No. 02-14670-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MILLER FRANK JOHNSON, et al.,

Plaintiffs

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee

v.

GERALD REGIER.

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the United States of America hereby certifies, in accordance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, that the following persons may have an interest in the outcome of this case:

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Bucklew, Susan C., United States District Judge

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose the State's request for oral argument.

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LEGISLATIVE HISTORY:

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1345. A timely notice of appeal from the district court's order of July 30, 2002, was filed by the State of Florida (R. 1465). This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court properly applied standards in *Christiansburg Garment* v. *EEOC*, 434 U.S. 412 (1978), to an attorney's fees request by prevailing defendants under the Civil Rights For Institutionalized Persons Act, 42 U.S.C. 1997c(d).

2. Whether the district court abused its discretion by denying the State defendant's request for attorneys' fees.

STATEMENT OF THE CASE

A. *Facts*

The State of Florida operated the G. Pierce Wood Memorial Hospital (GPW Hospital) in Arcadia, Florida, a psychiatric facility primarily serving patients with severe and persistent mental illnesses (R. 1319 at 2).[1] GPW Hospital had approximately 350 patients prior to its closing in February 2002 (R. 1319 at 2-3).

B. *Course of Proceedings*

1. *Underlying lawsuit*

On March 11, 1987, private plaintiffs brought this action pursuant to 42 U.S.C. 1983, alleging that conditions at GPW Hospital violated the First, Fifth,

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[1] "R. ___ at __" refers to numbered documents listed in the District Court's docket sheet, and the page number. "R. ____, Tr. (date) at __" refers to the docket number, date, and page number of transcribed proceedings held by the district court and magistrate judge in this case. "Br. __" refers to pages of the State's brief filed in this appeal on November 7, 2002.

Sixth, Ninth, and Fourteenth Amendment rights of hospital patients (R. 1; R. 30). Plaintiffs sought declaratory relief that the State's confinement and restriction of patients violate their constitutional rights, and injunctive relief enjoining the State from any such further violations (R. 30 at 11-12).

On June 9, 1989, the district court entered a consent decree under which the State agreed to make certain changes in the administration of the hospital, the treatment and care of patients, and the discharge of patients into community placements (R. 68). These changes included complying with Florida Department of Health and Rehabilitative Services regulations with respect to administering psychotropic drugs and governing restraint procedures (R. 68 at 4-9); providing appropriate exercise and recreational periods and programs for patients (R. 68 at 10); putting into place policies and procedures regarding patient participation in treatment and documentation of treatment progress (R. 68 at 11-13); and complying with state policies with respect to providing adequate medical, dental, and rehabilitation treatment and increasing staffing at the hospital (R. 68 at 16, 19-20). In addition, the State agreed to a process for placing qualified patients into community-based placements (R. 68 at 21-22). The parties agreed to monitor the State's compliance with the consent decree (R. 68 at 20). Shortly thereafter, though, the State withdrew its support of the decree and argued that it should be vacated (R. 83). On August 14, 1989, the district court dismissed all other claims

pursuant to a Stipulation of Dismissal filed by the parties (R. 92).

2. *United States intervenes*

On July 10, 1996, the United States, asserting that its review of conditions at GPW Hospital disclosed that serious constitutional and statutory violations of patients' rights continued, moved to intervene as of right in the case pursuant to Section 5 of the Civil Rights Of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997c(a)(1) (R. 637). CRIPA authorizes the United States to intervene in on-going litigation concerning federal statutory or constitutional rights of institutionalized persons. 42 U.S.C. 1997c(a)(1). The Attorney General filed a complaint in intervention alleging that the State's practices at GPW Hospital caused patients to suffer harm in violation of the Fourteenth Amendment to the Constitution and the Americans With Disabilities Act (ADA), 42 U.S.C. 12132. The district court granted the motion to intervene on March 23, 1998 (R. 705).

Following discovery, the district court conducted a 23-day bench trial from August 7, 2000, through September 8, 2000. The first day of trial, the State informed the district court that GPW Hospital "may be closing" at a future, albeit uncertain, date (R. 1255, Tr. 8/7/00 at 107).

3. *District Court's June 28, 2001, Order*

On June 28, 2001, the district court entered an opinion and order finding that the level of care and services at GPW Hospital and its placement of patients into

community settings satisfied the State's obligations under the Fourteenth Amendment and the ADA (R. 1319). The court entered final judgment in favor of the State.

The district court observed that under *Youngberg* v. *Romero*, 457 U.S. 307 (1982), an institutionalized patient has a constitutional right to adequate food, shelter, clothing, and medical care, and a substantive due process right to safe conditions of confinement (R. 1319 at 25). The district court stated that in "determining whether or not a constitutional violation has taken place, a court must determine whether a state exercised professional judgment in a decision related to constitutionally protected rights" (R. 1319 at 25). The district court determined that, as now administered, the State's provision of services and treatment with respect to the reasonableness of care and safety of patients, and the adequacy of treatment and community health services, was constitutionally sufficient (R. 1319 at 3-27).

The district court also held that, as the United States argued, the ADA obligates the State to place persons with mental disabilities in community settings when the "State's treatment professionals have determined that community placement is appropriate," the transfer "to a less restrictive setting is not opposed" by the patient, and the "placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with

disabilities" (R. 1319 at 28). The district court determined that the State's mental health program, discharge planning, and patients' needs assessment process, as now administered at GPW Hospital, did not violate the ADA (R. 1319 at 43). The district court observed that while there was evidence that "community services and facilities could be different and in some instances better," the State's mental health program does not result in unnecessary isolation of patients in segregated settings (R. 1319 at 43).

4. *State's Application For Attorney's Fees And Costs Against The United States*

On September 13, 2001, the State filed an application for attorneys' fees and expenses against the United States (R. 1351). The State sought $1,701,367.50 in attorneys' fees, and $679,657.66 in costs and expenses ($404,074.99 of the cost was to cover the fees and travel expenses of the State's expert witnesses) (R. 1351 at 6-10).

The United States moved to bifurcate the attorneys' fees proceeding, asking the district court to determine first the question whether the United States is liable at all to the State for attorneys' fees or expert witness fees, prior to determining the precise fee amount (R. 1362, 1363). The State's application for attorneys' fees was referred to a magistrate judge who subsequently granted the bifurcation motion on January 15, 2002 (R. 1394). Oral argument on liability was held on February 20, 2002 (R. 1415).

5. *Magistrate Judge's Report and Recommendation on the State's Attorneys' Fees*

On April 26, 2002, the magistrate judge entered a report recommending against the payment of attorneys' fees to the State, and granting in part the State's request for costs (R. 1432). The magistrate judge determined that the appropriate standard for analyzing the State's request for attorney's fees is set out in *Christiansburg Garment* v. *EEOC*, 434 U.S. 412 (1978), and that, under that standard, the State is not entitled to fees because the United States' action was not frivolous, unreasonable, or groundless (R. 1432 at 4-14). The magistrate judge recommended against granting the State's request for expert witness fees as well because neither CRIPA nor 28 U.S.C. 1920 authorize such an award (R. 1432 at 16). The magistrate judge determined that payment of expert witness fees is instead governed by 28 U.S.C. 1821, which authorizes witnesses to be compensated at a rate of $40 per day plus reasonable expenses (R. 1432 at 16).

6. *District Court's Order On The State's Attorneys' Fees*

On July 30, 2002, the district court adopted the magistrate judge's report and recommendation (R. 1463).

The district court held that "*Christiansburg* sets forth the appropriate legal standard for determining whether Defendants, as prevailing parties, are entitled to an award of attorney's fees under 42 U.S.C. 1997c(d)" and thus found the State entitled to fees only if the United States' case was frivolous, unreasonable, or

groundless (R. 1463 at 3).

Applying *Christiansburg*, the district court held that the State is not entitled to fees because the United States' case against it was not frivolous, unreasonable, or groundless (R. 1463 at 6-8). The district court observed that after the United States intervened, the State "did not move to dismiss the case, nor did they move for summary judgment" (R. 1463 at 7). The case proceeded to trial, and the district court stated that while it "found in favor of Defendants on all claims * * * both the evidence presented before this Court during the trial and the Court's Order on that trial reveal [that] the United States' case cannot be said to be frivolous, unreasonable, or groundless" (R. 1463 at 7). The district court stated that "[t]here were numerous allegations of patients experiencing serious harm, and even death, while under the State's supervision, some of which were supported by the State's own records" (R. 1463 at 7).

The district court also held that "the United States' continued litigation even after it became aware of the impending closure of GPW" does not warrant payment of fees to the State (R. 1463 at 7-8). The district court stated that while the United States sought to intervene in 1996, the hospital did not actually close until February, 2002. The district court stated that "[i]n light of the continued operation of the hospital for an extended period after Defendants announced that they would close the facility, and the numerous allegations of serious harms experienced by the

patients, the [United States'] continued pursuit of its claims does not warrant an award of fees to Defendants" (R. 1463 at 8).

The district court held that the ruling in *Geier* v. *Richardson*, 871 F.2d 1310 (6th Cir. 1989), was inapplicable because that case is "distinguishable on its facts" (R. 1463 at 5). The district court held that the *Geier* court did not apply the *Christiansburg* standard because of the "United States' complete reversal of its original position" and not because the usual *Christiansburg* standards did not apply in usual litigation (R. 1463 at 5). The district court stated that "[u]nlike the position of the United States in *Geier*, in this case the United States did not argue an inconsistent position against the consent decree * * * and remained on [plaintiffs'] side throughout the litigation" (R. 1463 at 6).

The district court further held that neither CRIPA nor 28 U.S.C. 1920 authorizes the award of expert witness fees, and thus "Defendants are not entitled to recover them" (R. 1463 at 9). The district court held that the State "may recover compensation for their experts at the rate of $40.00 per day plus reasonable expenses, the rate at which non-expert witnesses are ordinarily compensated" and ordered the State to "submit * * * an itemized amount of fees for their experts at [this] rate" (R. 1463 at 9). The district court awarded the State $351,139.45 for various administrative costs to which the United States did not object (R. 1463 at 2, 10-11).

STANDARDS OF REVIEW

The district court's legal conclusions are subject to *de novo* review, and its factual findings are subject to review for clear error. *Brochu* v. *City of Riviera Beach*, 304 F.3d 1144, 1154 (11th Cir. 2002). A district court's decision to deny attorney's fees is reviewed for abuse of discretion. *United States* v. *Crosby*, 59 F.3d 1133, 1137 (11th Cir. 1995).

SUMMARY OF ARGUMENT

Under CRIPA, "the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs." 42 U.S.C. 1997c(d). However, CRIPA does not make the United States liable for fees to State defendants merely because the Court entered judgment in the State's favor. The proper standard for awarding fees to prevailing *defendants* in civil rights cases, such as under CRIPA, is that a plaintiff is liable for fees only if its case was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978). "The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees." *Hughes* v. *Rowe*, 449 U.S. 5, 14 (1980).

The language and legislative history of CRIPA clearly reflect Congress's intention that the *Christiansburg* standard be used in deciding whether to award fees to prevailing defendants. No other fee-shifting standard applies here. The

district court correctly applied *Christiansburg* standards to the State's application for attorney's fees.

Employing the *Christiansburg* standard, the district court acted well within its discretion in denying the State attorneys' fees. The CRIPA suit brought by the United States was not frivolous, unreasonable, or without foundation. The United States presented seven expert witnesses and submitted numerous exhibits at trial in support of each of the claims raised in the complaint. The United States' case proceeded to trial and received the district court's careful attention and review. Furthermore, contrary to the State's claims, the United States handled the litigation in a reasonable manner. The United States had ample basis for intervening in the action, and there were sufficient grounds for the United States to continue the litigation; the State's assertions on the first day of trial, four years after the United States intervened, that GPW Hospital may be closing at some uncertain future date, does not demonstrate that the United States' intervention, and presentation of a case at trial, was unreasonable.

ARGUMENT

I

PREVAILING DEFENDANTS IN CRIPA ACTIONS CAN BE AWARDED FEES ONLY WHEN THE UNITED STATES' CASE IS FRIVOLOUS, UNREASONABLE, OR WITHOUT FOUNDATION

The Civil Rights for Institutionalized Persons Act, 42 U.S.C. 1997, *et seq.* (CRIPA), authorizes the Attorney General to file suit to enforce constitutional and

federal statutory rights of institutionalized persons. CRIPA authorizes the Attorney General to initiate suits and intervene in actions to redress "egregious and flagrant conditions" that deprive institutionalized persons of constitutional or statutory rights (42 U.S.C. 1997a, 1997c).

CRIPA contains two provisions which pertain to awarding attorney's fees; 42 U.S.C. 1997a(b) applies when the United States initiates the action, and 42 U.S.C. 1997c(d) applies when, as here, the United States intervenes in existing litigation. Section 1997c(d) states:

> In any action in which the United States joins as an intervenor under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs.

The district court entered final judgment in favor of the State, and the State is thus the prevailing party in this case. This Court must determine which legal standard the district court must use to determine whether the State, as a prevailing defendant, may be awarded attorney's fees under Section 1997c(d).

A. *CRIPA's attorney's fees provisions require use of the Christiansburg standard consistent with other similarly-worded civil rights fee-shifting provisions*

The text of CRIPA's attorney's fees provisions are nearly identical to civil rights fee-shifting provisions in the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. 1988(b), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). Under both those statutes, courts have employed the standards set out in

Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412 (1978), in awarding attorney's fees to prevailing defendants. Section 1988, which applies to a number of civil rights proceedings[2], states that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The Title VII attorney's fees provision nearly mirrors the fee provisions of CRIPA and Section 1988, and states that "the court, in its discretion, may allow the prevailing party, other than the [EEOC] or the United States, a reasonable attorney's fee * * * as part of the costs, and the [EEOC] and the United States shall be liable for costs the same as a private person." 42 U.S.C. 2000e-5(k). The standard for awarding fees to prevailing parties under these civil rights statutes is well established. Under Section 1988 and Title VII, a prevailing *plaintiff* is entitled to recover attorney's fees "unless special circumstances would render such an award unjust." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983), quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) (discussing § 1988); *Albemarle Paper Co.* v *Moody*, 422 U.S. 405, 415 (1975) (discussing Title VII). A prevailing *defendant* may recover fees only where the court finds that the plaintiff's action was "frivolous, unreasonable, or without foundation." *Hughes* v. *Rowe*, 449 U.S. 5, 14

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[2] The Section 1988 attorney's fees provision applies to "any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb *et seq.*], [or] title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*] * * *" 42 U.S.C. 1988(b).

(1980) (discussing 1988), quoting *Christiansburg*, 434 U.S. at 421; see also this Court's decision in *Sayers* v. *Stewart Sleep Ctr., Inc*. 140 F.3d 1351, 1353-1354 (1998) (discussing Title VII).

The standard for awarding fees to defendants in civil rights cases, even ones where the government, as here, is plaintiff, emanates from *Christiansburg*. In that case, the EEOC lost its Title VII case against the Christiansburg Garment Company, after which the Company moved for attorney's fees under Title VII's attorney's fees provision, 42 U.S.C. 2000e-5(k). Because the legislative history of Title VII's fees provision was "sparse" with respect to the standard for awarding fees to prevailing defendants, the Supreme Court looked to the "Senate floor discussions of the almost identical attorney's fee provision of Title II" of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b).[3] *Christiansburg*, 434 U.S. at 420. The Court found that Title II's legislative history demonstrated Congress's intent that prevailing defendants be entitled to fees as a way of "'deter[ring] the bringing of lawsuits without foundation,' 'discourag[ing] frivolous suits,' and 'diminish[ing] the likelihood of unjustified suits being brought.'" *Id.* at 420.

Based on the Title II legislative history, the Court in *Christianburg*

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[3] Similar to Title VII, Section 1988, and CRIPA, Title II's attorney's fees provision, 42 U.S.C. 2000a-3(b), provides: "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person."

determined that "while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation *having no legal or factual basis*." *Id.* at 420 (emphasis added). The Court approved of the reasoning of courts of appeals that addressed the appropriate standard for awarding fees to prevailing Title VII defendants[4] and, drawing from the legislative history of Title II's similarly-worded fees provision, concluded that prevailing defendants in Title VII cases should be awarded fees only when "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421.

While a prevailing plaintiff in a civil rights case is usually entitled to attorney's fees under Title VII (*Christiansburg*, 434 U.S. at 416-417), the Supreme Court found that two of the strong equitable considerations that favor an attorney's fee award to a prevailing plaintiff do not apply to a prevailing defendant. First, the plaintiff is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority,'" *id.* at 418, quoting *Newman* v. *Piggy Park Enters.*, 390 U.S. 400, 402 (1968), and Congress sought to encourage the filing of legitimate suits to enforce those prohibitions and policies. Second, when a district court awards attorney's fees to a prevailing plaintiff, it is awarding fees against a

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[4] See *Christiansburg*, 434 U.S. at 420-422 (discussing *Grubbs* v. *Butz*, 548 F.2d 973 (D.C. Cir. 1976); *United States Steel Corp.* v. *United States*, 519 F.2d 359 (3d Cir. 1975); *Carrion* v. *Yeshiva Univ.*, 535 F.2d 722 (2d Cir. 1976)).

violator of federal law. *Christiansburg*, 434 U.S. at 418; see also *Bruce* v. *City of Gainesville*, 177 F.3d 949, 951 (11th Cir. 1999). An unsuccessful plaintiff has violated nothing.

This Circuit, like other courts of appeals, has applied the *Christiansburg* standard to fee-shifting provisions contained in other similarly-worded civil rights statutes, such as the Americans With Disabilities Act, 42 U.S.C. 12205 (see *Bruce*, 177 F.3d at 951; *No Barriers, Inc.* v. *Brinker Chili's Texas, Inc.*, 262 F.3d 496, 498 (5th Cir. 2001); *Brown* v. *Lucky Stores, Inc.*, 246 F.3d 1182, 1190 (9th Cir. 2001)); the Fair Housing Act, 42 U.S.C. 3613(c)(2) (see *Brooks* v. *Center Park Assocs.*, 33 F.3d 585, 587 (6th Cir. 1994); *Sassower* v. *Field,* 973 F.2d 75 (2d Cir. 1992), cert. denied, 507 U.S. 1043 (1993)); the Voting Rights Act, 42 U.S.C. 1973l(e) (see *Riddell* v. *National Democratic Party*, 624 F.2d 539 (5th Cir. 1980); *Gerena-Valentin* v. *Koch*, 739 F.2d 755 (2d Cir. 1984); *Donnell* v. *United States*, 682 F.2d 240, 245 (D.C. Cir. 1982), cert. denied, 459 U.S. 1204 (1983)); and the Rehabilitation Act, 29 U.S.C. 794a(b) (see *Homeward Bound, Inc.* v. *Hissom Mem'l Ctr.*, 963 F.2d 1352, 1354 n.1 (10th Cir. 1992)). Like CRIPA, each of these civil rights fee-shifting provisions permits district courts to award attorney's fees to the "prevailing party," and applies the *Christiansburg* standard to prevailing defendants.[5]

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[5] The language in each of these fee provisions is nearly identical to one another

(continued...)

The State argues (Br. 16-17) that the similarity of CRIPA's attorney's fees provisions to that of the attorney's fees provisions of Section 1988, Title VII, Title II, and other civil rights statutes does not warrant applying the same legal standard. However, where Congress consistently uses nearly identical statutory language in the attorney's fees provisions of Section 1988, Title VII, Title II, and CRIPA, this Court should assume that "Congress intended the language to be interpreted similarly." *Agosto* v. *INS*, 436 U.S. 748, 754 (1978); see also *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 759 n.2 (1989) ("fee shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike"); *Northcross* v. *Board of Educ.*, 412 U.S. 427, 428 (1973) (per curiam) ("[S]imilarity of language * * * is, of course, a strong indication that * * * two [attorney's fee] statutes should be interpreted *pari passu*."). In *Hensley*, the Supreme Court made clear that with respect to awarding attorney's fees in civil rights cases under 42 U.S.C. § 1988,

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[5](...continued)
and to CRIPA. See Americans with Disabilities Act, 42 U.S.C. 12205 ("the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee"); Fair Housing Act, 42 U.S.C. 3613(c)(2) ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs"); Voting Rights Act, 42 U.S.C. 1973l(e) ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs"); and the Rehabilitation Act, 29 U.S.C. 794a(b) ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs").

> Congress intended that "the standards * * * be generally the same as under the fee provisions of the 1964 Civil Rights Act." The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a "prevailing party."

461 U.S. at 433 n.7 (citations omitted); *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 n.4 (1980) (noting that "§ 1988 was patterned upon the attorney's fees provisions contained in Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k), and 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973l(e)."). See also this Court's decision in *Bruce*, 177 F.3d at 951 (applying *Christiansburg* standard to ADA fee-shifting provision because it is "substantially the same as the Title VII provision involved in *Christiansburg*.").

Moreover, the State's claim (Br. 10) that federalism concerns should permit States to receive fees when prevailing against the federal government are simply unavailing. While it is true that Congress imposed a "higher standard" for the United States' involvement in suits against states and localities under CRIPA, it did so clearly through enactment of statutory language that requires the United States to sue or intervene only when the Attorney General certifies that there is "reasonable cause" to believe that the state or locality "is subjecting persons residing in or confined to an institution * * * to *egregious or flagrant* conditions which deprive such persons of any rights * * * causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of" their constitutional or statutory rights. 42

U.S.C. 1997c(a)(1) and 1997a(a)(emphasis added). The heightened responsibility for the Attorney General in CRIPA actions is that the United States seek to redress "egregious or flagrant conditions," H.R. Rep. No. 897, 96th Cong. 2d Sess. 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 787, 835. There is, however, nothing in the statutory language of the attorney's fees provision that similarly adopts a different standard than in other statutes in which the federal government may sue state governments. CRIPA clearly shows that when Congress wants to establish different or heightened requirements through statutory language, it knows how, and it did not do so in the attorney's fees language in CRIPA.

The State further argues (Br. 12-13, 17) that the policy objectives that support the award of fees to a prevailing defendant only when the plaintiff's case is frivolous are inapplicable in CRIPA cases because CRIPA actions are brought solely by the Attorney General. However, like the attorney's fees provisions of Title VII and Section 1988, Section 1997c(d) is a fee-shifting provision of a *civil rights* statute. The policy concerns arising out of the civil rights context that led to the dual standard under Title VII's fee provision and Section 1988 apply equally to CRIPA. Even though CRIPA cases are brought solely by the United States against units of state governments, that does not undermine the policy considerations that are embodied in similarly-worded fee provisions of other civil rights statutes. The Supreme Court in *Christiansburg* expressly rejected the argument that a more lenient standard should apply when the federal government is the plaintiff in a case

in which EEOC was the plaintiff. The Court stated:

> It has been urged that fee awards against the Commission should rest on a standard different from that governing fee awards against private plaintiffs. One *amicus* stresses that the Commission, unlike private litigants, needs no inducement to enforce Title VII since it is required by statute to do so. But this distinction between the Commission and private plaintiffs merely explains why Congress drafted § 706(k) to preclude the recovery of attorney's fees by the Commission; it does not support a difference in treatment among private and Government plaintiffs when a prevailing defendant seeks to recover his attorney's fees. * * * Hence, although a district court may consider distinctions between the Commission and private plaintiffs in determining the *reasonableness* of the Commission's litigation efforts, *we find no grounds for applying a different general standard whenever the Commission is the losing plaintiff*.

Christiansburg, 434 U.S. at 422-423 n.20 (emphasis added); see also *Copeland* v. *Marshall*, 641 F.2d 880, 895 n.27 (D.C. Cir. 1980); *United States Steel Corp.* v. *United States*, 519 F.2d 359, 364 n.24 (3d Cir. 1975) (court of appeals rejects theory that attorney's fees may be assessed "more easily" against the "unsuccessful government plaintiff"). The district court aptly observed that "[u]nder CRIPA, the United States is the 'chosen instrument of Congress' to defend the rights of the institutionalized, just as private plaintiffs are the 'chosen instruments' to vindicate their rights under the civil rights statutes" (R. 1463 at 4 (citations omitted)). The district court stated further that "[u]nder both CRIPA and other civil rights statutes, when a court awards a prevailing plaintiff attorney's fees, 'it is awarding them against a violator of federal law'" (R. 1463 at 4 (citations omitted)).

The State also argues (Br. 13-14) that *Christiansburg* does not apply because the EEOC plays a distinctly different role in Title VII cases than does the United

States in CRIPA cases. This argument is clearly meritless. There is no significant difference in the role of the EEOC under Title VII and that of the Attorney General under CRIPA that would warrant employing a legal standard other than *Christiansburg* for awarding attorney's fees to prevailing defendants. Title VII gives the EEOC authority to prevent unlawful employment practices by private employers, including authority to bring, and intervene in, civil actions in federal district court, 42 U.S.C. 2000e-5(a), (f), just as CRIPA authorizes the Attorney General to bring, and intervene in, civil actions to enforce constitutional and federal statutory rights of persons in state-operated institutions, 42 U.S.C. 1997a, 1997c. Moreover, Title VII authorizes the EEOC to bring broad "pattern and practice" suits in the employment context, 42 U.S.C. 2000e, actions that are similar to the CRIPA actions the Attorney General brings against public institutions, 42 U.S.C. 1997a(a) and 1997c(a). In addition, Title VII gives the Attorney General authority to bring employment discrimination suits against *public employers* and any award of attorney's fees under 42 U.S.C. 2000e-5(k) to public employers as *prevailing defendants* would be subject to the *Chrisiansburg* standard.

B. *CRIPA's legislative history directs that courts utilize the Christiansburg standard when awarding attorney's fees.*

The State argues (Br. 15-17) that the legislative history of CRIPA requires the United States to pay fees "whenever it loses" and, relying on *Fogarty* v. *Fantasy, Inc.*, 510 U.S. 517 (1994), argues that the legislative history of CRIPA

provides no support for adopting the legal standard employed in *Christiansburg*. This argument is meritless. In *Fogarty*, the Supreme Court analyzed the statutory language and legislative history of the attorney's fees provision of the Copyright Act, 17 U.S.C. § 505, and specifically rejected the claim that *Christianburg* should apply to actions brought under the Copyright Act. 510 U.S. at 534. The Court held that circumstances in litigation filed under the Copyright Act are significantly different from those filed under civil rights statutes so that application of the *Christianburg* standard was unfair. The Court noted that in Copyright Act cases, often both the plaintiff and defendant are copyright holders, one seeking to enforce his or her copyrights and the defendant seeking to defend his or her copyright, and so the claims of both parties are often similar. In addition, the Court noted that the attorney's fees language in the Act was first enacted in 1909, and at that time there simply was no fee-shifting provision that applied different standards to prevailing plaintiffs and defendants that was ultimately approved in *Christianburg*.

The Conference Report on CRIPA explains:

> [I]n both the initiation and intervention sections, the Act makes clear the liability of the United States to opposing parties for attorneys' fees whenever it loses. The award is discretionary with the court, and it is *intended that the present standards used by the courts under the civil rights laws will apply*.

H. R. Rep. No. 897, 96th Cong. 2d Sess. 12-13 (1980), *reprinted in* 1980 U.S.C.C.A.N. 787, 837 (emphasis added). *Christiansburg* was decided in 1978. At the time of CRIPA's passage, "the present standard[] used by courts under the civil rights laws" was the *Christiansburg* standard. Indeed, the Senate Report on

the legislation that became CRIPA explicitly refers to the "amendment * * * which would allow the prevailing party other than the United States a reasonable Attorney's fee at the discretion of the court," and states that "[t]his provision is similar to that found in Title VII of the Civil Rights Act of 1964. See *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412." S. Rep. No. 416, 96th Cong., 2d Sess. 31 & n.86 (1980), *reprinted in* 1980 U.S.C.C.A.N. 787, 813-814. Congress directly expressed its intent that the *Christiansburg* standard be employed in determining whether to award fees to prevailing defendants in CRIPA cases. The Supreme Court relied upon an almost identical indication of legislative intent when it applied Title VII fee standards to Section 1988 cases. See *Hensley*, 461 U.S. at 433 n.7.

C. *Geier is inapplicable to this case.*

The State relies on *Geier* v. *Richardson*, 871 F.2d 1310 (6th Cir. 1989) in arguing (Br. 17-19) that the *Christiansburg* standard does not apply to CRIPA and that the State is therefore entitled to attorney's fees. However, as the district court correctly determined, *Geier* is inapplicable because it is "distinguishable on its facts" (R. 1463 at 5).

In *Geier*, the United States originally intervened on the side of plaintiff and sought relief against the State of Tennessee to eliminate the effects of the *de jure* segregation in the State's higher education system. After court-ordered remedial measures spanning from 1968 to 1984, the district court agreed to a comprehensive

consent decree requiring numerous new desegregation programs throughout the State's higher education system. 871 F.2d at 1311. The United States, at that point, switched positions in the case, and "was the only party to object to the consent decree." *Ibid.* The district court approved the decree.

On appeal, the United States continued to object to a specific part of the consent decree that established a pre-professional program based on race. *Id.* at 1311-1312. The court of appeals affirmed the district court's order entering the consent decree, again over the United States' opposition. *Geier* v. *Alexander*, 801 F.2d 799 (6th Cir. 1988). After prevailing on appeal, the State and private plaintiffs, both of which were on the same side of the appeal against the United States, sought attorney's fees against the United States under 42 U.S.C. 1988. The district court awarded fees against the United States.

The court of appeals affirmed the award, holding that the *Christiansburg* standards for defendants do not apply because of the government's switch of positions and adoption of defensive arguments:

> The United States originally intervened as a plaintiff * * *, requested broad relief against the defendant, the State of Tennessee, and helped lay the foundation for the consent decree eventually entered into by the private litigants and the State of Tennessee. Fifteen years of litigation later, the United States *now reverses its position*. It challenges a validly and judicially approved consent decree, and further prolongs the litigation and costs to both the private plaintiffs and the State of Tennessee * * *. Congress clearly did not intend such a situation to result from the language of § 1988. The financial burden necessitated by the parties in order to prevail against the government's attempt to restrict the scope of mutually agreed upon relief through a challenge to the consent decree should be born by the government under § 1988.

Id. at 1313-1314 (emphasis added).

There is no such reversal of position in this case. The United States here intervened and brought the CRIPA action against the State to remedy practices that the United States determined were harming GPW patients. The district court correctly observed that

> [u]nlike the position of the United States in *Geier*, in this case the United States did not argue an inconsistent position against the consent decree. Moreover, in contrast to the United States' position in *Geier*, in this case the United States intervened on behalf of the Plaintiffs and remained on their side throughout the litigation

(R. 1463 at 6).[6] *Geier* is inapplicable.

D. *The EAJA standard cannot be applied here*.

The State argues (Br. 19-22) that the legal standard employed under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), may provide a way to "strik[e] a balance" between the competing interests of the parties in this case. However, when Congress consents to an action against the federal government "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); see also

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[6] The State argues (Br. 19) that the *Geier* decision establishes that the United States can be liable for attorney's fees where it engages in "unreasonable conduct in prolonging and confounding litigation." As we have explained, however, the court of appeals in *Geier* held the United States liable for attorney's fees due to its switch in position in the litigation (see pp. 24-25, *supra*). Nonetheless, there is no basis for finding that the United States acted unreasonably in this litigation (see pp. 32-36, *infra*).

West v. *Gibson*, 527 U.S. 212 (1999). When the United States waives its sovereign immunity, the waiver must be "strictly construed, in terms of its scope, in favor of the sovereign," *Department of Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); see also *Lane* v. *Pena*, 518 U.S. 187, 192 (1996), as the Supreme Court has "long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied,'" *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981), quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). The express language of CRIPA's attorney's fees provisions and the legislative history make clear that the consent of the United States to pay attorney's fees under CRIPA is based on use of the *Christiansburg* standards, and standards of the EAJA simply do not apply to the government in a CRIPA suit.[7]

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[7] The State cites (Br. 23, n.6) *Turlington* v. *Atlanta Gas Light Co.*, 135 F.3d 1428 (11th Cir. 1998), cert. denied, 525 U.S. 962 (1998), and *EEOC* v. *O & G Spring & Wire Forms Spec. Co.*, 38 F.3d 872 (7th Cir. 1994), cert. denied, 513 U.S. 1198 (1995), in arguing that this Court may employ an alternative legal standard to CRIPA's attorney's fees provisions. These cases, however, involve the attorney's fees provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 626(b), which, as this Court recognized in *Turlington*, 135 F.3d at 1437 n.19, and the Seventh Circuit observed in *O & G Spring*, 38 F.3d at 882-883, has a distinctly different remedial scheme from that of Title VII and CRIPA with respect to attorney's fees. This Court in *Turlington* stated that the ADEA's attorney's fees provision incorporates the attorney's fees provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. 216(b). 135 F.3d at 1437. The attorney's fees provision of the FLSA differs from that of Title VII, as that provision states that courts can "in

(continued...)

The State concedes (Br. 21-22) that EAJA does not apply directly to this case. While EAJA authorizes courts to impose attorney's fees against the United States where the government's position was not substantially justified, the EAJA applies *only* when another statute does not specifically provide for the award of attorney's fees. See EAJA, 28 U.S.C. 2412(d)(1)(A) ("*Except as otherwise specifically provided by statute*, a court shall award to a prevailing party other than the United States fees and other expenses * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.") (emphasis added); see also *EEOC* v. *Consolidated Serv. Sys.*, 30 F.3d 58, 59 (7th Cir. 1994). The legislative history of EAJA reflects Congress's intent that EAJA does not apply to "civil actions * * * already covered by existing fee-shifting statutes," and instead applies only to cases (other than tort cases) where fee awards against the government are not already

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[7](...continued)
addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant." 29 U.S.C. 216(b). This Court, consistent with numerous other circuits, has held that the FLSA "entitles a prevailing defendant to attorney's fees only where the district court finds that the plaintiff litigated in bad faith." *Turlington*, 135 F.3d at 1437, citing *EEOC* v. *Hendrix Coll.*, 53 F.3d 209, 211 (8th Cir. 1995); *O&G Spring*, 38 F.3d at 883 (7th Cir.); *Gray* v. *New England Tel. & Tel. Co.*, 792 F.2d 251, 260 & n.1 (1st Cir. 1986). This Court has made clear that the standard for awarding attorney's fees to prevailing defendants in FLSA cases "differs significantly from the rule governing the award of attorney's fees to prevailing defendants in Title VII cases." *Turlington*, 135 F.3d at 1437 n.19.

authorized under another statute. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4997; S. Rep. No. 253, 96th Cong., 1st Sess. 20 (1979); see also 28 U.S.C. 2412 note. Since CRIPA contains its own fee-shifting provision, Congress has not authorized application of EAJA standards. See *Consolidated Serv. Sys.*, 30 F.3d at 59; *O & G Spring*, 38 F.3d at 881 ("EAJA is a default provision, and does not apply if another statute specifically provides for fees in the same situation as described in § 2412(d)"); *EEOC* v. *Kimbrough Inv. Co.*, 703 F.2d 98, 103 (5th Cir. 1983); *Huey* v. *Sullivan*, 971 F.2d 1362, 1366-67 (8th Cir. 1992), cert. denied, 511 U.S. 1068 (1994).[8]

II.

THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN DENYING ATTORNEY'S FEES TO THE STATE

A. *The district court correctly determined that the United States' CRIPA case was not frivolous.*

This Court has stated that "[i]n determining whether a suit is frivolous, 'a

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[8] In any event, if EAJA was to apply here, the State would have to satisfy the definition of a "party," 28 U.S.C. 2412(d)(2)(B), in order to qualify for attorney's fees under that statute. That definition includes "unit[s] of local government * * * the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed." "EAJA's definition of 'party' restricts who may be an eligible party for fees. And, because the EAJA is a waiver of governmental sovereign immunity, the statute must be strictly construed." *United States* v. *Land, Shelby County*, 45 F.3d 397, 398 (11th Cir. 1995). The State of Florida would not qualify as a "party" eligible to apply for such fees under EAJA.

district court must focus on the question whether the case is so lacking in arguable merit as to be groundless or without foundation, rather than whether the claim was ultimately successful.'" *Sullivan* v. *School Bd. of Pinellas County*, 773 F.2d 1182, 1189 (1985). The Supreme Court in *Christiansburg* explicitly cautioned courts to

> resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

434 U.S. at 421-422.

"Cases where findings of 'frivolity' have been sustained typically have been decided in the defendant's favor on a motion for summary judgment or a Fed. R. Civ. P. 41(b) motion for involuntary dismissal," where "the plaintiffs did not introduce any evidence to support their claims." *Sullivan*, 773 F.2d at 1189 (citations omitted). Where "plaintiffs introduced evidence sufficient to support their claims, findings of frivolity typically do not stand." *Ibid.* (citations omitted). In *Sullivan*, this Court clarified the factors that are important in determining whether to award fees to defendants in civil rights cases:

> (1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle; and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits.

773 F.2d at 1189; see also *Sayers*, 140 F.3d at 1353. "There are general guidelines only, not hard and fast rules." *Sullivan*, 773 F.2d at 1189.

The State argues (Br. 26) that the United States did not make out a *prima*

facie case as called for by *Sullivan*. This argument, however, has no merit. At trial the United States had significant evidence and expert opinion raising serious and legitimate questions about the treatment of patients at GPW Hospital and in community placements that GPW ordered. The government presented seven expert witnesses and submitted numerous exhibits in support of each of the claims raised in the complaint.

United States expert witness Dr. Jeffrey Lee Geller testified as an expert in public sector psychiatry, and in the provision of mental health services to persons with mental illness. Dr. Geller testified that the hospital did not provide adequate supervision to high-risk patients (see Tr. 8/7/00 and Tr. 8/8/00). Expert witness Dr. Judith Jaeger, a neuro-psychologist specializing in psychosocial services for people with severe and persistent mental illness, evaluated GPW Hospital and testified that various hospital procedures and policies for psycho-social rehabilitation and psychological services failed to meet professionally accepted standards (see Tr. 8/9/00 and Tr. 8/10/00). United States expert witness Dr. Nancy Ray, a private consultant in the field of mental disabilities, testified on all areas of safety at GPW Hospital, including the provision of basic custodial care, environmental conditions and safety, patient supervision and appropriate use of restraints and seclusion, and concluded that the State failed to provide protection and safety at a professionally acceptable standard (see Tr. 8/10/00 and 8/11/00).

Martha Hodge testified for the United States as an expert on discharge

planning and case management, and determined that GPW Hospital's practices and procedures were substantially below professional standards (see Tr. 8/14/00). United States witness Raymond Brien, who has extensive experience working for state departments of mental health principally in the areas of administration and community mental health, testified that the State's community mental health services "represent[] a substantial departure from professional standards" (see Tr. 8/17/00 at 15). United States witness Pamela Hyde testified as an expert in administering mental health care systems, and determined that improvements in planning, resource management, accountability mechanisms, and service array would "greatly enhance [the State's] capacity to serve" GPW patients in community placements (see Tr. 8/21/00 at 52). United States witness Dr. Robert Constantine testified about various inadequacies in the state's provision of services and programs for persons in community placements (Tr. 8/22/00 at 146-147, 158-169).

In determining that the United States' case was not frivolous and denying the State's request for attorney's fees, the district court noted that the case revealed "numerous allegations of patients experiencing serious harm, and even death, while under the State's supervision, some of which were supported by the State's own records" (R. 1463 at 7). The magistrate judge determined that the United States "more than established a prima facie case, and was only concluded unfavorably after a full trial and additional briefings" (R. 1432 at 13 n.6). The State has offered

nothing to contradict the magistrate's and district court's findings of fact.

The remaining elements of *Sullivan* are also satisfied, as the parties engaged in two mediations in attempts to settle the case, and the State "did not move to dismiss the case" nor for "summary judgment," and the "case proceeded to a trial on the merits and the trial lasted for 23 days" (R. 1463 at 7). This Court has stated that a claim is not "groundless or without foundation for the purpose of an award of fees in favor of the defendant[] when the claims are meritorious enough to receive careful attention and review." *Busby* v. *City of Orlando*, 932 F.2d 764, 787 (11th Cir. 1991); *United States* v. *Mississippi*, 921 F.2d 604, 609 (5th Cir. 1991) (denial of fees appropriate where "the United States' evidence * * * was valid, but merely insufficient")). The United States' case, while ultimately unsuccessful, clearly was not "so lacking in arguable merit as to be groundless or without foundation." *Sullivan*, 773 F.2d at 1189; see also *United States* v. *Crosby*, 59 F.3d 1133, 1137 (11th Cir. 1995).

B. *The United States handled the litigation in a reasonable manner.*

The State argues (Br. 27-29) that it should be awarded fees because the United States acted "unreasonably" throughout the litigation. The magistrate judge and district court, however, determined that the United States handled the litigation in a reasonable manner, and the State offers nothing new on that issue.

The State insists (Br. 27-29) that the United States had no basis for intervening in the action because GPW Hospital was under judicial supervision

pursuant to a consent decree and therefore subject to continual monitoring. CRIPA, however, expressly authorizes the Attorney General to "intervene" in an ongoing suit to seek relief from what he or she considers "egregious or flagrant conditions." 42 U.S.C. 1997c(a)(1).

Prior to intervening in the case, the United States sent the State a lengthy letter, dated November 9, 1995, informing the State of numerous alleged constitutional and statutory violations the United States ascertained during its investigation of GPW Hospital, and recommended minimum remedial measures that could be taken to correct these alleged violations (R. 1447 at Tab D). These violations were determined while the consent decree was in place, so the decree clearly did not establish, in our view, that constitutional protections had been restored. The district court observed in its order granting the United States intervention that "a cursory review of the file indicates that this case is still being actively litigated by the parties – that Plaintiffs are still, *despite the State's efforts to undo the consent decree and to resist the adoption of exit criteria*, 'seeking relief'" (R. 705 at 6-7 (emphasis added); see also R. 1432 at 10 (magistrate judge observes that "the State had long resisted the consent decree by the time of the [United States'] intervention and numerous harms had been inflicted on persons within and without the facility")). Clearly the case was active and issues still being contested when the United States intervened. Contrary to the State's arguments, a consent decree does not automatically insulate a State from federal action under CRIPA to

seek relief to remedy serious violations of constitutional and statutory law, and in this case there was ample basis for the district court to grant the United States' intervention in this case.

The State's argument (Br. 27) that the United States acted unreasonably by continuing to litigate and not narrowing its claims because the hospital was slated to close at some uncertain future date also lacks merit. Throughout the investigation of GPW Hospital in 1995, the filing of this lawsuit in 1996, the trial in 2000, and the issuance of the district court's order on the merits in 2001, the hospital remained open.

Despite assertions by the State on the first day of trial that the hospital "may be closing" (p. 4, *supra*), the State remained obligated to comply with constitutional and federal statutory law. The hospital did not close until 2002, seven years after the United States began its investigation and nearly two years after trial. The district court correctly determined that "[i]n light of the continued operation of the hospital for an extended period after Defendants announced that they would close the facility, and the numerous allegations of serious harms experienced by the patients, the Government's continued pursuit of its claims does not warrant an award of fees to Defendants" (R. 1463 at 8; see also R. 1432 at 12 (The magistrate judge holds that "the mere announcement of the intention to de-fund and eventually close the hospital did not significantly alter the Government's right to proceed or the nature of its claims. More significantly, it did not render the

claims meritless or frivolous.")). In addition, as the magistrate judge observed, "even after the close of the hospital there would exist a class of former residents with rights and privileges under the consent decree" (R. 1432 at 12).

The State argues further (Br. 27-28 & n.9) that the district court abused its discretion by not addressing the claim that the United States improperly used the case broadly to attack the State's entire mental health care system. The State's claim, however, was addressed by the magistrate judge who determined that "if such broad ranging testimony came into evidence, it was admitted either without objection or because it was deemed to be relevant by the trial judge despite its breadth * * * [and that] if it did not come into evidence, then the litigation was not unreasonably extended" (R. 1432 at 11). The magistrate judge concluded that "[e]ither way, this would appear to offer little support for the Defendants' claim for fees" (R. 1432 at 11). By fully "adopt[ing] the Report and Recommendation" of the magistrate, the district court thus rejected the State's argument on this issue (R. 1463 at 3), and again, the State offers no new arguments on this point.

Moreover, contrary to the State's assertion (Br. 28 n.9), CRIPA actions are not limited to constitutional violations. CRIPA authorizes the Attorney General to bring, and intervene in, civil actions to remedy deprivations of any "rights, privileges, or immunities secured or protected by the Constitution *or laws of the United States*." 42 U.S.C. 1997a(a) & 1997c(a) (emphasis added). In this case, the United States alleged that the State's community based treatment program violated

the ADA as interpreted by *Olmstead* v. *L.C.*, 527 U.S. 581, 596-607 (1999). In order to prove the ADA aspect of the case, it was necessary for the United States' witnesses to assess the State's mental health system in order to demonstrate that the remedial measures that were required were reasonable modifications of the State's system.

In any event, in seeking to re-evaluate the testimony of the United States' experts, the State would have this Court engage in the precise kind of "post-hoc reasoning" that the Supreme Court in *Christiansburg* cautioned against. 434 U.S. at 421-422. While the State seems to suggest that the district court abused its discretion by allowing evidence on the State's mental health system, there was no such abuse of discretion. The magistrate judge noted (R. 1432 at 13) that the district court's order on the merits "gives no indication that the [United States'] witnesses were as extraordinarily over the top as * * * alleged," and aptly observed that the United States' case may not now be labeled frivolous just because the testimony of the United States' witnesses conflicted with that of the State's witnesses, and the Court found the State's case more persuasive (see R. 1432 at 13-14).

CONCLUSION

For the foregoing reasons, the district court's order denying the State attorney's fees should be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C). The brief was prepared using WordPerfect 9.0 and contains 9,295 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

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