

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: TOM SWINT, ET AL., PETITIONERS v. CHAMBERS
COUNTY COMMISSION, ET AL.

CASE NO: No. 93-1636

PLACE: Washington, D.C.

DATE: Tuesday, January 10, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TOM SWINT, ET AL., :

4 Petitioners :

5 v. : No. 93-1636

6 CHAMBERS COUNTY COMMISSION, :

7 ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, January 10, 1995

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:08 a.m.

14 APPEARANCES:

15 ROBERT B. McDUFF, ESQ., Jackson, Mississippi; on behalf of
16 the Petitioners.

17 PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the United States, as amicus curiae,
20 supporting the Petitioners.

21 PAUL MARCH SMITH, ESQ., Washington, D.C.; on behalf of the
22 Respondents.

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

2 (10:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 93-1636, Tom Swint v. the Chambers County
5 Commission.

6 Mr. McDuff.

7 ORAL ARGUMENT OF ROBERT B. McDUFF

8 ON BEHALF OF THE PETITIONERS

9 MR. McDUFF: Mr. Chief Justice and may it please
10 the Court:

11 On the merits, the question in this case is
12 whether counties in Alabama are liable for the
13 unconstitutional actions of their sheriffs under 42 U.S.C.
14 section 1983. In terms of jurisdiction, which I propose
15 to discuss first, the question is whether the court of
16 appeals had the authority, by the virtue of what it called
17 discretionary pendent appellate jurisdiction, to resolve
18 the county liability issue in the first place on an
19 interlocutory appeal.

20 Let me state at the outset that, because we
21 believe the court of appeals was wrong on the merits, we
22 would be pleased if its opinion were vacated one way or
23 the other, but of the alternatives, we take the opposition
24 that the case should be resolved on the merits. We agree
25 with our opponents, who asked the Eleventh Circuit to

1 address this matter in the first place, that the court of
2 appeals had the power to resolve the county liability
3 issue coming as it did in the context of an otherwise
4 valid interlocutory appeal on qualified immunity grounds,
5 and with the trial already on hold in the district court
6 until the appeal was completed.

7 We disagree with our opponents when they contend
8 that the county liability issue is independently
9 appealable as a collateral order. As far as back as Owen
10 v. City of Independence in 1980, this Court has stressed
11 that local governments are not cloaked with common law or
12 Federal constitutional statutory immunities, and those are
13 the sorts of immunities that give rise to collateral order
14 appealability in section 1983 cases.

15 QUESTION: Mr. McDuff, could the district court
16 judge have certified an appeal on this issue if it
17 determined that judicial economy would be served by that?

18 MR. McDUFF: Yes. Yes, he certainly could have.

19 QUESTION: Was the district judge asked to do
20 that?

21 MR. McDUFF: No.

22 QUESTION: No.

23 MR. McDUFF: And I -- I guess my opponents can
24 speak to this better than I, but I assume he was not asked
25 because, under existing Eleventh Circuit case law, the

1 court of appeals had discretionary pendent review, and
2 there was no need to take the district judge's time with a
3 request for certification. Certainly, if it had been
4 done, we wouldn't have this issue today, and I do want to
5 suggest that --

6 QUESTION: Suppose the district judge had been
7 asked and then -- and refused to certify under 1292(b),
8 could the Eleventh Circuit nonetheless exercise pendent
9 appellate jurisdiction?

10 MR. McDUFF: Yes, I think so.

11 QUESTION: Under the --

12 MR. McDUFF: Under our view, yes, that's
13 correct.

14 QUESTION: Perhaps this is a question better
15 reserved for your opponent, but when -- when the question
16 of pendent appellate jurisdiction drawing in other parties
17 came up for the district courts, Congress provided the
18 solution in 1367, is it, in 1990. Why should we approve a
19 court-made solution to the problem on the appellate level?

20 MR. McDUFF: Because I think the situation in
21 1367 is very different, because there you're talking about
22 parties who are not -- who at least prior to 1367 were
23 viewed by this Court in the Findley case as not even being
24 properly in Federal court.

25 And I think that's very different than a

1 situation where everyone is properly in the Federal case,
2 and the only question is whether the issue and the parties
3 should be in the district court or in the court of
4 appeals.

5 And it seems to me that it would be hard to
6 imagine a construction of pendent appellate jurisdiction
7 where the court of appeals could review pendent claims of
8 the party that had the right to bring the interlocutory
9 appeal in the first place but could not review claims
10 brought by other parties in the same case, even though
11 everyone was properly in Federal court. So I think there
12 are two very different situations between the one
13 encompassed by 1367 and the issue we have here.

14 QUESTION: Mr. McDuff, it must be hard to argue
15 a case where your opponent has not disagreed with you on
16 the issue --

17 (Laughter.)

18 QUESTION: -- so you don't know what questions
19 you're going to get, so I apologize for giving you this
20 one, but we have held in the United States v. Stanley that
21 there is no such thing as pendent appellate jurisdiction
22 where the appeal -- the reason the case is before the
23 appellate court is section 1292(b), a certified question
24 from the lower court. Why should it be any different
25 for --

1 MR. McDUFF: Because I think 1292(b) is a very
2 different -- well, let me answer it this way. I think
3 1291 is a much broader statute and has been interpreted
4 much more broadly than 1292(b). 1292(b) is guided by very
5 specific factors, and has a very specific procedure where
6 both the district judge and the court of appeals have to
7 approve an interlocutory appeal of an issue.

8 QUESTION: Well, sure it does, but the basic
9 reason why you assert pendent jurisdiction exists under
10 1291 is exactly the same. What the heck, we're up here,
11 we may as well make a clean sweep of it and get rid of
12 everything that needs to be decided. That same reason
13 would apply in certified questions.

14 MR. McDUFF: But in a certified question, there
15 is not a preexisting appeal. In other words, the whole
16 interlocutory appeal process starts anew with someone
17 going to the district judge and saying we want to take
18 this issue up, and I think that is a much narrower and
19 much more focused situation than here, 1291, which is a
20 broad jurisdictional statute, and where an appeal already
21 exists.

22 I mean, for example, you could say that 1292(b),
23 now that it has been passed and enacted and used,
24 precludes the need for collateral order jurisdiction under
25 1291, and that we no longer need to have this whole notion

1 of collateral orders under 1291 because you can achieve it
2 under 1292(b), but collateral order jurisdiction has not
3 been jettisoned because -- I think because 1291 is a much
4 broader statute.

5 QUESTION: I wouldn't make that argument. The
6 argument I would have made -- would make is that you don't
7 need pendent jurisdiction, because to the extent it is
8 really efficient to dispose of these other issues, you
9 could resort to 1292(b).

10 MR. McDUFF: But it seems to --

11 QUESTION: Have a lower court ask for them to be
12 resolved, but if he doesn't --

13 MR. McDUFF: It seems to us to be rather strange
14 to have the notion of under 1291 an appeal that already is
15 validly before the court of appeals -- that is, the
16 qualified immunity appeal in this case -- yet the court of
17 appeals has to have the permission, in effect, of the
18 district judge in order to consider any other issues in
19 the case.

20 QUESTION: Why isn't the answer to that Abney,
21 which was on the books when 1292(b) was --

22 MR. McDUFF: I'm sorry.

23 QUESTION: Why isn't the answer to that the
24 holding in Abney, which was on the books when 1292(b) was
25 enacted by Congress?

1 MR. McDUFF: We've got three answers to Abney,
2 and let me, if I can, spin them out very quickly. I mean,
3 first of all we believe Abney can be read as this Court
4 exercising its supervisory jurisdiction over the courts of
5 appeals, saying you should not consider pendent claims in
6 criminal cases.

7 Second, and fall-back from that is that Abney
8 can be read as a -- if it's read as a jurisdictional
9 limitation, it applies only to criminal cases in light of
10 this Court's statement in several cases that the final
11 judgment rule should be enforced more strictly in criminal
12 than in civil cases.

13 And then third, if Abney is read as
14 jurisdictional, and it is read to cover civil and criminal
15 cases, we believe it is in conflict with earlier
16 decisions, such as the Isen case and the Stude case, and
17 that Abney doesn't comport with the broad spirit of 1291,
18 and if necessary should be overruled to that extent.

19 QUESTION: Well, that would be a point to be
20 considered, but it's also the case that we're trying -- or
21 if our object is to consider what Congress' understanding
22 of the scope of 1291 and 1292(b) might be, the fact that
23 Abney came first before the enactment of 1292(b) would be
24 a reason, whatever its soundness, for assuming that
25 Congress intended the exclusive means of getting these

1 related cases -- related issues to beat 1292(b).

2 MR. McDUFF: I'm sorry, I misunderstood your
3 point earlier, and I see it now.

4 Frankly, I don't think -- I think it's there to
5 say that Congress has probably not considered this
6 situation in the same way that it had not considered
7 collateral order appeals when Cohen came out in 1949,
8 and --

9 QUESTION: I mean, why should we make that
10 assumption? Abney was there on the books. Congress
11 enacted 1292(b) a couple of years later. I mean, I would
12 suppose the reasonable assumption is that Congress knew
13 what we had been doing here.

14 MR. McDUFF: But Abney does not contain a very
15 thorough discussion of this issue. I mean, all Abney says
16 is the defendant tried to bring up the pendent claim, this
17 is a criminal case, and you know, we don't want to
18 encourage this sort of delay in criminal cases, and then
19 there's a sentence at the end saying, therefore the court
20 of appeals had no jurisdiction.

21 I do think it's -- the discussion was so limited
22 that I don't think as a practical matter the Members of
23 Congress thinking about the final judgment rule and how
24 1291 is going on into the future were really thinking
25 about that, and so I don't think that is an assumption

1 that should guide this Court.

2 I think instead the Court should look at this
3 the way it has interpreted 1291 in the past, whether it's
4 with a final judgment rule or other rules, in a very broad
5 way, in a way that will achieve the purposes of the -- of
6 1291, which are the limiting of piecemeal appeals and the
7 limiting of effective administration of justice, and
8 another example I want to give is -- is the final judgment
9 merger rule, which of course has been around for a long
10 time, and we refer to this at page 19 of our supplemental
11 brief.

12 Under the final judgment rule as applied in
13 section 1291, once there is a "final decision" -- that is,
14 a final judgment -- the court of appeals has the authority
15 to review all prior interlocutory decisions in the case,
16 even if they could not normally be thought of as final
17 decisions.

18 QUESTION: That's the very purpose of a final
19 judgment rule that says, you reserve all of your
20 objections all the way down the line, and then you have an
21 appeal from the final judgment. That's the very objective
22 of a final judgment rule.

23 But you didn't ask the Eleventh Circuit to do
24 this.

25 MR. McDUFF: That's correct.

1 QUESTION: Your opponent did.

2 MR. McDUFF: That's correct.

3 QUESTION: And perhaps we ought to let you
4 address the next question you have and ask your opponent,
5 who was responsible for bringing the pendent claim urging
6 the Eleventh Circuit to take it, to continue with the
7 1292(B)/1291 question.

8 MR. McDUFF: Very well.

9 QUESTION: Although you are aiding and abetting
10 him.

11 (Laughter.)

12 MR. McDUFF: We were forced to. We were drug
13 along.

14 In terms of the merits, the Eleventh Circuit in
15 this case never disputed the fact that the sheriff's
16 authority to set law enforcement policy within his or her
17 county is final and unreviewable. However, the court said
18 it's not the county's policy that the sheriff is setting.

19 The court of appeals never said for whom -- for
20 which unit of Government the sheriff sets policy, but the
21 only alternative I think would be the State, and that's
22 what our opponents contend.

23 But in looking at Alabama law, three factors
24 stand out and together demonstrate in our view --

25 QUESTION: Mr. McDuff --

1 MR. McDUFF: Yes.

2 QUESTION: -- ordinarily we give great deference
3 to the determination of a court of appeals that reviews
4 cases from a State like Alabama regularly as to what
5 Alabama law is. You have a fairly heavy burden, I think,
6 if you want to persuade us that the Court of Appeals for
7 the Eleventh Circuit was wrong on Alabama law.

8 MR. McDUFF: Mr. Chief Justice, we don't -- we
9 don't say that they were wrong in saying what Alabama law
10 means as a matter of State law, but we are saying, given
11 what Alabama law is and what the Eleventh Circuit said it
12 is, it has a different result in terms of the Federal law
13 than the Eleventh Circuit said it did.

14 I mean, the question of what does State law
15 mean, and what are the parallel relationships in State
16 law, that is a State law question, but given State law,
17 the next question is, does that mean that as a matter of
18 section 1983 a particular official sets final policy.

19 QUESTION: Well, you would agree, then, that
20 whatever the Eleventh Circuit said, if the sheriff is
21 enforcing Alabama State law rather than the policy of the
22 county law, that that would be binding, but you say the
23 Eleventh Circuit was wrong, it was the consequences of
24 that for the 1983 action?

25 MR. McDUFF: No, I'm sorry, I didn't mean to say

1 that. I think where the Eleventh Circuit says that the
2 sheriff is enforcing State policy rather than county
3 policy, we do dispute that, and I don't think they're
4 entitled to any deference on that. I don't think that is
5 an interpretation at State law. That is a conclusion.

6 QUESTION: I would think it would be
7 preeminently a question of State law as to where the
8 sheriff derives his authority, where does the policy come
9 from that he enforces. I would think that would be
10 preeminently a question of State law.

11 MR. McDUFF: I think -- we perceive that as a
12 conclusion that the Eleventh Circuit drew from the givens
13 of Alabama law. The fact that the sheriff has final and
14 unreviewable authority within the county and not outside
15 the county, that's a State law question. The Eleventh
16 Circuit never disputed that.

17 The fact that the sheriff is elected by the
18 voters of the county, State law question. The Eleventh
19 Circuit never disputed that.

20 The fact that the sheriff's office is funded by
21 the county commission, State law question. The Eleventh
22 Circuit never disputed that.

23 Where the dispute comes is, given those factors
24 of State law, what does that mean in terms of Federal law,
25 in terms of section 1983, as to the question for which

1 body the sheriff sets policy and which body is therefore
2 going to be held liable for the actions of the sheriff?
3 We think that's a Federal law question and the Eleventh
4 Circuit was just wrong on it. The --

5 QUESTION: This sheriff has Eleventh Amendment
6 immunity for suits against him in his official capacity.

7 MR. McDUFF: Well, that's what the district
8 court actually said in an early order in this case when it
9 dismissed the sheriff in his official capacity. We
10 disagree with that, and there's a footnote in Parker v.
11 Williams in the Eleventh Circuit where they discuss this
12 issue, and they say pretty much the same thing. They say,
13 if the sheriff is being sued as a representative of the
14 State, he has Eleventh Amendment immunity.

15 QUESTION: I thought there were holdings to that
16 effect in the Eleventh Circuit. I thought there were
17 holdings to that effect and not just passing statements.

18 MR. McDUFF: The only one I'm aware of is -- and
19 this is the one that pertains to Alabama -- is the one in
20 Parker v. Williams, and at the end of that footnote the
21 Eleventh Circuit says, now, to the extent the sheriff is
22 being sued in his official capacity as a representative of
23 the county, we don't need to pass on that because the
24 county is a defendant in Parker v. Williams anyway.

25 So although the Eleventh Circuit sort of held

1 that he was protected by the Eleventh Amendment in his
2 official capacity, they seemed to have maybe an escape
3 valve from that, if when one sues the sheriff in his or
4 her official capacity you're talking about a suit against
5 the county and a suit against the sheriff as a
6 representative of the county.

7 If there are no further questions, I'll reserve
8 the remainder of my time for rebuttal.

9 QUESTION: Very well, Mr. McDuff.

10 Mr Wolfson.

11 ORAL ARGUMENT OF PAUL R. Q. WOLFSON

12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

13 SUPPORTING THE PETITIONERS

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

16 The dispute between the parties on the merits is
17 whether the sheriff of Chambers County acted with the
18 authority of that county when he made the decisions that
19 led to the alleged constitutional violations in this case.

20 Now, in our view, the court of appeals erred
21 because it looked to the label that was placed on the
22 sheriff by the State rather than to the nature of the
23 authority that he exercised, and the Court has made clear
24 that the courts, when they determined who is a final
25 policymaker for purposes of section 1983, must examine all

1 of the relevant legal materials, including all the
2 positive law, as well as the custom and usage, and
3 although section 1983 was not intended to bring the States
4 into Federal court, nevertheless that when the sheriff
5 makes decisions and acts with the authority of the county,
6 he may subject that county to liability under section
7 1983.

8 In our view, examining all of the relevant legal
9 materials leads to the conclusion that the district court
10 properly denied summary judgment to the county, because it
11 does appear that in the area of law enforcement the
12 sheriff of Chambers County exercises county authority for
13 which -- and his decisions are county policies for which
14 the county may be held liable, and we look to the --

15 QUESTION: Are you saying, then, the county
16 can -- if the sheriff decides he wants to do one thing
17 that he thinks the law requires, can the board of
18 supervisors say no, you're wrong on that?

19 MR. WOLFSON: My understanding is that the board
20 of -- the county commissioners do not exercise supervisory
21 authority over the sheriff, but -- and the court --

22 QUESTION: Then why do you say it's the policy
23 of the board of supervisors that he's carrying out?

24 MR. WOLFSON: No, our -- we think that the court
25 of appeals and the respondent make this mistake. They

1 confuse the power of the county commission with the
2 authority of the county.

3 And in our view the sheriff -- the situation in
4 Chambers County is a familiar one of separation of powers,
5 where the sheriff has the power over law enforcement, and
6 he has the final policymaking authority in that area, the
7 county commission has the power of the purse and various
8 other powers that county commissions have, and they have
9 final policymaking authority in that area.

10 And there are other -- there are other officers
11 in Chambers County who are similar to the county sheriff.
12 There's the county tax assessor, there's the county tax
13 collector, the county coroner. All of these county
14 officers are directly accountable to the people, and they
15 exercise county authority even though they may not be
16 accountable to the board of supervisors and the board of
17 commissioners in a direct way.

18 So I think on that point the way that the -- the
19 error that the court of appeals made was saying that
20 because the county commissioners could not exercise law
21 enforcement authority, that also meant that the county
22 could not.

23 QUESTION: Well, how would the county exercise
24 law enforcement authority --

25 MR. WOLFSON: It's --

1 QUESTION: -- other than by the commissioners or
2 by the sheriff?

3 MR. WOLFSON: Our view is it's the sheriff that
4 exercises law enforcement authority for the county. He's
5 elected by the people of the county for the purpose of
6 enforcing the law within the county and apprehension of
7 suspects within the county.

8 And we look for similar analysis -- actually, we
9 look to the Court's decision in Prapotnik and also in
10 Pembaur, and in Prapotnik in particular, the Court seemed
11 to indicate that it understood that separation of powers
12 was quite common in local governments, and in that case
13 the Court noted that the county -- the city of St.
14 Louis's, rather, personnel policies could be exercised
15 either by the mayor or aldermen, or by an independent
16 civil service commission, or by the two acting in some
17 combination.

18 QUESTION: Couldn't State officers also be
19 elected by subunits of the State?

20 MR. WOLFSON: I would say this, there -- what we
21 looked --

22 QUESTION: I mean, the fact that he's elected by
23 the county doesn't necessarily show that he's not a State
24 officer.

25 MR. WOLFSON: I would say this, these factors:

1 first, he's elected by the county for the purpose of
2 exercising authority within the county, so he's not like a
3 State legislator who is sent to the State capital, so he
4 is exercising final policymaking authority within the
5 county.

6 Now, on the other side of the coin, he does not
7 follow any dictates of a higher authority, be it within
8 the county or within the State. He doesn't look to
9 guidelines issued by the Attorney General of Alabama, or
10 by --

11 QUESTION: Doesn't the -- don't the Alabama
12 statutes say something about what the sheriff shall do?

13 MR. WOLFSON: Yes. The Alabama statutes say
14 that the sheriff essentially has the power to exercise law
15 enforcement in the county, and also --

16 QUESTION: Do they say nothing more than that?

17 MR. WOLFSON: Well, they say -- they say a
18 number of things. They say that -- our reading of them is
19 they say no other sheriff from outside the county has any
20 power, and there's no indication that the sheriff
21 follows -- that the sheriff looks to anybody in
22 Montgomery.

23 In other words, he's not within a hierarchical
24 command structure set up by the State. He really is -- he
25 has the final say over law enforcement authority within

1 the county.

2 QUESTION: Well, I mean, so does a prosecutor.

3 MR. WOLFSON: Well, actually --

4 QUESTION: I mean, a Federal prosecutor doesn't
5 normally --

6 MR. WOLFSON: Well, Federal prosecutors are
7 subject, of course, to the command structure of the
8 Department of Justice, I might refer to it -- as I might
9 refer to it, and actually in Alabama county --

10 QUESTION: Smilingly, as -- I mean, I assume
11 they have an enormous amount of independence.

12 MR. WOLFSON: Well, but as a legal matter the
13 Governor of Alabama cannot remove a sheriff of Chambers
14 County.

15 Now, the sheriff of Chambers County may be
16 removed by the voters at the next election if he doesn't
17 exercise law enforcement authority properly, or if he --
18 indeed, if he takes an unconstitutional action which the
19 result is to visit liability on the county.

20 The voters may disagree with that, and in Owen
21 v. City of Independence, the Court said that's an
22 appropriate reason to visit liability on the county, and
23 that county policymakers should consider that, but there
24 isn't -- there is nobody in Montgomery who is watching
25 over the sheriff except a very limited power, the power of

1 impeachment, which is a criminal proceeding where --

2 QUESTION: Mr. Wolfson, you relied on three
3 factors, the election, his salary is paid by the county,
4 the expenses of his office are paid by the salary -- by
5 the county. Is there anything more that's needed, as you
6 view the case, to impose 1983 liability?

7 MR. WOLFSON: I think those three factors are
8 enough if there is nothing on the other side of the coin
9 that says that he must follow higher authority from the
10 State. There are county -- there are some forms of county
11 structures, State governing structures where people are
12 elected by the county but where they implement State
13 policy under detailed procedures and guidelines.

14 In Alabama, for example, county -- the county
15 prosecutors are subject to written circulars of
16 instruction, as I understand it, from the Attorney
17 General, so even though they may be elected from the
18 county they are constrained in the exercise of their
19 discretion, as I understand it, by higher authority, but
20 that is, as I understand it, completely absent in this
21 case, and there is essentially nobody to review what the
22 sheriff of Chambers County does.

23 QUESTION: Mr. Wolfson, would the sheriff be
24 considered a State officer for purposes of Eleventh
25 Amendment immunity?

1 MR. WOLFSON: We agree with what petitioner said
2 on that point. We recognize that there are Eleventh
3 Circuit decisions at least indicating that sheriffs sued
4 in their official capacity are entitled to Eleventh
5 Amendment immunity.

6 QUESTION: And normally you would expect, then,
7 that on this question of whether the sheriff is a State or
8 county officer for purposes of this suit, that the result
9 would be the same.

10 MR. WOLFSON: I would -- I think that decision
11 was incorrect by the district court. I would rely on
12 Brandon v. Holt for that, where the Court said suing a
13 governmental official in his or her official capacity is
14 really a pleading device that brings in the entity that he
15 or she acts for.

16 I think when the sheriff was sued in his
17 official capacity, the question is, well -- the question
18 was, in which capacity and that in some sense is before
19 the Court today, and --

20 QUESTION: Mr. Wolfson, you're assuming a
21 dichotomy. Is it necessarily true that the officer is
22 either a State officer or, if not a State officer, a
23 county officer which renders the county liable for him
24 under 1983? Might there not be many officers who are not
25 State officers but nonetheless for which the county is not

1 responsible under 1983 because it cannot control them?

2 MR. WOLFSON: Well I -- counties, as I tried to
3 make the point earlier, here it's not that -- the county
4 can control the sheriff. The county is the electorate.

5 QUESTION: But not the body corporate that's
6 being sued under 1983, and that's the whole assumption of
7 1983, isn't it, that you're dealing with something like a
8 corporation?

9 MR. WOLFSON: Actually, Alabama law, as I
10 understand it, refers to the county as the body corporate
11 and politic, not the county commission, but --

12 QUESTION: But the party here is the Chambers
13 County Commission.

14 MR. WOLFSON: I recognize that. I would make
15 two points in response to that. First of all, we think
16 that when the petitioners sued the sheriff in his official
17 capacity, that was in effect naming the county as a party
18 defendant, and it's true he was dismissed, but I think
19 Brandon v. Holt compels that conclusion.

20 Second, as we understand it, the reason why the
21 Chambers County Commission was sued was they have the
22 power of the purse and I would have to defer to the other
23 people who will be arguing, but my understanding is that
24 the county is probably not a necessary and indispensable
25 party under the Federal Rules of Civil Procedure.

1 QUESTION: Well, but under your theory it's the
2 county as an entity, rather than the county commission,
3 that would be sustainable for liability, and yet the party
4 here is the county commission.

5 MR. WOLFSON: The county was sued when the
6 sheriff was named in his official capacity.

7 QUESTION: And dropped.

8 MR. WOLFSON: It's --

9 QUESTION: Thank you.

10 Mr. Smith.

11 ORAL ARGUMENT OF PAUL MARCH SMITH

12 ON BEHALF OF THE RESPONDENTS

13 MR. SMITH: Mr. Chief Justice, and may it please
14 the Court:

15 Our position on the merits in this case is that
16 a county government cannot be held liable under section
17 1983 based on the actions of an official like the sheriff
18 in Chambers County, who is properly treated as a State
19 official both under State law and for purposes of the
20 Eleventh Amendment, and who operates entirely free of
21 control by the county commission.

22 QUESTION: Well, why does the county commission
23 have to have control? For example, let's assume the
24 county commissioners made ultimate law enforcement policy
25 for the county. The county would be responsible for them.

1 MR. SMITH: If the county commissioners make law
2 enforcement policy, the county is clearly responsible for
3 any actions by the county commission, because the county
4 commission is the governing body of the corporation, which
5 is Chambers County.

6 QUESTION: Right, so if the repository of
7 discretionary authority over law enforcement happens to be
8 in the sheriff rather than in the county commission, why
9 wouldn't the county, for the same reasons, be liable?

10 MR. SMITH: It is conceivable that State law
11 could establish an independent, autonomous municipal
12 official who has authority to make policy for the
13 municipal corporation. This is not this case.

14 QUESTION: No, but if they do, I take it your
15 answer is, yes, the county would be responsible.

16 MR. SMITH: Absolutely --

17 QUESTION: Okay.

18 MR. SMITH: -- if State law said that sheriffs
19 are county officials with policymaking authority over law
20 enforcement.

21 QUESTION: So the issue as you see it is not
22 whether there happens to be a county commission between
23 "the county" and the sheriff, the issue is whether the
24 sheriff is, in fact, a county official.

25 MR. SMITH: Well, I think there's two levels of

1 inquiry, Your Honor. I think first you have to look at
2 whether or not the sheriff is a State official or a county
3 official. At that point, I think if you determine he's a
4 State official, it is conceivable that there might be some
5 areas of his activity where he works under the control and
6 effectively is deputized to the county commission, and
7 that's why we go on to look at control after we look at
8 State law in our brief.

9 But I agree with you, the primary issue in this
10 case is, is the sheriff a State official or a county
11 official, and every indication here is that the's a State
12 official. This Court said the issue --

13 QUESTION: Well, not every indication. I mean,
14 he's elected by the county, he's paid by the county, his
15 expenses are paid by the county, his jurisdictional is
16 countywide. I mean, those are indications that he is a
17 county official.

18 MR. SMITH: Well, those things also apply
19 equally to any number of people --

20 QUESTION: For purposes of 1983, at least.

21 MR. SMITH: Well, to begin with, Your Honor, the
22 State constitution expressly designates him a State
23 official. He has -- the same removal procedures apply to
24 him that only apply to State officials and not to any
25 municipal officials.

1 QUESTION: Mr. Smith, can I ask a question?

2 MR. SMITH: Sure.

3 QUESTION: Supposing the policy at issue is that
4 in this county all raids of nightclubs shall be conducted
5 by teams of eight SWAT officers dressed in a certain way
6 and carrying certain arms. That's the way the sheriff
7 says we will conduct these raids. Who in the State can
8 tell him to conduct them differently?

9 MR. SMITH: The State legislature, to begin
10 with, if it's --

11 QUESTION: You mean they'd have to pass a
12 statute to tell him not to conduct the raids --

13 MR. SMITH: If that policy were illegal, he
14 could be impeached by --

15 QUESTION: I'm not saying its legal or illegal,
16 but the question is, who is the final person to decide
17 whether that policy shall be carried out in this
18 particular county?

19 MR. SMITH: If he's --

20 QUESTION: Under the present state of the law,
21 without any new legislation.

22 MR. SMITH: With respect to law enforcement
23 decisions that are discretionary and are wholly legal, he
24 has discretion to make that decision himself.

25 QUESTION: So he could announce that policy and

1 he would be the final authority on the effectuation of
2 that policy within the geographic boundaries of that
3 county.

4 MR. SMITH: Just as any number of other State
5 officials in Alabama and everywhere else have a certain
6 amount of discretion to set policy for the State --

7 QUESTION: For particular counties?

8 MR. SMITH: -- within certain confines of the
9 law.

10 QUESTION: For particular counties?

11 MR. SMITH: Circuit judges in Alabama, district
12 attorneys in Alabama, all unquestionably State officials,
13 are elected locally, their quarters and their equipment
14 are all provided through the county commission. They --

15 QUESTION: Yes, but can they make rules for the
16 county that are different from the rules in other parts of
17 the State?

18 MR. SMITH: Every time a prosecutor makes
19 judgments about which crimes he's going to prosecute or
20 not prosecute, within the bounds of the law, he's
21 essentially setting some kind of policy, and he's clearly
22 a State official doing that within the confines of
23 Chambers County.

24 QUESTION: So you're saying the sheriff is a
25 State official who sets the law enforcement policy within

1 the particular county.

2 MR. SMITH: I'm not saying that. That's clearly
3 what the law in Alabama is. The -- he has -- I should
4 note a sheriff has all of the absolute immunity that is
5 accorded to State executive branch officials in Alabama,
6 not accorded to any municipal officials. The removal
7 authority -- and there's a fair amount of supervision as
8 well at the State level. The Governor can direct him to
9 conduct investigations --

10 QUESTION: Well, what supervision is there at
11 the State level of the particular policy involved in this
12 case?

13 MR. SMITH: The supervision of this particular
14 policy could occur in the sense that the Governor could
15 direct him to investigate the Capri Club, could also
16 demand a report in the activities that he has been
17 conducting with respect to the Capri Club, and if he
18 didn't get a report that was accurate, he could -- that
19 would be an impeachable offense as well, so there is some
20 degree of --

21 QUESTION: Does the Governor tell him to use
22 nine officers instead of eight?

23 MR. SMITH: As I indicated before, if it's a
24 discretionary decision between two legal options about how
25 to conduct a raid --

1 QUESTION: The final authority on that is the
2 sheriff?

3 MR. SMITH: -- the State has made a decision to
4 allow some discretion. Excuse me, Your Honor?

5 QUESTION: The final authority on that is the
6 sheriff?

7 MR. SMITH: Yes, Your Honor. There's no
8 question about that.

9 QUESTION: And that's a matter of policy.

10 MR. SMITH: It's a matter of policy that he sets
11 for the State at the local level.

12 I think the other thing you have to focus on
13 here is the Eleventh Amendment. This Court just last
14 month, or two months ago, said we determine whether or not
15 a particular branch of Government or office of Government
16 is covered by the Eleventh Amendment by looking at who
17 would pay the judgment. That was in the Hess case
18 involving the port authority up in New York. That is
19 precisely the test of the Eleventh Circuit in a number of
20 decisions in a row has applied in deciding whether or not
21 the sheriff in Alabama is protected from suits in his
22 official capacity under the Eleventh Amendment, and it is
23 consistently held that the State would pay the judgment
24 precisely because the State has always treated sheriffs as
25 State officials.

1 QUESTION: If the sheriff ran over somebody in
2 the course of getting to some investigation, who would pay
3 that judgment?

4 MR. SMITH: If he was sued under State law,
5 there would be absolute immunity, because he has State
6 immunity as a State official. If he was sued --

7 QUESTION: There's no tort claims thing?

8 MR. SMITH: There's a board. You can go to a
9 board of adjustment for discretionary relief, but there's
10 absolute immunity.

11 QUESTION: Could -- is there any -- you said, if
12 he's sued under State law. Is there any other way for him
13 to be sued?

14 MR. SMITH: Well, there might be a suit -- I
15 guess if it was a negligence claim he couldn't be sued
16 under 1983, but -- so that would be the only way, Your
17 Honor. You're right.

18 QUESTION: I meant judgments in general, not
19 1983.

20 MR. SMITH: Yes.

21 QUESTION: One of the concerns, which we don't
22 know perhaps everything that there is to know about this,
23 is because the district judge was cut off, and since you
24 are the person responsible for bringing this to the
25 Eleventh Circuit, I would like to step back and talk about

1 the legitimacy of bringing the county up before the
2 Eleventh Circuit, and first, do you agree that you could
3 have asked the district judge to certify this question of
4 the county's responsibility under 1292(b)?

5 MR. SMITH: Certainly you can always ask the
6 district judge to do that. I think the chances that it
7 would have been granted in this case we can all speculate
8 about.

9 QUESTION: If that's so, aren't you just doing
10 an end run around what Congress wanted? Congress
11 deliberately put in place a two-level discretion. First,
12 the district judge has to say, this interlocutory order is
13 appealable. Then, the court of appeals has to agree. By
14 this pendent party appellate jurisdiction, aren't you just
15 demolishing that two-level discretion that Congress put in
16 place in 1292(b)? You could do an end run around 1292(b)
17 every time.

18 MR. SMITH: 1292(b) applies to the question of
19 whether or not the district court proceeding should be
20 suspended and an appeal should go up to the court of
21 appeals. We're talking about a situation where that is
22 already occurring as a matter of right under the
23 collateral --

24 QUESTION: For another party.

25 MR. SMITH: For another party under a related

1 issue.

2 QUESTION: So that extent, you do an end run
3 around 12 -- any time you have a legitimate interlocutory
4 appeal of any party in the case, then it's totally
5 discretionary with the court of appeals, and it doesn't
6 matter what the district court thinks.

7 MR. SMITH: But that's been the rule that this
8 Court has applied in any number of contexts. Whenever
9 there's been appellate jurisdiction to reach a particular
10 order, the routine rule of this Court has been to say --

11 QUESTION: The -- what is the routine rule of
12 this Court with respect to pendent party appellate
13 jurisdiction? You've given the example of Isen, which
14 involved the same parties.

15 MR. SMITH: Right.

16 QUESTION: What is the routine practice with
17 bringing up a party who could never have gotten there on
18 any question on her own, and pending that party without
19 consulting the district judge -- the district judge here
20 said, I'm not finished. I'm going to revisit this before
21 the case goes to the jury, and even so it goes up on your
22 theory that it's all discretionary with the court of
23 appeals.

24 MR. SMITH: Your Honor, I'm not aware of any
25 case dealing one way or the other with the question of

1 whether the pendent discretionary jurisdiction of an
2 appellate court can include a claim brought involving a
3 separate party.

4 QUESTION: Well, if you're not aware, then it
5 can't be the routine practice of this Court to sanction
6 pendent appellate jurisdiction over a party who could not
7 be there otherwise.

8 MR. SMITH: I would, though, Your Honor, point
9 the Court to an area of the law that was not discussed in
10 either of the supplemental briefs, and that is appeals
11 that used to come to this Court under section 1252, which
12 until 1988 was a statute that authorized direct appeals to
13 this Court from any Federal decision or order,
14 interlocutory or otherwise, holding a Federal statute
15 unconstitutional, and the doctrine that was applied by
16 this Court for decades was that such an appeal not only
17 brings up the issue of the constitutionality of that
18 Federal statute, but brings the entire case up to this
19 Court, and this Court then said that it had discretion in
20 those appeals to decide any issue that was present in that
21 whole case, as the doctrine read.

22 And for example, in the Williams v. Zabares case
23 in 1980, this Court dealt with an appeal from a Federal
24 district court decision holding the Hyde amendment
25 unconstitutional, and also in that same case the court had

1 held various State statutes unconstitutional, and in this
2 Court, the Court held that the district court didn't have
3 jurisdiction to even discuss the Hyde amendment, but then
4 said the whole case is here so we're going to go ahead and
5 proceed to decide the merits of the constitutionality of
6 these State statutes, issues which were not within the
7 scope of the statute that brought the case up to this
8 Court. So there is --

9 QUESTION: Nonetheless --

10 QUESTION: The case was before the Court, not
11 just an issue. The whole case was before the Court.
12 There hadn't been a final judgment. The case was done
13 with, and all that that doctrine said was that when you
14 have the whole case here you're not limited to deciding
15 that single Federal question. It seems to me quite a
16 different --

17 MR. SMITH: With respect, Your Honor, the
18 doctrine was that on an appeal from an interlocutory order
19 with respect to one issue, which is what the statute
20 authorized, the whole case comes with it, and there's
21 discretion to go beyond it, which is all we're saying
22 here, that when there's an appeal of one issue in the
23 case, courts of appeals, just as they do in preliminary
24 injunction appeals, just as they do in mandamus
25 situations, as the Court held in Schlagenhof, just as they

1 do -- used to under 1252 in appeals here, ought to have
2 some discretion to decide issues that are clearly
3 presented in the record of the case.

4 Both parties are telling them it's appropriate
5 to decide it, and it just doesn't make any practical sense
6 to tell the courts of appeals that they have to remand the
7 case to the district court knowing that what they're doing
8 is condemning the district court to carry on perhaps years
9 of proceedings that are totally unnecessary --

10 QUESTION: Well, you could have asked --

11 MR. SMITH: -- because of some legal error.

12 QUESTION: Could you have asked for a separate
13 judgment under 54(b)?

14 MR. SMITH: Well, Your Honor, the county
15 commission didn't actually have a clear ruling yet on the
16 Monell issue, but if we had had a clear ruling against us
17 on the Monell issue, then there wouldn't have been a
18 judgment to enter, because --

19 QUESTION: It's just the opposite --

20 MR. SMITH: -- the claim would have still been
21 pending against the county, so there wouldn't have been
22 anything to certify under --

23 QUESTION: The district judge said he wasn't
24 finished with it. He said, I'm not making a final ruling.
25 I'm going to revisit this question.

1 MR. SMITH: That's correct, Your Honor.

2 QUESTION: So it was not only interlocutory
3 within the case itself, but the district judge said, I'm
4 not even finished with this single issue.

5 MR. SMITH: Although, Your Honor, the issue is
6 clearly one purely of law, and the district court showed
7 some confusion about that, at one point saying that there
8 was enough to get the trial on the factual question.

9 QUESTION: Well, the district judge --

10 QUESTION: Yes, but that's the point. You see,
11 it isn't even final even as we sit here. You can't -- I
12 don't think you could have received an order under 54(b).

13 MR. SMITH: No, that's correct, Your Honor.
14 There was not -- there clearly was not a final
15 determination in the district court on this Monell issue.

16 But the court of appeals saw that this issue was
17 presented in the record of this case. It's a pure issue
18 of law that would, if resolved, allow the county to be
19 entirely exonerated in this case, and it said there's no
20 reason why we shouldn't go ahead and reach this pure legal
21 question now that the case is up here, and help to
22 expedite the processing of this case, something that made
23 eminent practical sense in the context of this case.

24 QUESTION: But even if the district judge had
25 said, I think, and I'm not going to change my mind, that

1 this county is liable under 12 -- under 1983, and now I'm
2 going to hear the case on the merits --

3 MR. SMITH: Yes.

4 QUESTION: -- you couldn't have gotten a 54(b)
5 order even then.

6 MR. SMITH: That's absolutely right, because all
7 he would have been saying is that the claim is legally
8 valid, and we have to go ahead and try it.

9 QUESTION: Right.

10 MR. SMITH: So there wouldn't have been anything
11 to get a 54(b) on, that's correct, Your Honor.

12 QUESTION: You might have gotten a 1292(b). At
13 least that would have been technically okay.

14 MR. SMITH: Conceivably, although if we were
15 talking about a separate appeal that would have stopped
16 the case in its tracks, there would have been all sorts of
17 issues of practicality there.

18 Here, the case was already stopped in its
19 tracks. The county is sitting there, and the individual
20 defendants are going up on appeal. There's clearly not
21 going to be any sort of proceedings in the meantime, and
22 it simply asked the court of appeals to take the
23 opportunity that was presented by this separate appeal to
24 resolve the additional issue.

25 QUESTION: But that's a classic case for

1 1292(b), because it's a different party, and it -- isn't
2 it really?

3 MR. SMITH: It could be, Your Honor --

4 QUESTION: Isn't that the precise case that
5 1292(b) was designed to provide a solution for?

6 MR. SMITH: Although 1292(b) also has a, you
7 know, a set of standards that have to be met that might
8 not be met here.

9 QUESTION: Well, sure.

10 MR. SMITH: When you have a different --

11 QUESTION: That argues to the contrary, it seems
12 to me, because you're bypassing those standards.

13 MR. SMITH: The other thing, of course, here, is
14 the county defendant was faced with case law in the
15 Eleventh Circuit which made it perfectly clear that this
16 was a perfectly appropriate thing to do, so I don't think
17 it's fair to sort of criticize the litigation decision
18 which was made to go ahead and --

19 QUESTION: Well, we're not criticizing it. It's
20 a question of power, and I mean --

21 MR. SMITH: Sure. Sure.

22 QUESTION: -- either they're right or they're
23 wrong, and we have to decide it that way.

24 MR. SMITH: Sure. I understand that, but it
25 seems to me that there's no reason to make people go

1 through the hoops of 1292(b) when there's already the case
2 going up to the court of appeals on a related issue. At
3 that point, it shouldn't be up to the district court to
4 decide what the court of appeals' scope of review should
5 be. It should be -- the court of appeals should have the
6 traditional authority.

7 QUESTION: Well, the statute says it's an appeal
8 from a decision. As in the Stanley case, it's an appeal
9 from an order, and the decision describes a particular
10 aspect of the case. Namely, they decided there's no
11 immunity here.

12 MR. SMITH: Sure, but that's exactly what
13 1292(a) says, and this Court has said for decades that
14 when you get a preliminary injunction appeal you can go
15 ahead and resolve the whole case, because it sometimes
16 makes more sense to do that.

17 The Youngstown Sheet & Tube case was an appeal
18 of a preliminary injunction, but the case was resolved on
19 the merits because the Court has this equitable discretion
20 to go ahead and broaden its review beyond the particular
21 order that --

22 QUESTION: Well, maybe -- maybe that applies
23 only if the issues are necessarily intertwined or
24 antecedent. I'm not sure there's any broad pendent
25 jurisdiction at the appellate level for an issue that is

1 neither intertwined nor antecedent, and I think the county
2 sheriff issue is not in this case. It's an independent
3 issue.

4 MR. SMITH: In nearly every --

5 QUESTION: And I think you have to look at the
6 statutes and see whether Congress has allowed the court of
7 appeals to exercise pendent jurisdiction. I frankly don't
8 see that authority, but --

9 MR. SMITH: Well, I guess I would say that you
10 should look at the traditional way that the scope of
11 review has been treated differently from the ability to
12 appeal. We're talking about how broadly a court of
13 appeals can rule once the case is up to the court of
14 appeals, and there's been a lot of play in those joints
15 for many, many years, and Congress has never done anything
16 to restrict it.

17 QUESTION: Was the courts of appeal pretty split
18 on this issue, actually?

19 MR. SMITH: Well, they've become more split
20 after Abney and begun to move in that direction, but I
21 think, you know, one thing the Court might want to
22 consider in looking at this is that the large number of
23 decisions of the courts of appeals which have continued to
24 try to find some way to broaden their scope of review in
25 these situations because of the really serious practical

1 considerations that come into play when you're a court of
2 appeals judge sitting there, knowing that --

3 QUESTION: Yes, but when Congress addressed this
4 issue, it decided it wasn't going to leave it all to the
5 court of appeals. It could have done that. It could have
6 done -- just had that one discretionary level, but it
7 deliberately said we want the district judge to say if
8 that judge thinks that this is going to expedite the case,
9 an immediate appeal, and if the district judge says no,
10 then under 1292(b) you can't do it.

11 Now, you presented this as, this is a routine
12 matter, but I think now you recognize that it isn't
13 routine, that we have never authorized pendent party
14 appellate jurisdiction --

15 MR. SMITH: Your Honor, I --

16 QUESTION: -- and the Congress certainly hasn't.

17 MR. SMITH: I think if you think about it,
18 though, the distinction between pendent claims and pendent
19 parties is much murkier and much less clear in the
20 appellate context than it is at the district court level,
21 because the county was going to be a party to this appeal
22 at least as an appellee, no matter what, and the claim of
23 the county, the plaintiffs against the county was going to
24 get up to the court of appeals sooner or later no matter
25 what, so --

1 QUESTION: Later, not sooner --

2 QUESTION: It was --

3 QUESTION: -- because the district judge wasn't
4 finished with it.

5 MR. SMITH: Right. So it's a question of
6 timing, rather than whether or not this is a dispute that
7 will ever get into the Federal courts, which was what the
8 Court was faced with in Findley, talking about pendent
9 parties at the district court level.

10 So I think taking into account that quite
11 different set of circumstances, and taking into account
12 the discretion that has traditionally been read into
13 statutes as specific as the one we're dealing with here,
14 indeed, more specific, like 1292(a), that there's no
15 reason to think that we're -- when we're piggy-backing on
16 top of a separate appeal, that we're doing anything that
17 Congress would have thought was strange, or that was not
18 left to this Court to authorize as an appropriate scope of
19 review issue.

20 It's not a question of new appeals, it's a
21 question of whether or not the court of appeals can go
22 beyond one order to resolve other matters while -- once
23 the district court proceedings have been stopped in their
24 tracks and the case has been brought up.

25 QUESTION: Are there cases where it might be

1 appropriate to piggy-back but where a certification could
2 not be made under 1292(b)?

3 MR. SMITH: Well, I think there may be issues
4 where the district court would appropriately say, this is
5 not sufficiently serious or important --

6 QUESTION: Would appropriately say?

7 MR. SMITH: -- to merit a 1292(b). Excuse me?

8 QUESTION: Would appropriately say?

9 MR. SMITH: I certainly think that could be
10 true, but at the same time the --

11 QUESTION: Then I should think that would be a
12 good reason for saying they shouldn't get up at that
13 point.

14 MR. SMITH: Well, Your Honor, once the case is
15 going up with another appeal, though, there may be lots of
16 practical reasons why the court of appeals would want to
17 reach it, even though it might not satisfy the 1292(b)
18 standards.

19 QUESTION: But why is the court of appeals'
20 interests significantly different from the district
21 court's interest here? I mean --

22 MR. SMITH: I think there's just a different
23 standard that should be applied once you're talking about
24 not creating an appeal, but simply what issues ought to be
25 decided now that we've gone to the trouble of having a

1 proceeding go to the court of appeals and at that point
2 the court of appeals is just deciding what state the case
3 should be in when we send it back, what we should tell the
4 district court to do on remand. It's just a whole
5 different set of practical concerns that I would think
6 allow a broader, freer hand.

7 QUESTION: Mr. Smith, you've mentioned 1292(a)
8 several times. I was under the same impression that
9 Justice O'Connor is, that the cases that allow other
10 issues to be brought up under 1291(a) allow to be brought
11 up only those issues that are necessarily involved in the
12 issue that comes before the Court.

13 For example, in every injunction case there's
14 the question of the probability of success on the merits,
15 and therefore you have to take that up in determining
16 whether the injunction was probably issued -- properly
17 issued.

18 Are you aware of any cases that do not establish
19 that as a criterion for bringing up a pendant issue?

20 MR. SMITH: Well, two points, Your Honor.
21 Clearly, there's a lot of cases which say you can go
22 beyond looking at probability and discretion and just go
23 ahead and decide the merits.

24 QUESTION: But to some extent that merits
25 question is necessarily reached, to some extent at least.

1 MR. SMITH: Right. Now, there are cases -- I'm
2 not aware of a case in this Court, but there certainly are
3 cases -- Judge Friendly's decision in the Semmes Motor
4 case cited in our brief, where there are just essentially
5 two different issues.

6 There was a question of whether or not there
7 ought to be a stay entered in one litigation, and then
8 there was a preliminary injunction, and Judge Friendly
9 said, I'm going to go ahead and decide whether the
10 district court should have entered a stay, and that
11 doesn't affect the propriety of the preliminary
12 injunction. I think these two issues ought to be decided.
13 That was certainly his view of how it ought to --

14 QUESTION: Are there cases under 1292(a) where a
15 party who could not have appealed is allowed to appeal
16 because another party appealed?

17 MR. SMITH: I've not found such a case, Your
18 Honor.

19 QUESTION: Which is what we have here.

20 MR. SMITH: Yes, Your Honor, and if you think
21 that the distinction in parties makes a big difference,
22 then that is clearly a difference.

23 As I was saying, I think that in an appellate
24 context where you already have the second party coming up
25 as an appellee and where --

1 QUESTION: Why would the county be an appellee,
2 just because it's a party to the litigation?

3 MR. SMITH: Just because it's a party.
4 Conceivably it could be in there arguing that the --
5 against the sheriff trying to --

6 QUESTION: Yes.

7 MR. SMITH: -- you know, so that the codefendant
8 might be kept in the case. I mean, there could be a
9 conflict there. That certainly will arise in some
10 circumstances as well, where the codefendants are against
11 each other on appeal.

12 QUESTION: Mr. Smith, one of the reasons was the
13 district could have made a difference -- you said it's a
14 pure question of law.

15 MR. SMITH: Yes.

16 QUESTION: But custom and usage counts also
17 under 1983, and perhaps when the district judge said, I'm
18 going to revisit this, my decision is not final, that's
19 what he had in mind. That's what Judge Varner had in
20 mind, that he wanted to look at not only what was formerly
21 in the Alabama statute.

22 For example, do we know whether -- could the
23 county commission have said, this kind of raid is
24 something we don't like, so we are telling this sheriff
25 that we're simply not going to pay for it? You're going

1 to engage in this kind of raid, we're not going to pay for
2 it?

3 MR. SMITH: Well, Your Honor, it's clear as a
4 matter of law that they could not do that, that they are
5 not authorized by State law to have any opinion whatever
6 about law enforcement policy, and I don't think that's
7 disputed here, so if such a thing occurred, it would be a
8 violation of law by the county commission.

9 There may be times when you need some facts
10 about custom and usage, but this is not such a case.
11 Here, the question is, what position does the sheriff
12 occupy in the State hierarchy, and should he be properly
13 viewed as a State official or as a county official?

14 QUESTION: So when they -- don't they audit his
15 books, or -- they pay for his office. Don't they have to
16 audit his books?

17 MR. SMITH: They have to -- they have to pay the
18 money that goes to pay his salary, which is set by State
19 law, and sufficient supplies and material to let him carry
20 out his office, and they have to give him a jail and an
21 office to work in just as --

22 QUESTION: Well, do they exercise supervision at
23 least to the extent of making sure that he's not dining at
24 the fanciest restaurant in town and charging the county
25 for that? Don't they go over his --

1 MR. SMITH: There can be litigation over this
2 issue. What happens is that the county commission
3 appropriates a certain amount of money, and if the sheriff
4 thinks it's un -- doesn't satisfy the State's statutory
5 standard of reasonable necessity, then the sheriff sues
6 the county commission.

7 QUESTION: I mean, does anybody look at his
8 books to see how he is spending the county's money, and
9 who is that somebody who does that?

10 MR. SMITH: I think there probably is -- I'm
11 sort of getting into speculation here, Your Honor. There
12 may well be some county executive official who could
13 determine whether or not he's actually stealing money from
14 the county and not spending it on inappropriate use, or
15 something like that.

16 QUESTION: Only stealing, but not acting
17 unlawfully, or in violation of the Constitution?

18 MR. SMITH: Well -- I'm sorry, Your Honor.

19 QUESTION: But not spending the county's money
20 in violation of the Constitution?

21 MR. SMITH: Well --

22 QUESTION: If there is a county body, somebody
23 commissioned by the county commission to audit the
24 books -- that's my question, is maybe yes, maybe no, but
25 the district judge didn't have a chance to explore any of

1 that because you took it right up to the court of appeals.

2 MR. SMITH: Well, Your Honor, the question of
3 whether or not the sheriff is a county official in this
4 case is so clear as a matter of law that it's hard for me
5 to understand how anybody could suggest that the reason to
6 reverse here would be that it was preliminary.

7 This -- the guy's clearly covered by the
8 Eleventh Amendment under the standard that this Court
9 announced just 2 months ago, and the State constitution --

10 QUESTION: It's so clear we should have denied
11 cert, I suppose.

12 MR. SMITH: Excuse me, Your Honor.

13 QUESTION: It's so clear we should have denied
14 cert, I suppose.

15 MR. SMITH: Your Honor, well -- I can understand
16 how --

17 (Laughter.)

18 MR. SMITH: -- at first blush the suggestion
19 that maybe a county sheriff is not a county official might
20 have struck the Court as odd, but in fact if you view it
21 in a historical context the -- there's really little doubt
22 that the State has taken responsibility for this official.

23 QUESTION: I have a list, say, here, of -- there
24 are two things. As you see the case on the merits --

25 MR. SMITH: Yes, Your Honor.

1 QUESTION: It's always possible we'll get to the
2 merits. If we do --

3 (Laughter.)

4 QUESTION: -- as you see it he's either a State
5 official or a county official. If he's a State official,
6 you win. If he's a county official, do you lose, or is
7 there some other theory distinguishing between county
8 commissioners and county something else, and county this,
9 and county that?

10 As I understand your argument, if he's a county
11 official, you lose. If he's a State official, you win.
12 Do I have that right?

13 MR. SMITH: If he's a county official, I think
14 it's perfectly clear he's a county policymaker on law
15 enforcement. If he's a State official --

16 QUESTION: And then -- and then if he's a county
17 official, the county commissioners have to pay?

18 MR. SMITH: I think that's correct, Your Honor.

19 QUESTION: Okay.

20 MR. SMITH: If the State law held that, that
21 was --

22 QUESTION: All right, then that's how you're
23 arguing.

24 MR. SMITH: If he's a State official --

25 QUESTION: I just wanted to know.

1 MR. SMITH: -- I think the Court ought to
2 look --

3 QUESTION: If he's a State official, you win.
4 I've got that. I just wanted to be sure it's a yes --

5 (Laughter.)

6 QUESTION: Now --

7 MR. SMITH: Well, to be fair -- to be fair, Your
8 Honor, I think it's conceivable you could have a State
9 official who in some of his functions is deputized to
10 perform municipal functions.

11 QUESTION: Of course. I accept that. Now what
12 I have here is, I have two lists, and I want to be sure
13 they're complete. The main thing that I have in arguing
14 for his being a county official is, he's elected by the
15 county, salary is paid, the expenses of the office are
16 paid, and his jurisdiction is primarily county. Okay.

17 I have in favor of his being a State that
18 there's a document somewhere in the State that says a
19 State, like a statute or something, or a regulation.

20 MR. SMITH: The State constitution.

21 QUESTION: Yes, right --

22 (Laughter.)

23 QUESTION: -- and that's important. I don't
24 mean to trivialize it. That is important.

25 And the second thing is, he could be impeached

1 by -- he could be impeached by State level, and the third
2 thing is there's some Eleventh Amendment cases.

3 Now, I want you to do -- add -- I'm asking
4 because I want to know is there a fourth, fifth, and sixth
5 thing I should put on that list?

6 MR. SMITH: In many of his functions he is
7 supervised by the State officials. The Governor can
8 require reports, can require investigations --

9 QUESTION: Good.

10 MR. SMITH: The circuit judges supervise him,
11 the district attorneys supervise him, the State Department
12 of Corrections supervises him.

13 The county commission by law has no authority to
14 supervise him, which also indicates that he's a State
15 official.

16 He also has the immunities that are given to
17 State officials under State law but not given to municipal
18 officials under State law.

19 I think ultimately, though, the Court ought to
20 look at the Eleventh Amendment ruling more than anything
21 else, because the Court said in Will that the distinction
22 between State defendants and municipal defendants is
23 coterminous with the Eleventh Amendment, and we're going
24 to not assume that the Congress meant to overrule any
25 aspect of Eleventh Amendment immunity, and here --

1 QUESTION: Mr. Smith, may I just go back to one
2 point? You were speaking of the supervisory authority of
3 State officials. I take it you agree that there is no
4 supervisory authority that would require the sheriff to
5 get the approval of a State official before setting the
6 kind of policy for the county that is alleged to have been
7 in effect here?

8 MR. SMITH: That's correct.

9 QUESTION: As he said in Justice Stevens'
10 question, now, if we're going to have raids in this way,
11 with people dressed like this, without prior notice and so
12 on, there's no one in the State that he has to -- at the
13 level of State government whose approval he has to get in
14 order to implement that policy.

15 MR. SMITH: That's correct, Your Honor.

16 QUESTION: Okay.

17 MR. SMITH: I think the State of Alabama, for
18 its good and sufficient reasons, has decided there needs
19 to be a certain amount of discretion over law enforcement
20 functions at the local level, because crime is local and
21 that's where we're going to have it enforced.

22 QUESTION: I am puzzled by your answer to
23 Justice Breyer's questions, which seem to accept a
24 dichotomy between State official and county official.
25 Aren't there various -- doesn't it depend on what you mean

1 by county official?

2 Aren't there county officials who are
3 accountable to and within the control of the organ of the
4 county commissioners, and other officials who could be
5 called county officials -- they have county-wide
6 jurisdiction, elected by the voters of the county.
7 Couldn't they be county officials without necessarily
8 being within the control and therefore responsibility of
9 the county commissioners?

10 MR. SMITH: Your Honor, I think it depends on
11 what you mean by county officials. When I answered that,
12 I was assuming that he meant by county officials people
13 who are designated by State law as the chief person of a
14 particular area function for that county as a municipal
15 corporation. I think --

16 QUESTION: For the corporation.

17 MR. SMITH: I think it is possible for State law
18 to set up autonomous executive officials who speak for a
19 particular municipal corporation, if the law very clearly
20 does that.

21 The control issue really comes in when it's
22 murkier and where somebody's making the claim, well, sure
23 they call him a State official in the State constitution,
24 but in reality he's more of a local official. Look, he's
25 elected locally.

1 And then I say at that point you really ought to
2 look at whether or not he's controlled by the governing
3 body of the county.

4 Thank you, Your Honor.

5 QUESTION: Thank you, Mr. Smith.

6 Mr. McDuff, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF ROBERT B. McDUFF

8 ON BEHALF OF THE PETITIONERS

9 MR. McDUFF: First, on -- let me respond to
10 Justice Ginsburg's question about whether there are any
11 cases with pendant parties bringing otherwise
12 nonappealable claims along with an appealable claim, and
13 we cite in our brief the 1954 case in Chicago and Rock
14 Island Railroad v. Stude, where it was a cross-appeal that
15 the Supreme Court said should be -- was properly
16 considered by the court of appeals along with the
17 originally appealable appeal by the cross-parties.

18 QUESTION: Same people.

19 MR. McDUFF: Same people.

20 QUESTION: The same people were already there
21 anyway. I was asking if there were any case, any
22 authority from this Court where you bring up somebody who
23 could not have gotten there as a petitioner or respondent
24 and let that person, who the district judge isn't finished
25 with, and say I can piggy-back on this other appeal.

1 MR. McDUFF: Yes. I'm not aware of any case in
2 this Court where there was a third party who came in, but
3 I think the point is well made by Stude that the
4 nonappealable claim was brought there and considered by a
5 party that did not have an original right to appeal at
6 that point, and even though it was a cross-appeal, we
7 still see that as a sort of pendant party thing that
8 allows nonappealable claims to be brought by parties who
9 otherwise don't have the right to appeal.

10 And also, in terms of the court of appeals, at
11 page 12 and 13 of our supplemental brief we cite some
12 court of appeals cases, and of course there's some
13 Eleventh Circuit cases where a third party came in.

14 QUESTION: Well, one can understand why courts
15 of appeals would be biased in favor of their discretion to
16 the exclusion of the district court.

17 MR. McDUFF: Well, that may certainly be the
18 case, or looking at the case once they have it, they see
19 that the litigation can be advanced by taking and
20 reviewing additional issues.

21 On the Eleventh Amendment point --

22 QUESTION: Or, indeed, why we would be biased in
23 that direction as well, I suppose.

24 MR. McDUFF: Justice Scalia, you asked me
25 earlier about the Eleventh Amendment case law -- I mean,

1 the Eleventh Circuit case law regarding the Eleventh
2 Amendment status of a sheriff's suit in an official
3 capacity. There are some Alabama cases after Parker v.
4 Williams that repeat the point in the Parker v. Williams
5 footnote saying that sheriffs should be considered State
6 officials for purposes of Eleventh Amendment immunity, and
7 our view is that they are all a misconstruction of what
8 Parker v. Williams said.

9 And let me say, there's nothing in the record
10 here, and there's nothing in the Alabama statutes, about
11 who will pay a judgment against the sheriff under section
12 1983. There's nothing to say it's going to be paid by the
13 State.

14 Our view, and this is from -- I mean, our
15 experience from outside the record is it's actually paid
16 by an insurance policy from an association of county
17 commissions, but at any rate, the Eleventh Amendment issue
18 we do not think has been properly determined by any court.
19 We think the Eleventh Circuit's been wrong, and if it
20 becomes necessary in this case, we will certainly
21 challenge it.

22 QUESTION: Who buys the sheriff's patrol cars?

23 MR. McDUFF: The county commission.

24 Now, in terms of the label, my opponent says
25 that Alabama law labels the sheriff as a State official.

1 The only label they're talking about is section 112 of the
2 constitution that says, "the executive department shall
3 consist of a Governor and some other officers and a
4 sheriff for each county." That doesn't answer the
5 question posed by section 1983 of for which body, for
6 which governmental unit does the sheriff set policy.

7 Even if Alabama passed a statute and said, the
8 sheriff sets law enforcement policy for the State, that
9 label wouldn't answer the question, either. You'd have to
10 look at the functions as set up by State law, and if usage
11 is any different from State law, you look at that.

12 In terms of labels, there are several statutes
13 that refer to the sheriff as a county officer. One of
14 them is cited in -- thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. McDuff.

16 The case is submitted.

17 (Whereupon, at 11:09 a.m., the case in the
18 above-entitled matter was submitted.)
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CERTIFICATION

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

TOM SWINT, ET AL., Petitioners v. CHAMBERS COUNTY COMMISSION, ET AL.

CASE NO.: 93-1636

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BY *Don Mani Federico*

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