, as you know well,
24 has considerably varying opinions on that issue. But it
25 does appear that the Court has held that there is a

1 private cause of action under Title VI.

2 QUESTION: Which now could have been filed, at
3 least under present law, you think, could have been
4 filed immediately without filing any complaint before
5 the agency?

6 MR. CALHOUN: It now appears that way,
7 although it appeared differently at the time we filed
8 the administrative complaint.

9 The --

10 QUESTION: And I suppose if you filed a suit,
11 and then went ahead with these private discussions, you
12 could get attorney's fees?

13 MR. CALHOUN: I think that's clear.

14 The Solicitor General's office has argued that
15 somehow awarding fees here would cause an interference
16 with the agency enforcement of Title VI.

17 First of all, as shown by Title VII
18 regulations, the agency has complete control of these
19 proceedings in terms of where they head. And they can
20 prevent any interference.

21 Second, in this case we're talking only about
22 the threshold requirement of the fee claimant. Getting
23 over this hurdle doesn't mean you're going to recover
24 all your fees that you've requested. You still have to
25 show that your fees are reasonable, and for work that

1 reasonably contributed to the result.

2 An administrative complaintant is simply not
3 going to burn time that is not helping the proceeding
4 because they know they're never going to get fees for
5 it.

6 There is no evidence here of any such
7 interference. In fact, the only evidence here is that
8 without the plaintiffs' active involvement, this
9 enforcement of civil rights would simply have never
10 occurred.

11 We also want to clarify on the party issue
12 what our position is. We don't say that if you affirm
13 this award of attorney's fees, that means that every
14 administrative claimant has to get fees.

15 This Court has repeatedly recognized the broad
16 discretion of administrative agencies to determine how
17 they will enforce their statutory duties. Cases such as
18 Florida East Coast Railroad, or Vermont Yankee Nuclear
19 Power Plant. The agency has very broad discretion.

20 But the flip side of that is, they did have
21 the authority, there was no bar, to their involving us
22 in this case as parties. And they did so.

23 I think one of the most telling weaknesses of
24 the defendant's case is the lack --

25 QUESTION: Do I interpret that last remark to

1 mean that if these regulations were eliminated, that if
2 there were -- if the agency were not obliged to and
3 chose not to have such complaint procedures, your mere
4 application to the agency would not suffice?

5 MR. CALHOUN: That's clear. Yes, we agree
6 with that.

7 The defendants in this argument, notably
8 absent from their discussion, is, what does the language
9 of the statute say, and what does the legislative
10 history show.

11 Here the language used is, as this Court noted
12 in Carey, the broad disjunctive: "any action or
13 proceeding." Not only any action, not any mandatory
14 action or proceeding, but any action or proceeding.

15 It's noteworthy --

16 QUESTION: But I don't think you're helped
17 much by the language of the statute. Because as Justice
18 Scalia ponted out, the statute says that the court, in
19 that proceeding, may award.

20 MR. CALHOUN: I think the same situation is in
21 Title VII, upon which Section 1988 was explicitly
22 modelled. And in Carey this Court found that you were
23 entitled to an independent action for fees.

24 QUESTION: Well, the Court said that. It was
25 dicta, I think.

1 MR. CALHOUN: And the Court -- granted it was
2 dicta, the Court reaffirmed that dicta, though, in White
3 v. State of New Hampshire.

4 QUESTION: In another dictum?

5 MR. CALHOUN: Yes. But as we have explained,
6 if a court action is required, it was present here in
7 the ECOS action. We wanted to submit the fees for
8 determination in the ECCS action. We asked the -- we
9 raised that with the defendants at that time.

10 They stated, no, let's not do that for two
11 reasons. One, the settlement that we reached was
12 contingent upon legislative acts by the City of Durham.
13 They had to promulgate and comply with statutory
14 requirements to implement a redevelopment plan for this
15 entire area. They could not commit in advance to that.

16 And the settlement explicitly provided, if
17 they didn't do this, this was all void.

18 Second, the defendant said, we are a state
19 agency, and it would be a lengthy process to come up
20 with agreement and consent on the fees. Let's negotiate
21 further. And we did so.

22 And then after we could not reach agreement,
23 we brought suit. But the ECOS claim included a claim
24 for fees, and when we signed that consent judgment, the
25 judgment specifically reserved our right to bring a

1 subsequent claim for fees.

2 We had that right in ECOS. In the ECOS case
3 it was dismissed without prejudice. And that's explicit
4 in the consent judgment which we signed in ECCS.

5 We could have brought it in ECOS. There were
6 various reasons why it was not done there. But neither
7 the court nor the defendant objected to our saving it
8 for a later date, if it could not be resolved.

9 QUESTION: What was the ECOS action?

10 MR. CALHOUN: The ECOS action was originally
11 an environmental suit.

12 QUESTION: It was not a Title VI?

13 MR. CALHOUN: That's correct.

14 QUESTION: And that's what the injunction was
15 entered under?

16 MR. CALHOUN: Yes.

17 QUESTION: And could you have gotten -- you
18 couldn't have got attorney's fees just for your success
19 in getting in the injunction?

20 MR. CALHOUN: No. But the --

21 QUESTION: So how could the -- when the
22 injunction was withdrawn, you thought -- you think --
23 that that was an independent ground for your getting
24 attorney's fees for administrative services?

25 MR. CALHOUN: If an independent court action

1 is required, if that anomalous result or practice is
2 required, we did go to federal court on the merits here.

3 QUESTION: Well, it's not just a court
4 action. It's a court action to enforce those particular
5 provisions of the United States Code set forth in
6 Section 1988.

7 MR. CALHOUN: And this -- and through our
8 intervention it did become that. Because it dismissed
9 with prejudice -- the ECOS action dismissed with
10 prejudice our Title VI rights.

11 If those rights were not before the court in
12 ECOS, how could those rights have been dismissed?

13 In conclusion, Congress in the legislative
14 history rejected --

15 QUESTION: Mr. Calhoun, may I ask one other
16 question?

17 I think in answer to a question by Justice
18 Scalia you indicated that your complaint was critical to
19 your claim.

20 Is the letter of the Office of the Secretary
21 of Transportation of February 20, 1980, also critical to
22 your claim, in which they conclude that there might be a
23 prima facie violation of Title VI?

24 MR. CALHOUN: We don't think it's essential to
25 our claim.

1 QUESTION: You don't.

2 MR. CALHOUN: But we think it certainly
3 bolsters the claim that this was no friendly
4 get-together we had here.

5 QUESTION: You would have the same claim if
6 they had repoded to your complaint by just saying,
7 well, we're not sure whether there's a violation, but
8 we'd like you parties to try and negotiate a settlement
9 anyway?

10 MR. CALHOUN: They were dragged into this
11 conciliation agreement. They did not voluntarily change
12 their ways after we raised this complaint.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
14 Calhoun.

15 General Thornburg, do you have anything more?
16 You have two minutes.

17 MR. THORNBURG: If Your Honor please, unless
18 the Court has additional questions, we have nothing
19 further.

20 CHIEF JUSTICE REHNQUIST: Thank you.

21 The case is submitted.

22 (Whereupon, at 1:57 p.m., the case in the
23 above-entitled matter was submitted.)
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-767 - NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, ET AL., Petitioners

V. CREST STREET COMMUNITY COUNCIL, INC., ET AL.

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

BY Paul A. Richardson

(REPORTER)

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