No. 06-0086-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARBOR HILL CONCERNED CITIZENS NEIGHBORHOOD ASSOCIATION, ALBANY COUNTY BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AARON MAIR, MARYAM MAIR, and MILDRED CHANG,
Plaintiffs-Appellants,

v.

COUNTY OF ALBANY and ALBANY COUNTY BOARD OF ELECTIONS,
Defendants-Appellees,

and

THE REPUBLICAN CAUCUS OF THE ALBANY COUNTY LEGISLATURE,
Intervenors.

On Appeal From The United States District Court
For the Northern District of New York

BRIEF FOR 29 PUBLIC INTEREST ORGANIZATIONS, LEGAL SERVICE ORGANIZATIONS, AND CIVIL RIGHTS LAW FIRMS AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS' MOTION FOR PANEL REHEARING OR REHEARING EN BANC

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

None of the *amici* is owned by a parent corporation, and no publicly held corporation owns more than 10% of stock in any *amicus*.

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INTEREST OF AMICI CURIAE

Amici are 29 public interest organizations, legal service organizations, and civil rights law firms that rely on 42 U.S.C. § 1988 or on analogous fee-shifting statutes. A detailed description of the interest of each *amicus* is set forth as part of the Appendix to this brief. *Amici* submit this brief in support of the plaintiffs-appellant's petition for panel rehearing or rehearing en banc.

The panel's opinion contains language indicating that attorney's fee awards should be reduced in certain civil rights cases on the ground that a hypothetical thrifty client would presume that certain attorneys would be willing to take cases at a reduced rate of compensation because they are handling the matter *pro bono,* pursuing reputational benefits, or seeking to achieve societal goals. As organizations that depend on 42 U.S.C. § 1988 or other fee-shifting statutes to sustain their work, *amici* are concerned that the panel's opinion conflicts with Supreme Court and Second Circuit precedent, could weaken their ability to recover attorney's fee awards in civil rights cases, and would thereby diminish their ability to bring such cases and to advance the public interest. *Amici* believe that their experience with 42 U.S.C. § 1988 and other fee-shifting statutes enables them to provide the Court with additional perspectives not presented by the parties' briefs and to illustrate the adverse collateral consequences of the panel's decision.

The parties to this appeal have consented to the filing of this brief. *Amici* have also submitted a motion dated May 22, 2007 seeking leave to file.

INTRODUCTION

In an effort to resolve the "endemic" confusion surrounding the proper application of the "forum rule," *see* Slip Op. at 19 n.3, the panel's opinion threatens to upend long-settled case law governing attorney's fees in civil rights cases. *Amici* express no opinion regarding whether the attorney's fee award in this case was reasonable in light of "all the case-specific variables." *See* Slip Op. at 17 (emphasis omitted). But *amici* urge the Court to reconsider language that could be construed as holding that reasonable attorney's awards in civil rights cases should reflect a hypothetical bargaining process in which a reasonable plaintiff negotiates for a lower hourly rate in consideration for the lawyer's "non-monetary returns—in experience, reputation, or achievement of the attorneys' own interests and agendas." *Id.* at 26. If left unaddressed, this language has the potential to inflict enormous collateral damage on the civil rights bar, and consequently on the enforcement of civil rights laws.[1]

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[1] Indeed, because the Supreme Court has used its analysis of 42 U.S.C. § 1988 to interpret the fee-shifting provisions of other statutes, *see, e.g.*, *Pennsylvania v. Del. Valley Citizens Council for Clean Air*, 478 U.S. 546 (1986) (construing "reasonable" attorney's fee provision of Clean Air Act, 42 U.S.C. § 7604(d) (1982)), the panel's analysis will have important ramifications for environmental law, consumer protection statutes, and a wide array of congressional policies that depend on such fee-shifting provisions for enforcement.

Although the parties never briefed the issue, the panel opinion—without citing to any legal authority, empirical study, or factual finding in the record—speculates in four different places about the ability of civil rights plaintiffs to negotiate for reduced attorney's fees for *pro bono* representation. *See id.* at 4 (stating that the district court should consider "whether the attorney had an interest (independent of that of his client) in achieving the ends of the litigation or initiated the representation himself, whether the attorney was initially acting *pro bono* (such that a client might be aware that the attorney expected low or non-existent remuneration), and other returns (such as reputation, etc.) the attorney expected from the representation"); *id.* at 17 ("The district court should also consider that such an individual might be able to negotiate with his or her attorneys, using their desire to obtain the reputational benefits that might accrue from being associated with the case."); *id.* at 22 ("Not incidentally, a reasonable, paying client might consider whether a lawyer is willing to offer his services in whole or in part *pro bono*, or to promote the lawyer's own reputational or societal goals."); *id.* at 25-26 ("We are confident that a reasonable, paying client would have known that law firms undertaking representation such as that of plaintiffs often obtain considerable non-monetary returns—in experience, reputation, or achievement of the attorney's own interests and agendas—and would have insisted on paying his attorneys at a rate no higher than that charged by Albany attorneys . . . ."). None of this

speculation is essential to the panel's analysis of the "forum rule" or its ultimate conclusion that, on the specific facts of this case, the plaintiffs' attorneys should be paid "at a rate no higher than that charged by Albany attorneys," even though the attorneys in question are located in New York City. *Id.* at 26.[2]

These portions of the panel's opinion are both inconsistent with governing law and unnecessary to resolve this case. *Amici* respectfully urge this Court to grant the plaintiffs' petition for panel rehearing or rehearing en banc and excise the four passages quoted above.

ARGUMENT

I. Precedent Requires that Attorney's Fees in Civil Rights Litigation Be Calculated at the Prevailing Market Rates Charged in Comparable Complex Federal Litigation.

If left in place, the panel's language threatens to have far-reaching effects beyond the facts of this case. The opinion suggests that the reasonable fees in civil rights cases should be lower than normal billing rates because, the panel hypothesizes, "a reasonable, paying client might consider whether a lawyer is willing to offer his services in whole or in part *pro bono*, or to promote the lawyer's own reputational or societal goals." Slip Op. at 22.

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[2] Lower courts have already begun to rely on these passages as controlling authority. *See Heng Chan v. Sung Yue Tung Corp.*, No. 03-6048, 2007 WL 1373118, at *3 (S.D.N.Y. May 8, 2007) (Lynch, J.) (citing to the panel's opinion and noting that the requested attorney's fees "already reflect a substantial discount from the regular market rates charged by Skadden for the services of these attorneys").

Such a conclusion flies in the face of congressional intent and long-settled precedent. The Senate Report accompanying 42 U.S.C. § 1988 declared in no uncertain terms that "[i]t is intended that the amount of fees awarded under [the statute] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be non pecuniary in nature." S. Rep. No. 94-1011, at 6, 1976 U.S.C.C.A.N. 5908, 5913. The Senate Report cited approvingly to *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), in which the court warned that it "must avoid . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return." *Id.* at 682. "The rationale of awarding reasonable attorneys fees, after all, springs from the need for placing the legal defense of certain constitutional principles and some congressional policies on an equal footing with the protection of private interests." *Id.*[3]

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[3] As recounted in the Senate Report:

> The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven. In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws. The very first attorneys' fee statute was a civil rights law,

The Supreme Court cited the Senate Report extensively in its unanimous decision in *Blum v. Stenson*, 465 U.S. 886 (1984). Although the panel opinion references *Blum* in other respects, it does not refer to *Blum*'s central holding: that "reasonable fees" should "be calculated according to the prevailing market rates in the relevant community *regardless of whether plaintiff is represented by private or nonprofit counsel*." *Id.* at 895 (emphasis added; footnote omitted). The Supreme Court considered and squarely rejected the Solicitor General's argument that awarding attorney's fees at the market rate would "'confer an unjustified windfall or subsidy upon legal services organizations.'" *Id.* at 893 (quoting Solicitor General's Br. at 6). After examining the legislative history, the Court concluded that "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." *Id.* at 894.

The Second Circuit has long honored *Blum*'s clear command that "prevailing market rates are fully applicable to fee awards to non-profit organizations." *Miele v. N.Y. Teamsters Conference Pension & Ret. Fund*, 831 F.2d 407, 409 (2d Cir. 1987). In doing so, this Court abrogated prior decisions

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> the Enforcement Act of 1870, 16 Stat. 140, which provided for attorneys' fees in three separate provisions protecting voting rights.

S. Rep. No. 94-1011, at 3, reprinted in 1976 U.S.C.C.A.N. 5908, 5910-11 (footnote omitted).

expressing concern that the calculation of fee awards based on the hourly rate of private law firms would "produce a windfall" for the prevailing party. *See id.* (citing *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1150-52 (2d Cir. 1983)). Instead, *Miele* declared that the district court's discretion in setting a reasonable attorney's fee award "must be exercised on the basis of rates charged to clients of private law firms. Otherwise, the concept of 'prevailing market rates' would mean less for legal services organizations than for law firms, a position the Supreme Court has rejected." *Id.*

The panel opinion's speculation about the bargaining abilities of a "thrifty, hypothetical client" is all the more puzzling because this Court has already held that civil rights attorneys should be compensated at the prevailing market rate, even when they have already agreed to charge their client at a discounted rate. In *Reiter v. MTA New York City Transit Authority*, 457 F.3d 224 (2d Cir. 2006), the plaintiff's counsel agreed to offer representation at a reduced rate because the plaintiff was bringing a civil rights case under Title VII. In light of this fee arrangement, the magistrate judge concluded that Reiter's attorneys could not recover a fee award at the prevailing market rate because "the amount actually charged by counsel was a dispositive indicator of a reasonable rate." *Id.* at 228. This Court vacated and remanded. The *Reiter* panel explained that "[i]mportant public policy considerations dictate that we should not punish an 'under-charging'

civil rights attorney" and that "courts 'must avoid decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return.'" *Reiter*, 457 F.3d at 233 (quoting *Blum*, 465 U.S. at 895) (alterations incorporated).[4]

If an attorney's fee award cannot be reduced because of a deal that was *actually negotiated* between a paying civil rights client and his or her attorney, then it defies logic to reduce attorney's fees across the board based on a *hypothetical* negotiation process that never took place. The panel opinion never mentioned *Miele* and relegated *Reiter* to a "but see" citation in a footnote as part of unrelated discussion. *See* Slip Op. at 25 n.6. Panel rehearing or rehearing en banc should be granted if for no other reason than to correct this clear departure from binding precedent. *See* Fed. R. App. P. 35(b)(1)(A).

II. The Actual Market Rate, Not the Negotiations of a "Thrifty, Hypothetical Client," Should Determine the Reasonableness of Attorney's Fees under 42 U.S.C. § 1988.

In calculating attorney's fees by imagining a hypothetical bargaining process between a "thrifty, hypothetical client" and a lawyer with "reputational and societal goals," the panel also ignored *City of Riverside v. Rivera*, 477 U.S. 561 (1986). *City of Riverside* explained that Congress enacted the fee-shifting

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[4] Other Circuits have reached the same conclusion. *See Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1520-24 (D.C. Cir. 1988) (en banc); *Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Labs.*, 842 F.2d 1436, 1448-50 (3d Cir. 1988) (Becker, J.).

provisions precisely because it determined that "private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights." *Id.* at 578 (plurality opinion); *see also id.* at 586 (Powell, J., concurring) ("It is clear from the legislative history that § 1988 was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs in unpopular civil rights cases."). It makes no sense to calculate fees under the statute by referencing a negotiation process that Congress determined to be inadequate.[5]

Similarly, in *Blanchard v. Bergeron*, 489 U.S. 87 (1989), the Supreme Court unanimously rejected the argument that a civil rights attorney's fee award should be capped by contingency fee arrangements negotiated with clients. As the Court explained, Congress sought to correct for market distortions that would otherwise encourage lawyers to pursue monetary recovery in civil rights cases instead of pursuing appropriate injunctive and declaratory relief: "If a contingent-fee agreement were to govern as a strict limitation on the award of attorney's fees, an undesirable emphasis might be placed on the importance of the recovery of damages in civil rights litigation." *Id.* at 95. By placing an undue emphasis on the

[5] Notably, in the mid-1980s, Congress considered and rejected legislation that would have required attorney's fees to be limited to a proportional share of the damages actually recovered. *See* The Legal Fees Equity Act, S. 2802, 98th Cong., 2d Sess. (1984); S. 1580, 99th Cong., 1st Sess. (1985); *see also City of Riverside*, 477 U.S. at 581 n.12 (plurality opinion).

bargaining abilities of a "thrifty, hypothetical client," the panel opinion re-imports those market distortions in the guise of calculating a reasonable fee.

Even if a focus on the bargaining process could be reconciled with *City of Riverside* and *Blanchard* or with congressional intent, the panel's approach would create only confusion and uncertainty by focusing attention away from the objective rates that actually prevail in the marketplace and toward hypothetical rates in a marketplace that does not exist. This approach is at odds with the Supreme Court's warnings that "Congress has created an artificial 'market' for [civil rights cases] by fee shifting—and looking to *that* 'market' for the meaning of fee shifting is obviously circular. Our decrees would follow the 'market,' which in turn is based on our decrees." *City of Burlington v. Dague*, 505 U.S. 557, 564 (1992); *see also Blum*, 564 U.S. at 895 n.11 ("The § 1988 fee determination is made by the court in an entirely different setting: there is no negotiation or even discussion with the prevailing client . . . .").

For example, this Court has already held that the government can also recover attorney's fees at the prevailing market rate. *See NLRB v. Local 3, Int'l Brotherhood of Elec. Workers*, 471 F.3d 399 (2d Cir. 2006) (awarding attorney's fees to government in contempt motion). It is hard to comprehend how a lower court should approximate the bargaining process that a "thrifty, hypothetical client" would use in securing representation for an NLRB enforcement action. At

a minimum, the uncertainty inherent in the panel's new approach will likely create a substantial amount of wasteful motion practice in the lower courts as defendants use this new subjective inquiry to argue that standard market rates should not apply for the plaintiff's counsel. *Cf. City of Burlington*, 505 U.S. at 566-567 (warning against an approach that would "make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable" and stating that "[i]t is neither necessary nor even possible for application of the fee-shifting statutes to mimic the intricacies of the fee-paying market in every respect"); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

The panel's decision will require district court judges—removed from the day-to-day workings of an actual practice—to speculate on what a hypothetical market would pay prevailing civil rights counsel, rather than rely on a more predictable measure of the actual market rate. *Cf. In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) (Posner, J.) ("It is apparent what the district court's mistake was. He thought he knew the value of the class lawyers' services better than the market did. What the market valued at $350 he thought worth only half as much. . . . [I]t is not the function of judges in fee litigation to determine the equivalent of the medieval just price."); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1149-51 (7th Cir. 1993) (Easterbrook, J.). Instead of embarking on a thought

experiment about hypothetical rates and bargaining processes, courts have had no difficulty determining appropriate hourly rates in civil rights cases by applying relatively objective criteria. In the federal courts in the District of Columbia area, fees are typically based on the "Laffey Matrix," originally devised in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (D.C. Cir.1984), which sets forth "a schedule of hourly rates based largely on years of experience." *See Covington v. District of Columbia*, 57 F.3d 1101, 1108 n.17, 1109 (D.C. Cir. 1995).[6] Courts within this Circuit have similarly set forth rough matrices of attorney's reasonable hourly rates based on their years of experience. *See, e.g.*, *Marisol A.* ex rel. *Forbes v. Giuliani*, 111 F. Supp. 2d 381, 386 (S.D.N.Y. 2000) (setting forth a "reasonable rate scale"); *Insinga v. Cooperatieve Centrale Raiffeisen Boerenleenbank B.A.*, No. 03-civ-7775, --- F. Supp. 2d ----, 2007 WL 837096, at *1 (S.D.N.Y. Mar. 12, 2007) (endorsing rates used in *Marisol*); *Nike, Inc. v. Top Brand Co.*, No. 00-civ-8179 2006 WL 2946472, *5 (S.D.N.Y. Feb. 27, 2006) (same). In addition, courts can consult professional publications, such as the National Law Journal, which publishes surveys of billing rates around the country each year. *See, e.g.*, *Barfield v. N.Y. City Health & Hosps. Corp.*, No. 05-civ-6319, 2006 WL 2356152, at *1 (S.D.N.Y.

[6] The *Laffey* Matrix has since been promulgated annually by the office of the U.S. Attorney for the District of Columbia. *See* http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_6.html.

Aug. 11, 2006) (citing to the rates in the National Law Journal); *Phoenix Four, Inc. v. Strategic Resources Corp.*, No. 05-civ-4837, 2006 WL 2135798, at *2 (S.D.N.Y. Aug. 1, 2006) (same). For attorneys in private practice, courts may also consult the actual billing rates that an attorney uses to charge his or her paying clients. *See, e.g.*, *Meriwether v. Coughlin*, 727 F. Supp. 823, 831 (S.D.N.Y. 1989) (holding that "the usual hourly rates charged to paying clients by [counsel] are reasonable rates of compensation for their work in this [civil rights] action").[7]

The panel's analysis departs from these objective measurements and introduces a subjective psychological analysis of a lawyer's motives in taking a case—"Do you believe in the plaintiff's cause?" This analysis will be impossible for lower courts to apply in a consistent and even-handed fashion, and it will put attorneys in potential conflict with their clients.[8]

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[7] In deciding whether to award higher rates for lawyers outside the forum district, courts have similarly looked to objective criteria instead of trying to psychoanalyze the lawyers' reasons for taking the case. *See Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 180 (4th Cir. 1994) (non-forum rates may be awarded when "the complexity and specialized nature of a case may mean that no attorney, with the required skills, is available locally"); *Am. Booksellers Ass'n v. Hudnut*, 650 F. Supp. 324, 328-30 (S.D. Ind. 1986) (applying New York City rates in Indianapolis case where complex First Amendment issues involved and services of equal quality not available in local forum).

[8] Indeed, the same reputational benefits might not exist for lawyers who represent unpopular civil rights plaintiffs or causes. And, presumably, the lawyer's interest in vindicating his or her societal goals would be undermined by representing a client he or she disagrees with. The panel's reasoning would thus seem to make the fee award depend on the relative popularity of a client's cause or the sympathies of the attorney that happens to have accepted the representation.

Even if a construction of a hypothetical bargaining process were administratively workable, the Court's assumptions do not necessarily reflect the reality of how the legal market operates. Representation of a major financial institution can arguably bring a law firm more opportunities for valuable experience and media coverage than, for example, an individual Title VII case of workplace discrimination. But, notwithstanding the potential collateral benefits involved in handling major commercial cases, a law firm still typically charges high-profile litigants the same standard billing rates it uses for lower-profile clients. What separates civil rights plaintiffs from high-profile institutional plaintiffs in commercial cases is not the reputational benefits the cases bring to the firm, but the clients' ability to pay.

Finally, even if it were true that lawyers routinely subsidize their civil rights clients to vindicate their own societal goals, there is no reason why that subsidy should be effectively transferred to the wrong-doing defendant, who has, after all, been found to have violated the plaintiff's civil rights. The fee-shifting statutes are designed to force defendants to internalize the costs of their own misconduct. *See* Harold J. Krent, *Explaining One-Way Fee Shifting,* 79 Va. L. Rev. 2039,

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Lower courts applying this test would thus seem to be required to engage in content and viewpoint discrimination, potentially in violation of the First Amendment. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (explaining that "[s]peech cannot be financially burdened, any more than it can be punished or banned" based on "the public's reaction" to it).

2044 (1993) (explaining that "fee shifting may force the executive branch and private firms to internalize more fully the costs of their misdeeds"). Under the panel opinion's reasoning, however, a hypothetical lawyer who forgoes other paying work in order to serve the public interest would be, in effect, subsidizing the defendant's wrongdoing.

The Second Circuit recognized the fallacy of such an approach long ago in *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103 (2d Cir. 1988) (fee shifting under the Lanham Act). This Court held that a prevailing plaintiff's attorney's fees should be calculated by the market rate, not by the special reduced billing arrangement that for which the plaintiff had bargained. The court explained that the defendant "should not benefit by the agreement between plaintiff and counsel." *Id.* at 114. "Awarding reasonable fees to plaintiff's counsel accords with the statute and results in no benefit to plaintiff, whereas an award based on the special arrangement would result in a windfall to the appellants as wrongdoers, who would pay less." *Id.* If it costs a certain amount of money (including the opportunity cost) for an attorney to correct a defendant's misconduct, then the congressional policy is that those costs should be borne by the wrongdoing defendant, not by the aggrieved plaintiff or the civic-minded lawyer.

Because these issues were not addressed by the parties' briefs, the panel did not have the benefit of full briefing on the implications of its new "thrifty,

hypothetical client" standard. *Amici* urge the Court to re-examine the opinion's ill-considered language on panel rehearing or en banc.

III. The Panel's Reasoning Will Have a Devastating Impact on the Enforcement of Civil Rights Laws.

When applied by lower courts, the panel's language could be devastating to the civil rights bar and, consequently, to the enforcement of civil rights laws. In enacting 42 U.S.C. § 1988, Congress recognized that the government lacks the resources to fully enforce those laws. S. Rep. No. 94-1011, at 3; H.R. Rep. No. 94-1558, at 1. As a result, enforcement falls largely on the private bar and public interest law firms.

Although the panel seems to have had white-shoe Manhattan law firms in mind, the thrifty, hypothetical client would bargain for the same reduced rate with any prospective counsel. In the perfectly efficient market that the Court hypothesizes, if the solo practitioner cannot match the lower price, the thrifty bargainer would simply turn to the white-shoe firm instead. Thus, one interpretation of the panel's language is that the reasonable market rates for civil rights cases should be categorically lower than the reasonable market rates for comparable complex federal litigation.

Many of the *amici* are small or mid-sized civil rights firms. Even if some firms might have the luxury of donating *pro bono* hours to vindicate their societal goals, not all civil rights attorneys would be similarly insulated. In most cases "the

relevant bar is the local-small-firm lawyer who brings the bulk of constitutional tort litigation." Steward J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 1988 Cornell L. Rev. 719, 768-69. "[T]he institutional civil rights litigator, the major-law-firm pro bono case, and the government-funded legal services case are the exceptions rather than the rule." *Id.* at 767-68.[9]

If the Court's language is interpreted as covering non-profit organizations as well, the results will be similarly devastating. The availability of attorney's fees can be an important tool in recruiting lawyers in private practice to take on civil rights cases and will often help defray the cost of an organization's own litigation efforts. *See* Amicus Statements, Appendix A. Nationally, the resources available for representing people unable to afford counsel are grossly inadequate to meet the need,[10] meaning that any diminution in the amount of fee awards available to public interest organizations will deprive those organizations of the ability to represent clients they would otherwise serve. *See also* Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281,

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[9] Any reputational benefits that lawyers gain from taking on these cases are more than offset by the risk of not being paid at all. Under current law, the fee-shifting statutes provide no added compensation for this contingency risk. *See City of Burlington*, 505 U.S. at 567.

[10] *See* Legal Services Corporation, Documenting the Justice Gap in America: The Current Unmet Legal Needs of Low-Income Americans 4, 12-13 (2005), available at http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf.

312 (1977) (criticizing concept of a "public interest discount" and arguing that "[r]educing the fees awarded on the ground that lawyers should be inspired by their sense of civic responsibility reduces the economic attractiveness of such cases, thereby restricting the supply of legal resources made available").

Congress determined that "[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." S. Rep. No. 94-1011, at 6. But if the panel's language is applied more broadly, there will be fewer lawyers able to litigate civil rights cases and fewer resources for the lawyers that continue to do so. This Court should grant panel rehearing or rehearing en banc to reconsider its opinion in light of these serious practical implications.

CONCLUSION

For the foregoing reasons, the plaintiffs' petition for panel rehearing or rehearing en banc should be granted. Specifically, *amici* request that the Court amend its opinion to excise the following four passages: Slip. Op at 4:9-15; 17:13-17; 22:19-22; 25:16-26:5. For the Court's convenience, the complete text of these passages is set forth in *amici*'s appendix.

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