No. 88-608

In The

Supreme Court of the United States

October Term, 1988

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

vs.

ANNE B. ZIPES, et al.,

Respondents.

BRIEF OF AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

EDWARD R. GRANT
(Counsel of Record)
CLARKE D. FORSYTHE
KEVIN J. TODD

AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND
343 South Dearborn St.
Suite 1804
Chicago, Illinois 60604
(312) 786-9494

Attorneys for Amicus Curiae

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INDEPENDENT FEDERATION
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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND (AUL) AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND (AUL) is a not-for-profit, national, public interest law firm. AUL is entirely supported by private charitable contributions and charges no attorneys fees or costs to its clients. AUL has represented a number of intervening defendants in federal litigation. In Harris v. McRae, 448 U.S. 297 (1980), a challenge to the Hyde Amendment, AUL represented Senators James L. Buckley, Jesse A. Helms, and Representative Henry J. Hyde. In Diamond v. Charles, 476 U.S. 54 (1986), a challenge to the Illinois Abortion Act, AUL represented two physicians. And in Bowen v. Kendrick, -- U.S.-- 108 S.Ct. 2562 (1988), AUL represented United Families of America in a challenge to the constitutionality of the Adolescent Family Life Act (AFLA).

Pursuant to NAACP v. Button, 371 U.S. 415 (1963), and In re Primus, 436 U.S. 412 (1978), AUL solicits clients to participate in civil rights litigation, where appropriate, as intervening defendants. The purpose of such activity is two-fold: to protect the rights and legal interests of such parties, and to advance AUL's organizational mission of maximizing legal protection for human life. AUL's use of litigation as a means of advocacy is indistinguishable from that of its principal opponents - except that AUL typically is in the position of defending state and federal statutes, while its opponents attack such statutes. Like other public-interest firms, AUL agrees to indemnify the clients that it solicits for all expenses, fees, and costs incurred or assessed in litigation.

AUL thus has a direct monetary interest in the disposition of this case. The same panel of the court of appeals that awarded attorneys' fees against the petitioner also awarded fees in excess of $250,000.00 (including interest and subsequent fee petitions) against AUL's clients, two physicians who had intervened as defendants in a suit challenging the Illinois abortion statute. Charles v. Daley, 846 F.2d 1057 (7th Cir. 1988), pet. for cert. filed, Diamond v. Charles, No. 88-664 (U.S., Oct. 20, 1988). This judgment severely compromises the ability of AUL's clients and potential clients to intervene as defendants in civil rights litigation to defend their legal interests, since they risk incurring huge fee awards if their claims are rejected. Furthermore, because of its standard prac-

tice of indemnifying its solicited clients, AUL must directly bear the burden of satisfying the fees award in Charles and in other cases where fees are assessed.

AUL's interest in the disposition of this litigation is set forth in greater detail in the petition for certiorari filed in Diamond v. Charles, No. 88-664.

SUMMARY OF ARGUMENT

This case is one in a series of erroneous lower court decisions which have assessed attorneys' fees under the federal civil rights statutes against intervening defendants who are free of any liability under the civil rights laws. Such awards violate the principle that "[t]here is no cause of action against a defendant for fees... absent that defendant's liability for relief on the merits." Kentucky v.

Graham, 473 U.S. 159, 170 (1985). Civil rights plaintiffs are only entitled to recover fees from those parties against whom they have "prevailed." This Court has repeatedly emphasized that a party does not "prevail" for the purposes of the fee-shifting statutes unless that party has obtained relief "which affects the behavior of the defendant towards the plaintiff." Hewitt v. Helms, --U.S.--, 107 S.Ct. 2672, 2676 (1987). In cases, such as this one, where the plaintiff has obtained no relief on the merits from the intervening defendant, the fee-shifting statutes provide no basis for an award of fees against the intervening defendant.

By assessing fees against innocent intervening defendants, the court of appeals below has converted the civil rights fee-shifting statutes into independent sources of financial liability against parties whose only offense is that they have entered litigation to protect their own legal rights. This is contrary to the purpose of the fee-shifting statutes, which were not enacted to create new substantive liability, but only to provide an incentive to sue for those whose rights have been violated, and to punish those guilty of such violations. Awards against intervenors who are innocent of such violations cannot be defended on the theory that such intervenors add to the expense of litigation. The "work theory" adopted by the court of appeals has been implicitly rejected by this Court in several cases. Moreover, since the court of appeals' "work theory" is directed exclusively at intervening defendants, and not at their plaintiff counter-

parts, it is highly inequitable. Finally, the "work theory" can be used to assess fees against an amicus curiae, or other non-parties to the litigation.

Assessing fee awards against intervenors will inevitably chill meritorious petitions for intervention in civil rights cases. Intervention has a salutary effect on civil rights litigation, bringing the opportunity for a fuller range of arguments on the proper application of the civil rights statutes. Without the opportunity for intervention, parties with competing claims may never be effectively heard.

Assessing fees against non-liable intervening defendants is also not necessary to protect the legitimate interests of civil rights plaintiffs who obtain relief from other defendants. Plaintiffs

will most often be able to obtain a fully compensatory fee from the defendants who have violated their rights. Moreover, the strict requirements of Rule 24 of the Federal Rules of Civil Procedure limit intervention to those parties with genuine legal interests in the dispute. In this case, the plaintiff has recovered very substantial fees from those responsible for the violation of Title VII. The purposes of the fee-shifting provision of Title VII are not served by imposing further liability upon those innocent of such violation.

In related cases, particularly those involving organizations which use litigation as a means of political expression and advocacy, the imposition of attorneys' fees threatens to chill their First Amendment rights. Since such awards are not

tied to a violation of civil rights, but to the position which the intervenor has taken in court, they act as a sanction upon speech, not upon conduct. Such awards also restrict the ability of counsel to locate and recruit potential litigants for public-interest cases.

Because such awards fall exclusively upon intervening defendants whose claims are rejected, and not upon plaintiffs whose claims are rejected, they also discriminate on the basis of viewpoint. Also, by compelling organizations which intervene as defendants to subsidize the attorneys' fees of their opponents, the courts are effectively forcing such organizations to contribute for the propagation of opinions of which they disapprove. Since the risk of such "forced speech" falls unequally upon intervening

defendants and plaintiffs, it cannot withstand constitutional scrutiny.

In order to avoid these constitutional problems, and to end the confusion over the liability of intervening defendants for attorneys' fees in civil rights cases, this Court should reaffirm the principle that liability for attorneys' fees is tied to liability on the merits, and that in the absence of liability on the merits against a defendant, no liability for fees can be assessed against that defendant. Any other rule will generate further wasteful litigation over the proper allocation of attorneys' fees. The rule proposed is the only one consistent with the text, history, and purpose of the civil rights fee-shifting statutes, and with the standards announced by this Court in prior cases.

ARGUMENT

I. INTERVENING DEFENDANTS SHOULD NOT BE HELD LIABLE UNDER THE CIVIL RIGHTS FEE SHIFTING STATUTES UNLESS THEY ARE LIABLE FOR RELIEF OBTAINED BY THE PLAINTIFFS ON THE MERITS

This case presents an opportunity to rectify the confusion that has reigned in the lower federal courts for over twenty years concerning the assessment of attorney's fees against intervening defendants who are free from liability on the merits of the underlying civil rights statutes.[1/] See generally, Goldberger, First Amendment Constraints on the Award of Attorneys' Fees Against Civil Rights Defendant-

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1/ This Brief will refer to the following "substantially identical" fee-shifting provisions as the "civil rights fee-shifting statutes:" §706(k) of Title VII, 42 U.S.C. §2000e-5(k); §204(b) of Title II, 42 U.S.C. §2000a-3(b); 42 U.S.C. §1988. See Christianburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978).

Intervenors: The Dilemma of the Innocent Volunteer, 47 Ohio St. L.J. 603 (1986).

Many courts have held that the federal civil rights statutes do not justify punitive attorneys' fees awards against otherwise innocent parties who have intervened in litigation to protect their own legal interests. Annunziato v. The Gan, Inc., 744 F.2d 244 (2nd Cir. 1984); Wolfe v. Stumbo, No. C-80-0285 (W.D. Ky., Dec. 15, 1983); Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D. Tenn., Dec. 23, 1981); Kirkland v. New York State Dept. of Correctional Services, 524 F. Supp 1214 (S.D.N.Y. 1981).

Other courts, while acknowledging the innocence of such parties under the civil rights statutes, have nevertheless awarded substantial attorneys' fees against them, proceeding under a theory that all "defen-

dants" must bear the burden of applicable fee-shifting statutes. See e.g., Charles v. Daley, 846 F.2d 1057 (7th Cir. 1988) pet. for cert. filed sub. nom. Diamond v. Charles, No. 88-664 (U.S., Oct. 20, 1988); Akron Center for Reproductive Health v. City of Akron, 604 F. Supp 1268 (N.D. Ohio 1985); Vulcan Society of Westchester County v. Fire Department, 533 F. Supp 1054 (S.D. N. Y. 1982). Some courts have gone so far as to award fees against parties whose Rule 24 petitions to intervene were denied. See, e.g., Moten v. Bricklayers, Masons, & Plasterers Int'l Union, 543 F.2d 224 (D.C. Cir. 1976); Robideau v. O'Brien, 525 F. Supp 878 (E.D. Mich. 1981); Thompson v. Sawyer, 586 F. Supp 635 (D.D.C. 1984).

In such cases, the salutary motive of rewarding successful civil rights advocacy

is purchased at extreme cost to those private groups and individuals who, like the plaintiffs, have sought to engage in litigation to protect their legal rights. Such an approach is inconsistent with the plain text and legislative history of the fee-shifting statutes, and compromises the rights of intervention secured by F.R. Civ. P. 24. Furthermore, it creates an unfair double-standard in civil rights cases. Win or lose, private parties who litigate as plaintiffs bear little or no risk of being assessed fees; and if they win, such parties will have their fees paid for. On the other hand, private parties who litigate as intervening defendants must not only pay their own attorneys, but must also pay a successful plaintiff's attorneys - even though they have committed no violation of the civil rights laws.

The principles enunciated by this Court in civil rights attorneys' fees cases state that such awards are improper. These principles must be reaffirmed, and the erroneous doctrines of the court of appeals reversed.

A. Awards of Attorneys' Fees Against Innocent Intervening Defendants Are Impermissible under the Federal Civil Rights Statutes

1. The petitioner accurately notes that this Court has never addressed the specific issue of applying the civil rights fee-shifting statutes to "parties who are neither the victims nor the perpetrators of the alleged discrimination, but who intervene to be heard because the resolution of the litigation will affect their rights." Petition for Certiorari at 3. However, this Court, based upon the

text, statutory history, and purpose of the relevant statutes, has repeatedly stated general principles of fees liability that are dispositive. "There is no cause of action against a defendant for fees...absent that defendant's liability for relief on the merits." Kentucky v. Graham, 473 U.S. 159, 170 (1985). See also, Hewitt v. Helms, --U.S.-- 107 S.Ct. 2672 (1987) (Even where a court has stated that plaintiff's rights were violated by a defendant, fees may not be assessed against that defendant if no merits relief was obtained from him.); Hanrahan v. Hampton, 446 U.S. 754, 756 (1980) (A party is not a "prevailing" party "in the sense intended by 42 U.S.C. § 1988" unless it has obtained relief on the merits of its claim.); Christianburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978) ("[W]hen a

district court awards counsel fees [under the Civil Rights Act of 1964] to a prevailing plaintiff, it is awarding them against a violator of federal law.")

Every time that a court awards attorneys' fees against a non-liable intervening defendant, it violates the holding of Graham that the fee statutes do not authorize a fee award against any defendant who has not been prevailed against on the merits of the plaintiff's claim. 473 U.S. at 165. In such cases, the plaintiff has obtained no relief from the intervening defendant. Rather, the plaintiff has obtained, at best, a decree that the intervening defendant's legal claims do not preclude the plaintiff's own claims for relief. However, as this Court noted in Hewitt v. Helms, "[i]n all civil litigation, the judicial decree is not the end

but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces - the payment of damages, or some specific performance, or the termination of some conduct. ... The real value of the judicial pronouncement - what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion - is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff." -- U.S. at --, 107 S. Ct. at 2676 (emphasis in original). In Rhodes v. Stewart, -- U.S.--, 109 S. Ct. 202 (1988) (per curiam), this Court again noted that in the absence of relief on the merits, "a party cannot meet the threshold requirement of §1988 that he prevail, and in consequence he is not entitled to an award of attorney's fees." 109 S. Ct. at 204.

2. The applicable standard for this case, and others like it, is that a plaintiff is not entitled to fees from an intervening defendant unless the plaintiff has obtained from that party some relief on the merits of the underlying litigation. This is the only rule consistent with the text, legislative history, and purpose of the fee-shifting statutes. For example, §1988 was enacted: (1) so that plaintiffs could vindicate federal constitutional and statutory rights, and (2) so that "those who violate the Nation's fundamental laws" may not "proceed with impunity." S. Rep. No. 1011, 94th Cong. 2nd Sess. 2 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910. Some courts have effectively taken the position that the first of these objectives is all-important, and may be met even at the

expense of sanctioning parties who have not violated any law. See, e.g., Charles v. Daley, 846 F.2d at 1063. However, this ignores the express intent of Congress that §1988, and related provisions, did not enact any change in the substantive liability provisions of the underlying statutes. 122 Cong. Rec. at 35122 (statement of Rep. Drinan). According to the view adopted by the Seventh Circuit, §1988 and §706(k) are converted, contrary to legislative intent, into independent sources of financial liability against defendants who are guilty of no wrongdoing, but are merely "guilty" of asserting legal theories that are opposed to those of a successful plaintiff.

3. The Seventh Circuit also justified its fee award against the union, and against the intervenors in Charles, by

citing the "added work" caused by the presence of these parties in the litigation. While this argument has facial appeal, it cannot be squared with this Court's decisions, nor with the text of the civil rights statutes. As demonstrated in Hanrahan v. Hampton, 446 U.S. 754 (1980), Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), and Hewitt v. Helms, 107 S.Ct. 2672 (1987), the fact that a civil rights plaintiff has expended effort to defeat the legal arguments posed by a defendant does not entitle the plaintiff to fees from that defendant unless merits relief has also been obtained from that defendant.

In Hanrahan, this Court determined that the work expended by plaintiffs' counsel in defeating their opponents on procedural issues was irrelevant unless

relief had been obtained on the merits. In the absence of such relief, no fees could be awarded. 446 U.S. at 757. In Helms, the plaintiff had obtained merits relief, but because the relief was rendered moot, plaintiffs' counsel received no fee award to compensate for its substantial work in defeating the defendant's legal arguments. 107 S.Ct. at 2676. If the Seventh Circuit's "work theory" were valid, the Helms plaintiffs should have recovered for the work caused by the defendant's opposition to their claims. However, this Court rejected such an approach, causing Judge Manion, in dissent, to remark:

> If the plaintiff in Helms was denied attorneys' fees despite his establishing as a 'private attorney general' that the defendants violated his constitu-

> tional rights, it is difficult to see how plaintiffs in the present case can obtain fees against intervenors who did not violate any of the plaintiffs' rights and were not liable on the merits.

Charles v. Daley, 846 F.2d at 1078.

In Consumers Union, the defendant state court was also found liable for failing to amend the State Bar Code to cure a constitutional defect. The court's defense of its actions had caused work for the plaintiff's counsel, and fees were awarded to compensate for that work. Nevertheless, because the state court could not be liable on the merits for actions taken, or not taken, in its legislative capacity, this Court vacated the district court's fee award. Again, if the "work theory" were valid, plaintiffs should have been entitled to recover their

fees. However, this Court determined that the pivotal issue in determining fees liability is not whether a plaintiff has been forced to expend effort to defeat a defendant's arguments, but whether that defendant is responsible for relief obtained on the merits. 446 U.S. at 734, 739.

Another problem with the "work theory" is that it may logically be applied to those who are not even parties in civil rights litigation. For example, in Moten, 543 F.2d 224, Robideau, 525 F.Supp. 878, and Thompson, 586 F.Supp. 635, fees were awarded against parties who were unsuccessful in their petitions to intervene. Thus, by merely asserting that one has an interest in the outcome of litigation, a party is exposed to substantial, and chilling, fee awards. AUL

currently represents a client which unsuccessfully petitioned to intervene in a civil rights case, and now faces a claim for attorneys' fees exceeding $33,000. Herbst v. Daley, No. 84 C 5602 (N.D. Ill; fees petition filed March 14, 1986). See also, Thompson v. Sawyer (lodestar fee of $37,245 awarded against unsuccessful applicant for intervention).

Under the "work theory," fees may even be awarded against an amicus curiae. There is nothing in the text of the fee-shifting statutes to distinguish between intervening defendants and amicus, and either form of participation may cause extra work for a prevailing plaintiff. See Comment, Protecting Defendant-Intervenors from Attorneys' Fee Liability in Civil Rights Cases, 23 Harv. J. Legis. 579, 588 (1986). However, Graham clearly

states why fee awards against non-liable intervenors and amicus are equally invalid: "That a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone a non-party." 473 U.S. at 168.

Finally, the "work theory" is inappropriate because it results in the imposition of fees against innocent private parties whose only offense is to seek access to the courts to defend their legal interests. In practice, the work theory discriminates on the basis of viewpoint: the only parties who are penalized solely for causing "work" are those who intervene on behalf of defendants in civil rights cases. Those who intervene on behalf of plaintiffs face no such risk. In order to avoid such constitutional problems, the civil rights fee-shifting statutes should

be construed so that fee awards are predicated upon a party's liability on the merits, and not his advocacy of legal interests that are sufficient to warrant intervention.

B. Awarding Fees Against Non-Liable Intervening Defendants Is an Inappropriate Sanction Against Intervention in Civil Rights Litigation, and Is Not Necessary to Protect the Interests of Civil Rights Plaintiffs

Although fee-shifting is by now commonplace in federal civil rights litigation, it remains an exception to the American Rule. Thus, each application of fee-shifting to a new set of facts must be scrutinized to determine first, if the statute "expressly" provides for fee-shifting in the new circumstance, Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975), and second, if

the purposes set forth in that statute would be advanced, or frustrated, by the proposed fee-shifting. None of the civil rights fee-shifting statutes provide, expressly or otherwise, for the award of fees against non-liable intervening defendants. Moreover, the underlying purposes of such statutes is frustrated by awards which discourage litigation by private individuals and entities who, while innocent of any violation of the civil rights laws, have legal interests which will be affected by relief granted the plaintiffs under such laws.

1. Fee awards against defendant intervenors will inevitably chill such intervention. Parties who contemplate intervention will be deterred by the prospect of paying huge fee awards if they lose, and they will have no corresponding

expectation of recovering fees should they prevail. See, Christianburg Garment Co. v. EEOC, 434 U.S. 412, 420-421 (1978) (fees may be awarded to prevailing defendants only if plaintiff's claims are "unreasonable, frivolous, meritless, or vexatious"). Some public-interest litigants may balance their risk by initiating or intervening in civil rights litigation as plaintiffs. However, for those who must litigate as intervening defendants, or not at all, there is no way of avoiding this risk except to refrain entirely from litigation, or to intervene only when their likelihood of success is certain. Realistically, when faced with having to pay their own lawyers, as well as their opponents', such parties will choose not to litigate.

The cost of such abstention will be to remove an important element in Title VII and §1983 litigation: the advocacy of those private parties who may be harmed by unwarranted expansion of these laws or by relief granted to particular plaintiffs. See, e.g., Idaho v. Freeman, 625 F.2d 887 (9th Cir. 1980) (intervention by NOW to defend notification procedures for Equal Rights Amendment); Washington State Bldg. and Construction Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982) (intervention by environmental organization to defend state statute); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983) (intervention by Audubon Society to defend federal environmental regulations). The named defendants in such lawsuits may be ill-equipped, or even estopped, from making some of the argu-

ments which potential intervenors could present. See, e.g., Sagebrush Rebellion v. Watt, supra. Where appropriate, intervention may also deflate the myopic assumption that the civil rights statutes are a one-way street to relief for aggrieved plaintiffs. Intervenors may act as "functional plaintiffs," seeking to counter a plaintiffs' claim with their own contentions under the civil rights laws, See, Reeves v. Harrell, 791 F.2d 1481 (11th Cir. 1986), cert. denied, 479 U.S. 1033 (1987), or they may establish the harmful impact of the plaintiff's theories upon equally fundamental rights. See, Akron Center for Reproductive Health v. Akron, 604 F.Supp. 1268 (N.D. Ohio 1985) (parents intervened to support parental notification provision of abortion ordinance).

Intervention thus has the salutary effect of bringing to the court the opportunity for a fuller range of arguments on proper application of the civil rights statutes. This is true whether the countervailing interest is that of union members protecting their rights of seniority, or of physicians protecting the lives of their potential patients. While it is the purpose of §1988 and §706(k) to encourage vindication of civil rights, it was not the intent of Congress to do so at the expense of full, vigorous, and contested adjudication of claims brought under these statutes. Yet, by imposing an uneven risk of fee-shifting against private intervening defendants for engaging in such advocacy, the decisions of the Seventh Circuit have had precisely this effect.

2. The consequence of such awards is not merely a diminished range and quality of advocacy in civil rights cases; it is the virtual elimination in such cases of a potential litigant's rights under Rule 24 of the Federal Rules of Civil Procedure. Unless such parties have independent standing to initiate litigation under the civil rights laws, they have no means other than intervention to protect their legal interests. Yet, despite their innocence from substantive liability, such parties can only file a Rule 24 petition at the peril of being assessed their opponents' fees. Indeed, such parties can be penalized for merely asserting a right under Rule 24. Moten, 543 F.2d 224; Robideau, 525 F.Supp. 878; Thompson, 586 F.Supp. 635. The Seventh Circuit, in Charles, supra, candidly

admitted that the prospect of attorneys' fees will inform putative intervenors to "think twice before engaging in battle." 846 F.2d at 1075. Such a blatant intrusion upon the rights afforded under Rule 24 cannot be defended on grounds that intervention is "voluntary and self-initiated." 846 F.2d at 1067. An intervenor's petition under Rule 24 to defend his legal interests is no more "voluntary" or "self-initiated" than the plaintiff's very filing of the lawsuit. Yet, the plaintiff faces no parallel risk of being assessed attorneys' fees if his legal theories do not prevail. Since the plaintiff and the intervenor are equally innocent of any civil rights violation, the effect is not to encourage the filing of civil rights complaints, but to punish the filing of equally meritorious intervention petitions.

3. Awarding fees against non-liable intervening defendants is not necessary to protect the legitimate interests of plaintiffs who prevail in civil rights litigation. Most often, compensatory fees will be assessed against the parties liable for relief on the merits of the plaintiff's claims. Since these parties alone have the capacity to grant the relief sought by the plaintiff, they should be accountable for the work that is required to obtain such relief.[2/] Even if such parties can-

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2/ In enacting §1988, Congress assumed that fees would be assessed against the State. "In such cases, it is intended that the attorneys' fees... will be collected directly from the official, in his official capacity, from funds of his agency or under his control or from the State or local government." S.Rep. No. 1011, 94th Cong. 2nd Sess. 6, reprinted in 1976 U.S. Code, Cong. & Admin. News 5908, 5913. "The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff..." H.R. Rep. No. 1558, 94th Cong., 2d Sess. at 7.

not be justly held responsible for all of a plaintiff's fees, it does not follow that the plaintiff is entitled to collect the balance from an intervenor. Section 706(k), §1988, and related provisions do not create "a relief fund for lawyers," and they "[do] not create fee liability where merits liability is non-existent." Graham, 473 U.S. at 168 (citations omitted). Moreover, plaintiffs are not automatically entitled to fees by virtue of obtaining a judgment or a favorable settlement. See, e.g., Kentucky v. Graham; Jeff D. v. Evans, 475 U.S. 717 (1986). The plaintiff (or plaintiff's counsel) who must bear the cost of litigating against claims raised by an intervenor, but is compensated for the remainder of his case, is far better off than most litigants, including the successful plaintiffs in Jeff D. and Graham.

It is also unrealistic to argue that screening non-liable intervenors from fee awards will unduly burden civil rights plaintiffs. Rule 24 of the Federal Rules of Civil Procedure requires all intervenors to have a protectable legal interest as the basis for their intervention; if such interest is lacking, then the court may deny intervention. Goldberger, supra, 47 Ohio St. L.J. at 614; see Keith v. Daley, 764 F.2d 1265 (7th Cir.), cert. denied sub. nom. Illinois Pro-Life Coalition, Inc., III v. Keith, 106 S.Ct. 383 (1985). However, where such an interest is present, its holder should not be compelled to stay on the sidelines at the risk of incurring a fees award. In this situation, over-sensitivity to the plaintiff's interest in recovering a compensatory fee is permitted to squelch another

party's very right to have his day in court. Furthermore, in light of this Court's decision in Diamond v. Charles, 476 U.S. 54 (1986), denying standing on appeal to private intervenors when the state attorney general fails to appeal, the capacity of such intervenors to "prolong" litigation in the absence of the named defendants is severely curtailed.

Finally, although this question is not before the Court, an intervenor might be liable for fees if his claims are frivolous or vexatious. Christianburg Garment Co., 434 U.S. at 420-421. Such conduct is also sanctionable under Rule 11 and Rule 37 of the Federal Rules of Civil Procedure. Moreover, if it becomes apparent that an intervenor no longer has a cognizable legal interest in a case, a plaintiff may move at any time to dismiss the intervenor from the litigation.

In short, a civil rights plaintiff is not entitled to litigate without opposition, nor is he entitled to his fees in all circumstances. The risks imposed by allowing innocent intervenors to present their claims without fear of being taxed for plaintiff's fees are no different in kind or degree from the risks already borne by civil rights plaintiffs when they initiate litigation. These risks are acceptable, controllable, and necessary to preserve access to the courts for those with legal interests contrary to those of the plaintiff.

C. Innocent Intervening Defendants in Civil Rights Cases Must Be Uniformly Protected From Fees Liability

The best route for disposing of this case is to follow Kentucky v. Graham, and hold that, in the case of intervening

defendants, as in the case of governmental defendants, "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, [§706(k)] does not authorize a fee award against that defendant." 473 U.S. at 165. The IFFA's non-liability on the merits is the most salient, undisputed, and justifiable criterion for exonerating it from fees liability. The other arguments relied upon by the IFFA, while meritorious, are complementary to the central issue at stake in this case: the erroneous extension of attorneys' fees liability to parties who are admittedly free from taint on the underlying statute. See, Charles, 846 F.2d at 1070 ("the intervenors were found to have themselves violated none of the

plaintiffs' constitutional rights."). Moreover, if the IFFA had been liable for relief on the merits, its remaining arguments would only serve to mitigate the extent of its liability for attorneys' fees. The union's status as an "innocent" intervenor is thus the sine qua non of its petition to this Court, and it is the proper focus of this Court's analysis.

By emphasizing the link between merits liability and fees liability that is at the heart of the civil rights fee-shifting statutes, this Court will restore consistency and predictability to an area of law sorely in need of these qualities. This Court has wisely observed that a "request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). However, current law on the issue

of intervenors' fees liability virtually guarantees that such major litigation will occur. The circuit and district courts are split not only over the liability of such parties for fees, but also over the appropriate amount of fees that should be awarded. For example, the intervening parties in Charles v. Daley were assessed over two-thirds of the total fees bill in that case; the intervenors in the Akron case, whose role in the litigation was virtually identical to that of the Charles intervenors, were assessed only five percent of the total bill. Akron, 604 F. Supp. at 1294. Furthermore, there are no clear guidelines for the apportionment of such fees. The attempt to assess fees according to the work caused by a particular party is inherently subjective, and may be influenced by the prevailing

party's motivation to exact a financial penalty from an ideological or political rival. Under these circumstances, intervenors against whom substantial fees are sought will have every incentive to contest such awards.

This state of affairs is the natural and predictable consequence of improperly severing the link between fees and merits liability under the civil rights statutes. To restore order, this Court should declare the following standard applicable to intervening defendants in all civil rights cases: attorneys' fees may be awarded against such parties only if the intervening defendant is liable for some portion of the relief obtained by the plaintiffs on the merits.

II. IMPOSITION OF ATTORNEYS' FEES AGAINST INTERVENING DEFENDANTS IN PUBLIC INTEREST LITIGATION VIOLATES THE FIRST AMENDMENT RIGHTS OF THOSE PARTIES TO PARTICIPATE IN LITIGATION AS A MEANS OF POLITICAL EXPRESSION

This Court has long held to the policy that an Act of Congress "ought not be construed to violate the Constitution if any other construction remains available." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979). In this case, the construction of §706(k) and §1988 adopted by the Seventh Circuit threatens a severe violation of the right to litigate as a means of political expression. NAACP v. Button, 371 U.S. 415 (1963); In re Primus, 436 U.S. 412 (1978). Where, as here, the potentially unconstitutional construction is so ill-founded, there is all the more reason to

avoid it. If, however, that construction cannot be avoided, this Court should decide the important question of whether awards such as this violate the right secured in Button and Primus.

For several reasons, fee awards against non-liable intervening defendants violate the rights of such parties to litigate as a means of political expression. First, such awards bear no relation to any violation of civil rights by the intervenor, but are made simply because the intervenor has allied himself with a losing cause. Thus, the fees serve as a sanction not against conduct, but against the content of the intervenor's speech. Second, the prospect of fees liability chills the process of soliciting clients that is specifically protected by Button. It is difficult to imagine, to

use the language of the Seventh Circuit, a more "specific and admittedly severe restriction[] on the ability of counsel to locate and recruit potential litigants." Charles v. Daley, 846 F.2d at 1074. See Goldberger, First Amendment Constraints on the Award of Attorneys' Fees Against Civil Rights Defendant-Intervenors: The Dilemma of the Innocent Volunteer, 47 Ohio St. L.J. 603 (1986).

Third, fee awards against public-interest intervenors discriminate on the basis of viewpoint. In establishing the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment," In re Primus, 436 U.S. 412, 426 (1978), this Court emphasized that this right must be equally extended to all public interest

litigants, regardless of how well or poorly their legal arguments fare in court:

> That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protection would apply as fully to those who would arouse our society against the objectives of the petitioner. For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.

Button, 371 U.S. at 444-445 (Emphasis supplied). Awarding attorneys' fees against innocent private parties who act to defend governmental action effectively penalizes the speech of such parties on the basis of content. Between parties with competing legal claims, neither of which has violated any civil rights laws, all of the risk of attorneys' fees is borne by those who happen to be in the posture of defense, while none of the risk falls upon those who find themselves as plaintiffs.

Fourth, in cases where the intervenor and plaintiff are litigating as a means of political expression, see, e.g., Charles v. Daley, the award of fees against the intervenor has the effect of forcing the intervenor to subsidize the activity of its political and ideological opponents.

This Court, following Madison and Jefferson, has termed such forced contributions to be "tyrannical." Abood v. Detroit Board of Education, 431 U.S. 209, 234-35, n.31 (1977). "Whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear." Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, (1986). In deciding whether to exercise rights under Button, a potential intervenor should not have to weigh the prospect of being forced to contribute for the "propagation of opinions which he disbelieves." Abood, 431 U.S. at 235, n.31.

Nor should an advocacy organization involved in intervention, such as AUL, the ACLU, the Audubon Society, the Sierra

Club, or the National Organization of Women, be forced to use membership contributions to underwrite the very forces which they are organized to oppose. What member of, or contributor to, such organizations would want his philanthropy used to benefit the organization's opponents? Not only is this coerced speech of the most offensive type, it also threatens to dry up contributions to those organizations saddled with fee awards by their ideological opponents. Fee-shifting, therefore, can become a form of blackmail by which organizations litigating as plaintiffs threaten financial ruin to those who dare to oppose them by intervening as defendants.

In rejecting these arguments, the Seventh Circuit in Charles stated that an intervenor has no constitutional protec-

tion from the "inherent and statutorily imposed financial consequences" of his litigation activity. 846 F.2d at 1074. However, the question cannot be so simply disposed of, for intervenors are being asked to bear a burden that is neither borne by those who initiate civil rights cases, nor tied to any violation of law. The Seventh Circuit stubbornly refused to recognize that the imposition of attorneys' fees, unlike the shifting of costs, is an extraordinary remedy, and clearly acts as a sanction. In the case of the intervenors in Charles, what is being sanctioned is the exercise of their rights under Button. The punitive character of such fee awards cannot be excused by stating that they are a necessary incentive to civil rights plaintiffs Charles, 846 F.2d at 1074-1075.

> The First Amendment would... be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.

United Mine Workers of America, District 12 v. Illinois State Bar Ass'n., 389 U.S. 217, 222 (1967). Contrary to the Seventh Circuit's position, therefore, a party cannot be forced to "think twice," 846 F.2d at 1075, before exercising his rights under Button.

In Catholic Bishop of Chicago, this Court held that before determining whether a particular construction of an Act of Congress was unconstitutional, it must first identify whether that construction is based upon "the affirmative intention of the Congress clearly expressed." 440 U.S. at 500 (citations omitted). Congress expressed no affirmative intention that §706(k) and §1988 was to permit the award of fees against non-liable defendants; Graham holds that the intention of Congress was precisely the opposite. This Court should accordingly follow its own "prudential policy," 440 U.S. at 501, and decline to construe §706(k) and §1988 in such a manner that could infringe upon the constitutionally protected interests of those who intervene in civil rights cases as a means of political expression.

CONCLUSION

The judgment of the court of appeals should be reversed for the reason that no intervening defendant can be liable to fees under §706(k) and related fee-shifting provisions unless that defendant is liable for relief on the merits.

Respectfully submitted,

*EDWARD R. GRANT
CLARKE D. FORSYTHE
KEVIN J. TODD

Americans United for
Life Legal Defense Fund

343 South Dearborn Street
Suite 1804
Chicago, IL 60604
(312) 786-9494

Counsel for Amicus Curiae

*Counsel of Record