No. 84-1288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN V. EVANS, *et al.*,

Petitioners.

—v.—

JEFF D., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AMERICAN CIVIL LIBERTIES UNION, AND LEGAL AID SOCIETY OF NEW YORK, IN SUPPORT OF RESPONDENTS

JAMES ROBERTSON
HAROLD R. TYLER, JR.
Co-Chairmen
NORMAN REDLICH, Trustee
WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
Lawyers' Committee for
Civil Rights Under Law
1400 'Eye' Street, N.W.
Washington, D.C. 20005
(202) 371-1212

KALMAN FINKEL
HELAINE M. BARNETT
JOHN E. KIRKLIN
The Legal Aid Society of New York
11 Park Place
New York, New York 10007
(212) 406-0745

JULIUS LEVONNE CHAMBERS
*CHARLES STEPHEN RALSTON
STEVEN L. WINTER
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
New York, New York 10013
(212) 219-1900

E. RICHARD LARSON
BURT NEUBORNE
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Amici Curiae

*Counsel of Record

QUESTION PRESENTED

May a court, in determining post-judgment fee entitlement under 42 U.S.C. § 1988 in a case in which only injunctive relief is sought, approve a coerced waiver of all attorneys fees sought by defense counsel on the eve of trial as a condition of providing relief on the merits through a consent decree?

INTEREST OF AMICI[1]

Amici are public interest law organizations that have substantial experience in the litigation of civil rights cases subject to various statutes providing for awards of attorneys fees, particularly the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. We have been involved in many cases, either as counsel for parties or as *amicus curiae*, which have established basic standards for awarding fees.[2]

Our interest in the issues presented by this case is two-fold. First, we depend on donated services of attorneys in the private bar to assist us in conducting litigation. In our experience, the potential for fee awards to prevailing parties in such litigation has increased the willingness of the private bar to participate in civil rights cases. The extent that fees and costs become unavailable even when the party receiving *pro bono* representation prevails, the availability of donated services will decrease.

Second, we also depend to a substantial degree on fee awards for income necessary to carry out, through our own staff, our programs of providing legal services to the victims of civil rights violations. Thus, the availability of fee awards is essential both to the continued provision of legal services and to the vigorous enforcement of the civil rights statutes in general.

We are convinced that the judgment of the court below is correct. Allowing defense counsel to offer lawyers for plaintiffs in civil rights or other injunctive actions certain, meaningful relief for their clients—on condition that statutory fee entitlements be waived—in theory pits plaintiffs against their attorneys. In fact, longsettled ethical principles, prudence and compassion dictate that plaintiffs' counsel in such cases will be compelled to waive fees. If this tactic is approved by this Court, it would destroy the efficacy of the civil rights acts and would totally undermine the intent of Congress when it made attorneys fees available in such suits.

---

1. Letters consenting to the filing of this Brief have been lodged with the Clerk of Court.

2. *E.g.*, *Blum v. Stenson*, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982); *Hutto v. Finney*, 437 U.S. 678 (1978); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974); *Northcross v. Board of Education of Memphis*, 412 U.S. 427 (1973); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980); *Johnson v. Georgia Highway Express Co.*, 488 F.2d 714 (5th Cir. 1974).

SUMMARY OF ARGUMENT

Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("the Fees Act"), to increase the availability of counsel to represent plaintiffs in suits brought under applicable federal law[3] by authorizing recovery of reasonable compensation for attorneys' services where plaintiffs prevail on their claims. *See generally Blum v. Stenson*, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In the absence of "special circumstances [which] would render such an award unjust,"[4] the liability of a defendant whose conduct violates a statutory or constitutional obligation encompassed by the applicable statutes is expanded to include a fee award to the prevailing plaintiff. "If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."[5]

This case involves perhaps the most extreme factual situation in which government defendants, in a private action brought to compel compliance with these important public policy requirements, seek to avoid their statutory liability under the Fees Act by trying to condition an offer of substantial relief on the merits to plaintiffs upon their lawyers' abandonment of any fee entitlement.

Unlike the "lump sum" offer context in *Marek v. Chesny*, 53 U.S.L.W. 4903, 4905 (U.S. June 27, 1985), in which the client, in deciding whether to accept a monetary offer of settlement, must confront some necessary reduction of his recovery in order to permit his counsel to be compensated, plaintiffs in an injunctive suit such as in this case will not have their recovery diminished in the slightest by waiving the right to prosecute a statutory fee claim against the defendant. For this reason, when defense counsel in such a case propose a substantial merits settlement conditioned on a fee waiver, they are knowingly presenting the plaintiffs and their attorneys with a "loaded game board"[6]—an offer which plaintiffs could have no reason whatever to reject and which their lawyers cannot ethically or morally advise them to reject.[7]

---

3. The Fees Act applies to suits under 42 U.S.C. §§ 1981, 1982, 1983, 1985 and 1986, and to suits to enforce provisions of 20 U.S.C. §§ 1681 *et seq.* or 42 U.S.C. §§ 2000d *et seq.*

4. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), *quoted with approval in* S. Rept. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 *U.S. Code, Cong. & Ad. News* 5908, 5912; *and quoted in* H.R. Rep. No. 1558, 94th Cong., 2d Sess. 6 (1976).

5. *Newman*, 390 U.S. at 402, *quoted in* S. Rep. No. 1011, *supra* note 4, at 3, *reprinted in* 1976 *U.S. Code, Cong. Ad. News* at 5910; *and quoted in* H.R. Rep. No. 1558, *supra* note 4, at 6.

6. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971).

7. Plaintiffs in this case are a class of indigent juveniles, committed involuntarily to state institutions, who necessarily had no liability to their Legal Services counsel for either fees or costs. In these circumstances, no attorney could, consistent with his ethical obligation to place the client's interests above his own, advise rejection of merits relief which promised some change in allegedly unconstitutional and dangerous conditions of confinement simply because counsel's costs would not be reimbursed or fees not awarded to him. *See* American Bar Association, *Model Code of Professional Responsibility* DR 5-101(A) ("Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his profes-

It is precisely the devotion of plaintiffs' counsel to their ethical obligations to their clients in this, and in similar cases, which places in the hands of defense counsel a potent weapon to defeat the policy underlying the Fees Act. Attorneys in private practice who accept *pro bono* referrals and who are confronted after years of litigation with coerced waivers of fees are unlikely to continue to provide representation in such cases in the future unless their financial burden is eased in accordance with congressional intent. Public interest law organizations such as *amici* will be less able to undertake representation in such cases without fee awards when their clients prevail. Thus, allowing defendants to coerce waivers of fee awards as a condition of making available substantial merits relief through settlement will directly impede realization of the purposes of the Fees Act.

ARGUMENT

In civil rights injunctive suits such as this case, federal courts cannot condone, much less enforce, defense efforts to coerce fee waivers by conditioning substantial merits relief for plaintiffs upon counsel's abandonment of statutory fee entitlement.

A. The Nature of Civil Rights Practice Makes Civil Rights Lawyers Uniquely Vulnerable to Coerced Waivers of Fees, a Practice Which if Approved Would Result in No Fees Whatsoever.

In order to understand fully the problems that arise when defendants demand a waiver of fees as the price for settling a civil rights case, particularly one in which only equitable relief is sought, it is necessary first to understand the relationship between counsel and client in a typical civil rights suit. That relationship is very different from traditional commercial or contingent fee practices, in which the client undertakes a specific monetary obligation to the attorney, based either upon an agreed (usually hourly or daily) rate, or upon a percentage of the ultimate recovery in cases where monetary relief is sought.

1. In the vast majority of civil rights cases, plaintiffs are unable to pay any fees whatsoever.[8] Further, by statute, court rule, or Internal Revenue Service regulation, most legal services and legal aid organizations like *amici*

sional judgment on behalf of his client will be or reasonably may be affected by his own financial business, property, or personal interests"); *id.*, EC 5-2 ("A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable possibility that they will, adversely affect the advice to be given or services to be rendered to prospective client"); *id.*, EC 7-7 ("[I]t is for the client to decide whether he will accept a settlement offer"); American Bar Association, *Model Rules of Professional Conduct* Rule 1.2(a) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter"); Committee on Legal Ethics, The District of Columbia Bar, Opinion No. 147, *reprinted in* 113 Daily Wash. Law Rptr. 389 (Feb. 27, 1985) ("Plaintiff's counsel owes undivided loyalty to the client and is obliged to exercise his judgment in evaluating the settlement free from the influence of his or her organization's interest in a fee. DR 5-101(A)").

8. This fact has been widely recognized by the lower federal courts, *see, e.g., Lipscomb v. Wise*, 642 F.2d 319, 320 (5th Cir. 1981); *Regalado v. Johnson*, 79 F.R.D. 447, 451 (N.D. Ill.

are prohibited from charging fees to their clients.[9] Occasionally, civil rights plaintiffs can afford to pay some of the costs of the litigation or a reduced fee. But in most instances, we reiterate, the client has no written or unwritten duty to compensate counsel for his services.[10]

In many civil rights cases, even where monetary relief is demanded, the amounts likely to be recovered will not be large enough to cover the reasonable value of the attorneys' services in the litigation.[11] Moreover, as is true here and as this Court noted in *Newman v. Piggie Park Enterprises Inc.*, 390 U.S. at 402, many cases involve only injunctive relief.[12] All of these cases,

---

1978); and it provided the basic premise for Congress' enactment of the Fees Act, *see infra* at 23-30.

9. For example, private organizations in New York that provide legal assistance are chartered by the courts as legal aid societies which ordinarily are prohibited from charging fees. Congress specifically intended that such groups receive awards under the Fees Act, *see* H.R. Rept. No. 1558, 94th Cong., 2d Sess. 8 n.16 (1976); *Palmigiano v. Garrahy*, 616 F.2d 598, 601-02 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980).

10. As noted, civil rights and legal aid organizations may not create such an obligation in a retainer agreement. While private *pro bono* counsel might do so, plaintiffs in these cases, many of whom have already suffered from harassment by legal or governmental authorities, are often reluctant to sign such agreements. The object of the Fees Act was to make it unnecessary for civil rights plaintiffs to assume fee payment obligations in order to secure counsel.

11. For example, suits to redress the invasion of fundamental constitutional rights may produce only nominal damages, *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); the requirement that even a wronged party mitigate his damages may reduce a recovery, *see, e.g.*, 42 U.S.C. § 2000e-5(g) (interim earnings to be deducted from back pay award); in suits against public officials, immunity doctrines and special defenses may limit or even bar the recovery of damages, *see, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (punitive damages unavailable from municipal defendants); or the offer of partial relief *pendente lite* may toll accrual of monetary entitlements, *see Ford Motor Company v. EEOC*, 458 U.S. 219 (1982). In the typical individual employment discrimination case, the back pay award will be too small plausibly to justify either a contingent fee or a fee premised on reasonable hourly rates for time expended to obtain a favorable result. Most, but not all, Title VII cases have involved lower-level, "blue-collar" positions, *see* Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 948-49 (1982); since monetary recovery in such cases is restricted to back pay, the amount of recovery is necessarily limited by the lower prevailing salaries for these jobs. Thus, at New York City rates for attorneys wilth about two years of experience, *see Blum v. Stenson*, 79 L.Ed.2d at 897 n.4; *Bradford v. Blum*, 507 F.Supp. 526 (S.D.N.Y. 1981), an individual Title VII case requiring 200 hours of lawyer time for filing, discovery and trial would, if handled by a relatively young attorney, still require a fee of $19,000 exclusive of costs—more than a year's back pay for many entry-level jobs. Recoveries are generally small even in damage actions for killings brought under 42 U.S.C. § 1983, *see, e.g., Gibbs v. Town of Frisco City*, 626 F.2d 1218, 1220 (5th Cir. 1980) (plaintiff's son shot and killed by local police, damage award of $12,000 and fee award of $8,000).

12. *Amici* do not mean to suggest that serious ethical and public policy problems do not exist in cases where relief other than an injunction is at issue. In litigation enforcing Title VII of the Civil Rights Act of 1964, it is now increasingly common for defendants to offer a lump sum representing back pay and fees in total settlement of a case. Since it is rare that the lump sum is sufficient both to cover the individual back pay claims of the class members (so as to make them whole) and to compensate their attorneys, the interests of the class members are pitted against those of their attorneys. And since these actions are class actions in which there is no contractual obligation on the part of either the named plaintiffs or the class itself to pay fees, the conflicts cannot be resolved by submission to the clients.

The Court is not faced with such questions in the case before it, however, and we limit our

however, are precisely the lawsuits whose initiation and litigation Congress wished to encourage through the fee award mechanism of 42 U.S.C. § 1988.

Thus, the typical civil rights lawsuit subject to the Fees Act has the following characteristics: (a) the plaintiff has no or only a very limited obligation either to provide funds for the costs of litigation or to compensate his counsel for legal services; and (b) once the attorney-client relationship comes into being, plaintiff's counsel owes his client the same quality, zeal and efficacy of representation which he would provide to a paying client, as required in bar disciplinary codes. Recognizing these facts, Congress created, in the Fees Act, an obligation of unsuccessful *defendants* in civil rights cases to compensate plaintiffs' attorneys for their services, in order to encourage and attract lawyers to provide representation in these cases.

2. Given this context, the problems faced by plaintiffs' counsel when the issues on the merits of the case and the availability of attorneys fees are linked, in a single offer proposing waiver of the latter in exchange for substantial relief on the former, are totally different than in ordinary tort or commercial litigation. For example, in a personal injury case where there is a contingent fee retainer, client and counsel will share proportionately in any recovery and the client's decision whether to accept a settlement will be subject to the client's obligation to share the proceeds with his attorney. While some differences of opinion may persist which are detrimental to the attorney's interest in maximizing his remuneration, *see* Br. for U.S. at 24-25, civil rights suits in which a fee waiver is demanded differ from this situation in at least two very significant respects. (a) So long as there is some recovery for the client, there is some recovery for counsel; the two are inextricably linked and cannot be manipulated one against the other by defense counsel. (b) There is no strong public policy, much less a federal statute, providing that counsel for successful plaintiffs should receive reasonable compensation for their time and effort, to be paid by the defendant.

Similarly, in a case in which the client has agreed to compensate his counsel at an established rate, irrespective of the results of the litigation, the relationship between attorney and client is impervious to the tactics of defense lawyers and is unaffected by any public policy, save that favoring its confidentiality.

In each of these situations, while differences may occur, the personal and professional interests of counsel are at least generally aligned with the interests of the client when a settlement is proposed. In the typical civil rights case, however, the situation is diametrically opposite. Because the client is under no financial obligation to pay the attorney, a settlement offer of substantial merits relief conditioned upon a fee waiver necessarily places the personal interest of the attorney, the professional interest of the attorney, and the interest

---

discussion in this Brief to demands for complete waiver of fee entitlements in suits where no monetary relief has been sought but in which defendants offer substantial merits relief.

of the client, in conflict. As the Committee on Legal Ethics of the District of Columbia Bar aptly put it, *supra* note 7:

> Defense counsel thus are in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: They make a demand for a benefit that the plaintiff's lawyer cannot resist as a matter of ethics and one in which the plaintiff has no interest and therefore will not resist.[13]

Under our adversary system of litigation, counsel are encouraged to compromise claims favorably to their clients even if the result is to afford somewhat more or less than complete and exact compensation to the victim of wrongdoing. Petitioners and their *amici* are frank to advise this Court, however, that they read prevailing principles to require defense counsel to seek a *waiver* (not a compromise) of fees as part of any settlement in a civil rights case.[14] The issue in this case is thus whether coercing a fee waiver in settlement of a case subject to the Fees Act is consistent with that statute—and it is to that question which we now turn.

B. Coerced Waivers of Fee Entitlement Under 42 U.S.C. § 1988, Obtained As Prerequisite Conditions for Merits Settlements, Contravene the Purposes of the Statute

Petitioners and their *amici* argue that coerced fee waivers are permissible merely because the Fees Act does not bar them *in haec verba*.[15] These arguments, however, wholly overlook Congress' purposes in enacting the Fees Act.

1. It has never been the rule that a statutory scheme may be vitiated and congressional purposes frustrated through ingenious construction or devious strategems which were neither anticipated nor explicitly prohibited at the time of enactment. For example, this Court has long refused to permit the direct or indirect waiver of the minimum wage requirements of the Fair Labor Stan-

13. These concerns are not abstract or theoretical. *Amici* and the attorneys with whom they work have experienced the problems outlined above in many different contexts. In fact, we recently have all been repeatedly faced with the impossible choice between obtaining relief for our clients and forfeiting our statutory entitlement to the fees that would enable us to bring other actions to enforce civil and constitutional rights.

For our cooperating attorneys who are in private practice and, therefore, dependent on fees for their very livelihood, the problem is even more severe. We know of attorneys who have abandoned civil rights practice because of the widespread use of tactics such as those employed by the petitioners' attorneys in the present case. The combination of the loss of income and the continued threat of being placed in ethical dilemmas has forced attorneys, otherwise willing to be involved in the enforcement of the civil rights laws, to abandon this phase of their practice or to limit it to those few clients who can contract to pay a full fee out of their own pockets.

14. *See, e.g.*, Pet. Br. at 31-35; Br. of Alabama, et al., at 52-53; U.S. Br. at 23; City of New York Br. at 13; *but see* Br. of Council of State Governments, et al., at 4 ("The narrow questions presented to the court of appeals for view in this case was the propriety of defendant's insistence on a waiver of plaintiff's attorney's fees as a condition of settlements. *Amici* take no position with respect to this issue.").

15. *See* Pet. Br. at 12-13; Br. of Equal Employment Advisory Council at 8-9; Br. for Alabama, *et al.*, at 14-17; U.S. Br. at 21-22.

dards Act. *E.g., Barrentine v. Arkansas-Best Freight System*, 450 U.S. 725 (1981); *Schulter v. Gangi*, 328 U.S. 108 (1946); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1944). In its opinion in the seminal case in this line, *O'Neil*, the Court justified its decision on the basis of the overall policy goals of the statute:

> Neither the statutory language, the legislative reports nor the debates indicates that the question at issue was specifically considered and resolved by Congress. In the absence of evidence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind this provision as evidenced by its legislative history and the provisions in the structure of the Act.

324 U.S. at 705-06 (footnotes omitted). Indeed, *O'Neil* is particularly apt since the congressional purpose underlying the Fair Labor Standards Act was to ameliorate the results flowing from bargaining between economically unmatched and unequal interests:

> The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce . . . . No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

Id. at 706-07 (footnote omitted).[16] The same inequalities of access and bar-

16. It is the peculiar history of the Fair Labor Standards Act, as construed by this Court in *O'Neil* and *Schulte*, rather than some generically different approach to writing statutes, which thus accounts for the unusual language of 29 U.S.C. § 253(a), relied upon by the Solicitor General, *see* U.S. Br. at 21. That section of the Portal-to-Portal Pay Act was drafted to overrule *O'Neil* and *Schulte* as to liquidated, but not compensatory damages, and it was prompted by the specific circumstances in which those cases arose. It would be ludicrous to suggest that after those decisions, it was incumbent upon Congress to add similar language to every federal statute which created rights enforceable by individuals. *Cf. Hall v. Cole*, 412 U.S. 1 (1973) (attorneys' fees awarded in suit to enforce statute despite absence of explicit statutory authorization). Moreover, no suggestion has been advanced by petitioners or their *amici*, and none can be supported in the legislative history, that the Congress which passed the Fees Act intended to authorize defendants to coerce fee waivers in settlements.

It is equally significant that the decision in *Wilko v. Swan*, 346 U.S. 427 (1953), also cited in U.S. Br. at 21-22, likewise relied upon the general purposes of the Securities Act rather than any provision explicitly addressing arbitrability:

> Two policies, not easily reconciliable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration of the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights

gaining power motivated Congress' enactment of the Fees Act.[17]

2. Congress' primary purpose in enacting the Fees Act was to attract competent counsel to represent victims of civil rights violations who otherwise would be unable to gain access to the courts, and thereby to provide amechanism for actual civil rights enforcement. This overriding goal emerges clearly from an examination of the legislative history of the Fees Act.[18]

Running throughout the legislative history, particularly the Reports accompanying the Fees Act legislation,[19] are three recurrent themes. (a) The victims of civil rights violations are ordinarily unable to afford lawyers, and are thus ordinarily unable to gain access to the courts. (b) Effective civil rights enforcement depends upon actions initiated by private plaintiffs and thus depends upon encouraging private lawyers, through the availability of court-awarded attorneys fees, to represent plaintiffs in private suits. (c) For these reasons, fee awards are essential if our Nation's civil rights statutes are to be enforced.

a. The Senate Report at 2 recognized at the outset that in "many cases

---

of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress *concerning the sale of securities* is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.

346 U.S. at 438 (footnote omitted and emphasis added).

17. The suggestion of Judge Torruella in *Lazar v. Pierce*, 757 F.2d 435, 439 (1st Cir. 1985), endorsed by petitioners and their *amici* — that the statutory fee entitlement under the Act must be waivable since even in the criminal sphere, federal constitutional rights are subject to waiver — is *non sequitur*. The issue is whether the defendant may coerce such a waiver as the price for agreeing to substantial relief on the merits. In the criminal area, it is thoroughly settled that a prosecutor may not coerce waiver of constitutional rights as the price of some other agreement with the defendant. *E.g.*, *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S. 711 (1969).

18. Despite their broad contentions, petitioners studiously avoid any examination of the legislative history, with the exception of four minor and misleading cites to H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976). *See* Pet. Br. at 13. Petitioner's amici similarly avoid any review of the legislative history. For example, although the Solicitor General advances a congressional intent argument in his U.S. Br. at 20-21, nowhere in the argument is there any reference to the language of the Fees Act or to its accompanying legislative history.

The overriding importance accorded the legislative history accompanying the Fees Act is illustrated by, *e.g.*, *Pulliam v. Allen*, 80 L.Ed.2d 565, 570 & n.4, 580 & n.23 (1984) (relying on the House Report at 9); *Blum v. Stenson*, 79 L.Ed.2d 891, 898-900 (1984) (relying on the Senate Report at 6); *Hensley v. Eckerhart*, 461 U.S. 424, 249-34 & nn.2, 4, 7 (1983) (relying on the Senate Report at 4, 6; and on the House Report at 1, 7); *Maher v. Gagne*, 448 U.S. 122, 129, 132 n.15 (1980) (relying on the Senate Report at 5; and on the House Report at 4 n.7); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70-71 n.9 (1980) (relying on the House Report at 5, 8 n.16); *Hanrahan v. Hampton* 446 U.S. 754, 756-58 (1980) (relying on the Senate Report at 2, 5; and on the House Report at 4, 7, 8); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737-39 & n.17 (1980) (relying on the Senate Report at 4; and on the House Report at 9); *Hutto v. Finney*, 437 U.S. 678, 694 n.23 (1978) (relying on the House Report at 4 n.6).

19. The Senate and House Reports are, respectively: S. Rep. No. 1011, 94th Cong., 2d Sess. (1976) [hereinafter "Senate Report"], *reprinted in* 1976 *U.S. Code, Cong. & Ad. News* 5908-14; and H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) [hereinafter "House Report"], *reprinted in* E. Larson, *Federal Court Awards of Attorneys' Fees*, 288-312 (1981).

arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." This lack of financial resources, coupled with this Court's rejection of the "private attorney general" doctrine in *Alyeska Pipeline Service Corp. v. Wilderness Society*, 421 U.S. 240 (1975), effectively precluded access to the courts. The House Report at 2 made clear that "civil rights litigants were suffering very severe hardships because of the *Alyeska* decision." "[P]rivate lawyers were refusing to take certain types of civil rights cases," and civil rights organizations, "already short of resources, could not afford to do so" either. *Id.* at 3. For victims of civil rights violations, the situation was indeed bleak: "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to courts." *Id.* at 1.

Congress responded by authorizing court-awarded fees as a financial incentive to attract counsel to represent persons whose rights had been violated. "In authorizing an award of reasonable attorney's fees [the Fees Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." House Report at 1. "This bill . . . provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing [civil rights] statutes." Senate Report at 6.

b. Congress thoroughly understood that most of our "civil rights laws depend heavily upon private enforcement," Senate Report at 2, for the obvious reason that "there are very few provisions in our federal laws which are self-executing." *Id.* at 6. "The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." House Report at 1. In creating the incentive of fee awards to facilitate the functioning of the enforcement mechanism, Congress made "fees . . . an integral part of the remedy necessary to achieve compliance with our statutory [civil rights] policies." Senate Report at 3. Congress did so consciously and purposefully. It was aware of *Hall v. Cole*, 412 U.S. 1, 13 (1978), in which this Court endorsed a fee award in a union member's suit to enforce the Landrum-Griffin Act because: "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose." Senate Report at 3. Similarly, both Reports quoted from this Court's decision in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968): "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts." Senate Report at 3; House Report at 6. Finally, the legislative history demonstrates that Congress reviewed the enforcement success achieved through fee-shifting provisions in other civil rights states: "These fee-shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation." Senate Report at 4.

c. The legislative history leaves no doubt that Congress believed fee awards to be essential both to secure future legal representation for aggrieved

individuals and to create an ongoing mechanism for civil rights enforcement in general. As summarized in the Senate Report:

> [C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an *essential* remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

Id. at 2 (emphasis added); "fee awards are *essential* if the Federal statutes to which [the Fees Act] applies are to be fully enforced," *id.* at 5 (emphasis added); fee awards "are *necessary* if citizens are to be able to effectively secure compliance with these existing statutes," *id.* at 6 (emphasis added); "[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we *must* maintain the traditionally effective remedy of fee shifting in these cases," *id.* (emphasis added).

In sum, Congress enacted the Fees Act to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights," and thereby "to promote the enforcement of the Federal civil rights acts, as Congress intended." House Report at 9.

3. It is also evident that Congress intended to make fee awards available to counsel who further private enforcement of national civil rights laws by successful resolution of lawsuits through settlement rather than formal adjudication.

The Fees Act "by its terms . . . permits the award of attorney's fees only to a 'prevailing party.' " *Hanrahan v. Hampton*, 446 U.S. 754, 756 (1980). Giving meaning to this statutory phrase, the legislative history demonstrates Congress' intent to make fee awards available after a party "prevails" through settlement as well as through trial. The House Report at 7 states:

> The phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a fully evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen County v. Fair*, 507 F.2d 281 (6th Cir. 1974); *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976); *Aspira [sic] of New York, Inc. v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975). A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion.

By equating success through settlement or a consent decree with success through judgment following a full trial, and particularly by emphasizing that a prevailing party should not be penalized by a denial of fees for seeking an out-of-court settlement, Congress certainly did not intend to diminish statutory fee entitlement, much less obliterate it. Congress instead meant nothing less than

what it said: fee entitlement follows the achievement of prevailing party status won through settlement or a consent decree.[20]

The Senate Report, albeit less elaborately, confirms this interpretation. After noting that fee awards are "appropriate where a party has prevailed on an important matter in the course of litigation," the Senate Report at 5 further states: "Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." Once again, according to Congress, a plaintiff's achievement of prevailing party status means that fee entitlement follows.

4. This basic congressional intent was recognized by the Court in *Maher v. Gagne*, 448 U.S. 122, 129 (1980), where the Court held that the "fact that [plaintiff] prevailed through a settlement rather than through litigation does not weaken her claim to fees." The Court further observed:

> Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, p. 5 (1976).

Id. See also Hanrahan v. Hampton, 446 U.S. at 756-57 (quoting with approval the House and Senate Reports). And in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), the Court held that a post-consent decree fee motion was not a Fed. R. Civ. P. Rule 59(e) motion to alter or amend a judgment on the merits because § 1988 "provides for awards of attorney's fees only to a 'prevailing party,' " *id.* at 451, fee entitlement "under § 1988 raises issues collateral to the main cause of action," *id.* (footnote omitted), and any "decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has prevailed," *id.* at 451-52.[21]

---

20. The three cases relied on in the House Report at 7 further illustrate Congress' intent. In two of the cases, the consent decrees addressed and resolved the merits of the litigation without any reference to attorneys fees. *Incarcerated Men of Allen County v. Fair*, 507 F.2d 281 (6th Cir. 1974), *aff'g* 376 F. Supp. 483 (N.D. Ohio 1973); *ASPIRA of New York, Inc. v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975). The consent decree in the third case reserved the fee issue for later resolution by the court. *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976), *aff'd sub nom., Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977). Significantly, in all three cases, fee entitlement was held to flow from the fact, and after the fact, of the plaintiffs having achieved prevailing party status.

21. Also in *White*, as petitioners and their *amici* here are fond of pointing out, this Court "decline[d] to reply on" plaintiff's alternative "reason for finding Rule 59(e) inapplicable to post-judgment fee requests": that "prejudgment fee negotiations could raise an inherent conflict of interest between the attorney and client," and that "to avoid this conflict of interest any fee negotiations should routinely be defered until after the entry of a merits judgment." *Id.* at 453-54 n.15. Apart from the fact that resolution of this alternative argument was no longer neces-

Thus, under the statutory scheme, fee entitlement follows from the precondition of achieving prevailing party status through trial or settlement. Petitioners' tactic of demanding a fee waiver as the price for the defendant's execution of a settlement agreement on the merits, which establishes a plaintiff's prevailing party status, thus turns the law on its head.[22] Judicial approval of petitioners' approach would have the undeniable effect of removing fee entitlement from virtually all cases where plaintiffs prevail through settlements or consent decrees.[23] This, however, would be directly contrary to Congress' injunction that a " 'prevailing' party should not be penalized for seeking an out-of-court settlement." House Report at 7. And, contrary to Congress' directions, it would eliminate fee entitlement from a large category of cases in which Congress intended fees to be awarded.

Thus, not only is the position of petitioners and their *amici* not supported by the express purposes of the Fees Act, it is directly contrary thereto. It is inconsistent, however, with the persistent and unsuccessful efforts of the Department of Justice, the National Association of Attorneys General, and other government representatives to convince Congress to amend the Fees Act to

---

sary in view of this Court's favorable ruling for plaintiff-petitioner on the meaning of Rule 59(e) given that fee entitlement is "collateral to the main cause of action," *id.* at 451, the fact of the matter is that this Court, in a footnote, "decline[d]" to rule on this simultaneous negotiation argument, and in fact said little more than that a defendant deciding whether to settle a case on the merits "may have good reason to demand to know his total liability from both damages and fees":

> Although sensitive to the concern that petitioner raises, we decline to rely on this proffered basis. In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.

Id. at 453-54 n.15. This is far from any endorsement of petitioner's request here for judicial approval of a coerced waiver of fees altogether, a situation not presented in *White*.

22. Petitioners' suggestion that Congress enacted the Fees Act cognizant of federal court decisions that "had interpreted Title II and VII to allow [defendants to coerce] plaintiffs to waive attorney's fees" and intended to incorporate "this judicial gloss on the parallel statutes" into the Fees Act, Pet. Br. at 13, is unsupportable. Congress directed attention specifically to "existing judicial standards, *to which ample reference is made in this report*," House Report at 8 (emphasis added); and Congress illustrated those standards by directing that fees be awarded where plaintiffs prevail through settlements or consent decrees, House Report at 7 and Senate Report at 5, *see supra* at 31-35. *Cf. Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979).

In any event, the two pre-Fees Act cases cited by petitioners do not concern waiver at all. One gave simultaneous approval of settlements of the merits and fees, without indicating whether both subjects were discussed in the same negotiations, and without any mention of a fee waiver. *Leisner v. New York Telephone Co.*, 398 F. Supp. 1140, 1143 (S.D.N.Y. 1974) ("Defendant has admitted nothing in terms of liability but has agreed to a compromise guaranteeing substantially all the affirmative relief sought by plaintiffs, *and further agreed* under 'II.A' to 'Payments . . . to Plaintiffs *and* their Attorneys . . .' ") (emphasis added in part). In the other case, *Clanton v. Allied Chemical Corporation*, 459 F. Supp. 282 (E.D. Va. 1976), the settlement agreement provided not for a fee waiver but for the court to determine fee entitlement. *Id.* Indeed, all of the pre-Fees Act cases cited, *see* House Report at 7, involved bifurcated negotiations with the Court determining the fee, as in *Clanton*.

23. *See supra* note 14 and accompanying text.

limit drastically the availability of attorneys fees against government agencies.[24] To date, they have been unable to get a bill out of committee in either house.[25]

The present case is but the latest in a series of equally unsuccessful government efforts[26] to have this Court interpret the Fees Act in such a way as to cripple private civil rights enforcement.

C. *Enforcement of Congress' Intent, by Barring Coerced Fee Waivers, Will Not Discourage Settlements or Make More Difficult the Quick Disposition of Nuisance Suits*

Notwithstanding Congress' clearly expressed purposes in enacting the Fees Act, petitioners and their *amici* argue strenuously that restricting the ability of defense counsel to press for fee waivers as part of overall settlements will have "dire consequences for our judicial system, defeating salutary policies favoring compromise and settlement of litigation and burdening the courts with frivolous, nuisance" litigation. These assertions are devoid of merit.

1. As to settlements in general, it is an historical fact that counsel in many earlier civil rights cases followed a bifurcated approach, settling the merits first and thereafter resolving the matter of fees. This is precisely what occurred in the three settled cases cited with approval in the House Report at 7.[27] It also is what occurred in *Maher v. Gagne,* 448 U.S. 122, 126 (1980) (the "parties informally agreed that the question whether [plaintiff] was entitled to recover attorney's fees would be submitted to the District Court after entry of the consent decree"); in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 447-48 (1982) (the parties first negotiated a settlement, and thereafter sought to negotiate fees, with the district court ultimately awarding fees); and in hundreds of other civil rights cases including *Nadeau v.*

---

24. *See, e.g., Attorney's Fees Awards: Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982); *Municipal Liability Under 42 U.S.C. § 1983: Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

25. The latest effort to limit drastically fee awards against government agencies is legislation entitled the "Legal Fees Equity Act," which was drafted by the Justice Department and which was introduced in the 98th Cong., 2d Sess. (1984) as S. 2802 and H.R. 5757. Hearings were held only on the Senate bill, *Legal Fees Equity Act: Hearings on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984), but the bill was not even voted out of subcommittee.

This same legislation was recently reintroduced as S. 1580, 99th Cong., 1st Sess. (1985); *see* 131 Cong. Rec. S10876 (daily ed. Aug. 1, 1985). The section-by-section analysis states that this new bill is not "intended to preclude discussions between the parties of attorneys fees, or the waiver therof, before the decision on the merits . . . or to prevent the government from discussing liability for attorneys' fees in conjunction with liability on the merits as part of a settlement agreement." *Id.* at S10881.

26. *See, e.g., Blum v. Stenson*, and the U.S. Br. therein; *Hutto v. Finney.*

27. *See supra* note 20 and accompanying text.

Helgemoe, 581 F.2d 275 (1st Cir. 1978), *cited with approval in Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

Even more compelling is the fact that court orders barring defense counsel from conditioning an offer of settlement upon a coerced waiver of fees have not deterred settlement. For example, in *Lisa F. v. Snider*, 561 F. Supp. 724 (N.D. Ind. 1983) (Civ. No. S-79-103), where the government defendants, after four years of litigation, proposed a settlement on the merits conditioned upon a coerced waiver of fees, and where the court ordered any negotiation on the merits to be conducted "separate from the question of the plaintiff's entitlement to attorney fees," *id.* at 726, this order did not deter settlement. Less than six months later, the parties settled the case on the merits favorably to the plaintiff. Order of September 15, 1983. Thereafter, fee negotiations commenced, no agreement on fees was reached, the matter was submitted to the district court, and the court ultimately awarded fees to plaintiff's counsel. Order of February 8, 1985.[28]

Rather than deterring settlement, the certainty of defendants' liability for fees in meritorious cases not only provides a powerful incentive for defense counsel to assess the strength of a case early and to settle, *cf. Marek v. Chesny*, 53 U.S.L.W. at 4904, but also serves to deter potential wrongdoers from violating the law in the first place. These principles were repeatedly enunciated by the courts of appeals that ruled, prior to this court's decision in *Blum v. Stenson*, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), that legal aid organizations were entitled to fee awards computed on the same basis as those for private counsel. As stated by the en banc court of appeals in *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980), if market fees could not be awarded when "a public interest law firm serves as plaintiff's counsel," then

> the defendant will be subject to a lesser incentive to settle a suit without litigation than would be the case if a high-priced private firm undertook plaintiff's representation. That is so because the marginal cost of each hour of continued litigation would be reduced. Defendant's counsel could inundate the plaintiff with discovery requests without fear of paying the full value of the legal resources wasted in response. We do not think that Title VII intended that defendants should have an incentive to litigate imprudently.

Id. at 899 (citation omitted). Additionally, the "incentive to employers not to

28. Similar results have occurred in many other cases. For example, the same private attorney who represented the plaintiff in *Lisa F.* represented the plaintiffs in another § 1983 class action, *Ellison v. Schilling*, Civ. No. L-80-23 (N.D. Ind. consent decree entered on July 11, 1983), a case in which another set of government defendants sought a coerced waiver of fees from this private attorney after nearly three years of litigation. Plaintiffs immediately thereafter filed a motion seeking an order barring simultaneous negotiation; the district court granted plaintiffs' motion in an unreported order filed on April 6, 1983; the parties then negotiated a settlement on the merits favorable to plaintiffs, and the court approved the consent decree on July 11, 1983; following unsuccessful settlement negotiations as to fees, the court awarded fees to plaintiffs' attorney on April 10, 1985.

discriminate is reduced if diminished fee awards are assessed." *Id. See also, e.g., Oldham v. Ehrlich*, 617 F.2d 163, 168 (8th Cir. 1980) (with the focus "on deterring misconduct by imposing a monetary burden on the wrongdoer, a legal aid organization merits an attorney's fee fully as much as does the private attorney"); *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980) (a full fee "award encourages potential defendants to comply with civil rights statutes"). As the Ninth Circuit also correctly observed in *Dennis*, 611 F.2d at 1307: "if the state could immunize itself against a fee award . . . the state would have less incentive to settle pending litigation and more incentive to resist civil rights compliance by defending against the suit until trial."

2. Just as a rule barring coerced fee waivers will not deter settlement of meritorious cases, neither will such a rule—whether through a *Lisa F.* order or otherwise—deter settlement or early disposition of frivolous cases or nuisance suits. In dealing with these suits, defense counsel in fact possess a considerable array of permissible tactics provided by federal rules and statutes.

Where a matter truly is frivolous at the outset as a matter of law, defense counsel may quickly have the case resolved under Fed. R. Civ. P. Rule 12(b) by filing a dispositive motion to dismiss or for judgment on the pleadings. Alternatively, where defense counsel choose to address matters outside of the pleadings, they may quickly have the frivolous case resolved under Fed. R. Civ. P. Rule 56 by filing a dispositive motion for summary judgment. In either event, defense counsel may seek and obtain an award of attorneys fees from plaintiffs so long as the case was in fact frivolous. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). These fee awards, which are often substantial,[29] pose a strong deterrent to frivolous litigation. And, as if additional tools were needed to deter nuisance litigation, fees may always be assessed against counsel personally for bad faith litigation, *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), and fees now may also be assessed against counsel under Fed. R. Civ. P. Rule 11 for frivolous litigation.[30]

3. Given this arsenal of procedural devices available both to dispose of truly frivolous cases and to obtain compensation for defending them, it is apparent that defense counsel's concern is not the frivolous case but the meritorious case. For example, in a meritorious case recently brought by *amicus* Legal Aid Society of New York against the City of New York—and contrary to the impression conveyed to this Court in its Brief in this case—the City

29. *See, e.g., American Family Life Assurance Company v. Teasdale*, 733 F.2d 559 (8th Cir. 1984) (fee award of $63,000 assessed against plaintiff under § 1988); *Arnold v. Burger King Corp.*, 791 F.2d 63 (4th Cir. 1983) (fee award of more than $10,000 assessed against plaintiff under Title VII); *Charves v. Western Union Telegraph Company*, 711 F.2d 462 (1st Cir. 1983) (fee award of $25,000 assessed against a losing plaintiff).

30. Defense counsel also have available yet another permissible tactic: they are free to make an early offer of judgment under Fed. R. Civ. P. Rule 68 without specifically including a fee component. If the offer is accepted, the available attorneys fees will be small, *Hensley v. Eckerhart*, 461 U.S. 424 (1983). If the offer is unreasonably rejected and the plaintiff fails to secure a superior result, no fees would be available from the date of the offer, *Marek v. Chesny*, 53 U.S.L.W. 4903 (U.S. June 27, 1985), and the available fees again would be small, *Hensley*.

declined a prelawsuit settlement, waited until the eve of trial to invoke its policy of offering a settlement conditioned upon a total waiver of fees, and ultimately was held liable after trial for greater relief and for fees.[31] In fact, in *amici's* experience, it is precisely in meritorious cases in which plaintiffs' claims on the merits are strong that the use of coerced fee waivers is most prevalent.[32]

Since this case is neither frivolous nor a nuisance suit but rather a substantial case involving a wholly *il*legitimate effort by petitioners to evade fee liability imposed by statute, approval by this Court of the tactic followed by petitioners in seeking a coerced waiver of all fees in this case would necessarily allow all defense counsel to extract coerced fee waivers in all settlements, and it would thus eliminate the very incentive provided by Congress for enforcement of and compliance with our civil rights laws.

---

31. This chronology occurred in *Henry v. Gross*, 84 Civ. 8399 (TPG) (S.D.N.Y. June 18, 1985) *notice of appeal filed*, (2d Cir. July 18, 1985). Two months before the suit was filed, Legal Aid lawyers, pursuant to established Legal Aid policy (similar to the policy required of all grantees of the federal Legal Services Corporation), sent the New York City Department of Social Services a letter describing the claims by a class of welfare recipients of improper termination of benefits without hearings, and inviting the City to take voluntary remedial action. This of course gave the City ample opportunity "as a matter of policy or practical judgment . . . to dispose of the matter [with a] . . . substantial reduction of attorneys' fees." Br. for City of New York at 11. Nevertheless, the Department of Social Services rebuffed this attempt, and suit was thus filed. Some four-and-a-half months later, after discovery and after motions for class certification and for a preliminary injunction had been filed, and on the eve of a trial, the City made an incomplete merits settlement offer which was somewhat favorable on the merits but conditioned upon a complete waiver of fees under § 1988. Despite the trial court's oral suggestions to the City that this negotiating tactic was improper, the City refused to negotiate separately and decided to risk going to trial rather than agree to pay reasonable fees. After a three-day trial, the trial court awarded plaintiffs sweeping relief on the merits—relief substantially more favorable than that proposed in the City's withdrawn settlement offer—and the court also assessed fees against the City.

This is not an isolated example. *Amicus* Legal Aid Society of New York has in other meritorious cases been confronted with New York City's practice of seeking coerced fee waivers, ordinarily after substantial litigation has taken place, and usually on the eve of trial.

32. While at first blush it might seem that offers of substantial merits relief in exchange for fee waivers would only be made in weak cases, the opposite is true. Unlike ordinary commercial or tort litigation, or even individual Title VII cases, weak class action cases under § 1983 are rarely settled; the government agency usually prefers to fight the case on the merits rather than restructure its operations. It often decides that the costs of litigation, conducted by staff counsel and assisted by paid employees in the affected agency, are lower than the costs of structured relief.

It is thus in the strong cases that waiver demands from governmental entities are most common. Facing long-term, structural relief after substantial litigation, defendants in these cases are most eager to reduce their costs by limiting what they know will be a large attorneys fee bill. Accordingly, just prior to trial they will often offer some relief on the merits contingent on a fee waiver. This behavior is often reinforced by attitudes about local autonomy and resistance to "outside do-gooders" that make anathema the idea of liability for the plaintiffs' attorneys fees. The result is that it is precisely in the cases where plaintiffs are most likely to prevail that fees waiver requests are most common.

D. *In View of the Federal Courts' Inconsistency in Confronting Coerced Fee Waivers, Specific Guidance Must Be Provided by this Court Barring Coerced Fee Waivers*

As is apparent from the lower court rulings on the general subject before this Court, and from the submissions of petitioners and their *amici* in this case, the federal courts to date have neither followed uniform standards nor developed procedures sufficient to insure that the purposes of the Fees Act are not defeated through merits settlements conditioned upon coerced fee waivers. This Court's clear guidance to the district courts is necessary if the congressional intent to facilitate meritorious civil rights litigation is to be realized.

Of course, the ruling by the court of appeals in this case goes no further than to hold that defendants offering substantial merits relief in a nonmonetary Fees Act case may not condition settlement upon a complete fee waiver. This reading of the statute has ample support in this Court's decisions. *See, e.g., Wilko v. Swan*, 346 U.S. 427 (1953); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1944). Yet, some courts have been reluctant to adopt such a rule because of fear that it would permit a "secret plan to rescind," *Lazar v. Pierce*, 757 F.2d 435, 438 (1st Cir. 1985).[33] Given this perspective, and especially given the occasional judicial reluctance to confront the coerced fee waiver issue early and directly, there is a compelling need for clear guidance from this Court.

1. The judicial response to defense counsel tactics of simultaneous negotiation in general and of coerced waivers in particular—as demonstrated in reported opinions, in unreported orders, and in unreported refusals to act—has been varied and inconsistent. Where judicial assistance has been sought early, some courts have barred coerced waivers in simultaneous negotiations; other courts have responded not at all; and yet others have implied approval.

The most effective case-by-case procedure for responding to unfair defense tactics is a court order, as in *Lisa F. v. Snider*, 561 F. Supp. 724, 726 (N.D. Ind. 1983), directing that any negotiations on the merits be conducted "separate from the question of the plaintiff's entitlement to attorney fees." This type of court order grows out of the Third Circuit's general prohibition against simultaneous negotiation, as set forth in *Prandini v. National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977). Although that decision arose in the con-

33. *Compare Regalado v. Johnson*, 79 F.R.D. 447 (N.D. Ill. 1978) (refusing to hold, in light of the public policy underlying the Fees Act, that silence as to fees in a settlement agreement amounted to a fee waiver); *Gillespie v. Brewer*, 602 F. Supp. 218, 226-28 (N.D. W. Va. 1985) (refusing to enforce a fee waiver provision in a settlement agreement); *Shadis v. Beal*, 685 F.2d 824 (3d Cir.), *cert. denied*, 459 U.S. 970 (1982) (voiding on public policy grounds a provision in a funding contract between the state and a legal services grantee requiring the grantee to waive fee awards in suits against governmental entities); *with Moore v. National Ass'n of Securities Dealers*, 762 F.2d 1093, 1095-97, 1105 n.17 (D.C. Cir. 1985), *petition for rehearing pending* (affirming a denial of post-consent decree fee petitions where counsel and plaintiff made no objection at a hearing on the fairness of the decree which included a waiver provision, and suggesting counsel's obligation to bring any overreaching tactics to the attention of a court *prior to* approval of settlement); *Lazar v. Pierce* (*semble*).

text of a "sweetheart" settlement rather than a "sacrifice" case, the Third Circuit has recognized the applicability of the *Prandini* principles to the sacrifice situation as well, *El Club del Barrio v. United Community Corporations*, 735 F.2d 98 (3d Cir. 1984), and other courts have applied the principles to bar coerced fee waivers.[34]

Without a governing *Prandini*-type bar against simultaneous negotiation, however, some courts have been reluctanct to act at all when defense counsel seek a coerced waiver. For example, when plaintiff's attorney in *Lazar v. Pierce*, 757 F.2d 435 (1st Cir. 1985), was confronted with defense counsel seeking a coerced waiver, "[p]laintiff filed a motion requesting the court to intervene, but . . . no action was taken." *Id.* at 437. Since this judicial inaction allowed the coerced waiver tactic to work from defendants' perspective, it was of no consolation to plaintiff's counsel that the First Circuit subsequently criticized the defense tactic as contrary to the Fees Act: "for a defendant to require [plaintiff's counsel] to forego his fee . . . or to attempt to negotiate an unreasonable fee, by playing upon counsel's concern for his client, is contrary to the very intendment of the Act." *Id.* at 438.

The absence of a *Prandini* rule has led to similar inaction in other cases, thereby allowing defendants to leverage coerced waivers.[35] It also has permit-

34. *See, e.g., Gillespie v. Brewer*, 602 F. Supp. 218 (N.D. W.Va. 1985); *Freeman v. B & B Associates*, 595 F. Supp. 1338 (D.D.C. 1984); *see also* Opinion No. 80-94, Committee on Professional and Judicial Ethics of New York City Bar Ass'n, 36 Record of New York City Bar Ass'n 507 (Nov. 1981), *amended and reissued in* Opinion No. 82-80 (Dec. 1983); Kraus, *Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases under the Civil Rights Attorney's Fees Awards Act of 1976*, 29 Vill. L. Rev. 597, 638-48 (1984). *Contra, Moore v. National Ass'n of Securities Dealers*, 762 F.2d 1093 (D.C. Cir. 1985).

35. The judicial inaction in these cases is, not surprisingly, ordinarily unreported. Illustrative is *Chattanooga Branch, NAACP v. City of Chattanooga*, No. 79-2111 (E.D. Tenn. Dec. 2, 1981), *appeal dismissed*, Nos. 82-5013 & 82-5016 (6th Cir. April 29, 1982), a suit challenging, on racial discrimination grounds, a rezoning that prevented construction of a low-income housing project. Subsequent to extensive discovery and pretrial preparation, plaintiffs were presented with a coerced waiver. The district court refused to enter a formal order on plaintiffs' motion to bar defendants from insisting on a fee waiver in exchange for a settlement offer. (This inaction prevented an interlocutory appeal). Instead, the judge advised counsel orally in an unrecorded chambers conference to negotiate for the clients without regard to any fee interest. The defendants then threatened to withdraw their offer to make a parcel of city-owned land available for construction of the low-income housing. With the ethical dilemma squarely presented, plaintiffs agreed to a fee waiver provision, which the district court subsequently refused to set aside. Plaintiffs then appealed the district court's order refusing to set aside the fee waiver. Defendants cross-appealed conditionally, arguing (as do petitioners here) that if the fee waiver were invalidated the entire consent decree must fall. Defendants then advised plaintiffs' counsel that because of the pending cross-appeals, the city was unable to obtain title insurance for the parcel, could not close and transfer the property to the developer, and could not assure that the housing project would be built. Again, faced with the imminent danger of losing all relief on the merits, plaintiffs' counsel capitulated and dismissed the appeal. *See generally* Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations*, 131 U. Pa. L. Rev. 793, 802 (1983); *see also, e.g.*, Levin, *Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees Are Authorized*, 14 Clearinghouse Review 515, 519 & nn.47 & 48 (1980).

ted district court judges on occasion to compel simultaneous negotiation.[36]

2. The widely varying judicial responses to these problems is mirrored by the approaches taken by petitioners and their *amici*. Several, for example, urge rejection of the *Prandini* rule against simultaneous negotiation but at the same time suggest that ethical difficulties may be avoided by resort to the district courts pursuant to Fed. R. Civ. P. Rules 16 and 23.[37] On the other hand, the Solicitor General suggests that these rules are inappropriate to the task, U.S. Br. at 28-29, and that trial courts should rarely become involved in disputes over demands for fee waivers, *id.* at 27. Both petitioners and the Solicitor General suggest the necessity of an initial showing of "bad faith" on the part of defense counsel, Pet. Br. at 36; U.S. Br. at 27;[38] while at the same time petitioners and other *amici* urge that the ethical obligation to provide zealous representation in fact *requires* defense counsel nearly always to seek to extinguish the fee liability of the client in any settlement.[39]

3. There is, in fact, no standard practice among the federal trial courts to prevent coerced fee waivers that are contrary to the policy underlying the Fees Act.[40] While the instant case arises in unique circumstances since the parties openly memorialized petitioners' demand for a fee waiver and agreed that the propriety of that demand should be decided by the court, *amici* submit that this Court should do more than merely affirm the judgment below.

A holding that fee waivers coerced as a condition of merits settlements are unenforceable and contrary to public policy will do much to ameliorate the problem in negotiations between "ethical counsel," *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 453 n.15 (1982). More importantly, this Court's announcement of a *Prandini*-type bar against simultaneous negotiation, or at least against defense initiated fee waivers in the con-

36. *Amicus* Lawyers' Committee recently represented plaintiffs in an education suit seeking only injunctive relief. When defendants raised the fee question before agreement on the merits had been reached, plaintiffs' counsel suggested there was an ethical problem and that fee discussions should be postponed until after court approval of a merits consent decree. At the next settlement meeting, defense counsel reported that he had had an *ex parte* conversation with the judge, who advised that he would refuse to consider any proposed consent decree that did not resolve the question of fees along with the merits.

37. *E.g.*, Br. for Council of State Governments, et al., at 19; Br. for Equal Employment Advisory Council at 7, 18; Pet. Br. at 8.

38. Any such bad faith requirement as a precondition for awarding fees to prevailing plaintiffs is of course completely inconsistent with *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. at 401-02; *see also Hutto v. Finney*, 437 U.S. at 693.

39. *See* Pet. Br. at 31-35; Br. for Council of State Governments, et al., at 16; Br. for Alabama, et al., at 52-53.

40. The suggestion in *Moore*, 762 F.2d at 1105 n.17 (opinion of MacKinnon, J.) that the conflict can be avoided by careful drafting of a retainer agreement to vest the right to the fee award in the client is unavailing. If the retainer merely transfers the attorney's interest in a statutory fee recovery to the client, it would lack consideration and, more to the point, would vest in the client a right to recover sums never anticipated which he would be quite likely to abandon in order to protect the merits relief offered. If, on the other hand, the retainer transfers to the client the right to the fee award but also creates an obligation to pay a reasonable fee to the attorney should the merits claim prevail, then either the policy underlying the Fees Act, or the policy encouraging settlements, will be fatally compromised.

text of merits negotiations, would fulfill Congress' purposes in enacting the Fees Act.[41] It would also have the profoundly beneficial effect of encouraging early settlement negotiations. In our experience, separate negotiation of the merits, followed by good faith negotiation of fees, greatly advances the settlement of cases, while also fulfilling Congress' intent.

CONCLUSION

The judgment below should be affirmed. And clear guidance to the lower federal courts should be provided so as to assure, in the words of Congress in the Senate Report at 6, that "our civil rights laws" do not "become mere hollow pronouncements which the average citizen cannot enforce."

Respectfully submitted,

JULIUS LEVONE CHAMBERS
*CHARLES STEPHEN RALSON
STEVEN L. WINTER
NAACP Legal Defense and Educational Fund, Inc.

JAMES ROBERTSON
HAROLD R. TYLER, J.
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
Lawyers' Committee for Civil Rights Under Law

E. RICHARD LARSON
BURT NEUBORNE
American Civil Liberties Union Foundation

KALMAN FINKEL
HELAINE M. BARNETT
JOHN E. KIRKLIN
The Legal Aid Society of New York

*Counsel of Record

September 6, 1985

41. Short of drawing a *Prandini* bright line, the Court at the very least must direct lower federal courts to give special scrutiny to simultaneously negotiated settlements when parties seek court approval of settlements pursuant to Fed. R. Civ. P. Rule 23(e), or entry of consent decrees in individual suits. Further, the Court should instruct the lower courts to take prompt action when the parties seek assistance pursuant to Fed. R. Civ. P. Rule 16 because of conflicts of interest arising in the negotiation process. Such prompt action should include the entry of *Lisa F.* orders barring simultaneous negotiations of fees and the merits. Responsiveness by the courts to counsel's requests for assistance is, we submit, the minimum judicial action necessary to assure at least a measure of compliance with Congress' purposes in enacting the Fees Act.