No. 02-1282

In The
Supreme Court of the United States

THE HOUSING AUTHORITY OF
THE CITY OF DALLAS,

Petitioner,

v.

HIGHLANDS OF MCKAMY IV AND V COMMUNITY
IMPROVEMENT ASSOCIATION, ET AL.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF OF *AMICUS CURIAE* HOUSING AND DEVELOPMENT LAW INSTITUTE IN SUPPORT OF THE PETITIONER

LISA WALKER SCOTT
Bar No. 238273
Counsel of Record
Executive Director and
General Counsel
HOUSING AND DEVELOPMENT
LAW INSTITUTE
630 Eye Street, N.W.
Washington, DC 20001
(202) 289-3400

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICUS CURIAE*[1]

Housing and Development Law Institute (HDLI) is a national nonprofit member organization whose mission is to serve as a legal resource to public housing and redevelopment agencies and their legal counsel. For nineteen years, HDLI has worked to enlighten its members with respect to all legal aspects of state and federal housing law and policy. In addition to serving as *amicus* in appropriate cases important to its membership, HDLI focuses on the myriad of legal issues relating to affordable and public housing, including standards for the award of attorneys' fees and other issues related to public housing litigation. It does this by publishing legal periodicals, conducting conferences and other educational activities, and providing legal training and individualized counseling.

HDLI's membership consists of more than 260 public housing agencies and more than 45 law firms that represent public housing agencies across the United States. HDLI's board of directors is composed of both executive directors and/or senior officers of public housing agencies and attorneys who represent those agencies. On behalf of its members and board of directors, HDLI submits this brief to assist the Court in understanding the profoundly

[1] Pursuant to Rule 37.6 of this Court, HDLI states that the counsel named below authored this brief in its entirety, and that no party or entity other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of the brief. In accordance with Rule 37.2(a), all parties have consented to the filing of this brief.

adverse implications of the Fifth Circuit's decision below for public and municipal entities, such as public housing authorities, whose decisions and actions are governed, not only by court orders to which they are subject, but by the limitations of scarce and precious public resources with which they are entrusted.

SUMMARY OF ARGUMENT

The crux of this case centers on this Court's enunciated exception to the general rule that prevailing parties in civil rights litigation are entitled to attorneys' fees – that is, that a fee award is not justified when "special circumstances" are present that render such an award unjust. Perhaps, there can be no clearer case of special circumstances rendering a fee award unjust than is present here: a defendant's good faith obedience to an existing order of a federal court that carries with it serious contempt sanctions in the event of noncompliance.

The long history of housing discrimination that serves as the backdrop to the consent decree in this case is relevant. *See Walker v. HUD*, 734 F. Supp. 1289, 1293-1312 (N. D. Tex. 1989). Equally relevant is the Dallas Housing Authority's ardent attempts in good faith to eradicate the vestiges of that discrimination by carrying out its consent decree obligations as ordered by the district court – obligations that the court and all the parties believed in 1995 were necessary, legal, and would improve

the lives of low income minority residents of the City of Dallas. Indeed, the fact that distinguishes this case from all other cases involving the "special circumstances" rule, is that the U.S. District Court for the District of Texas in Dallas signed an order *requiring* the Dallas Housing Authority to undertake the very actions that were later challenged by the homeowners.

This *amicus* brief adopts by reference the argument set forth in the Petition for Certiorari at pages 15 *et seq*. that the homeowners in this litigation were not prevailing parties as contemplated under 42 U.S.C. §1988.[2] However,

[2] HDLI respectfully disagrees with the Fifth Circuit's holding that the elimination of the race-based criteria in the consent decree gave the homeowners the result they requested in their lawsuit – *i.e.*, a foreclosure of the Dallas Housing Authority's ability to construct public housing in their neighborhoods. Since the Fifth Circuit's decision did not prevent the Dallas Housing Authority from proceeding with its plans to construct public housing in the homeowners' neighborhoods, but rather permitted it to do so using race-neutral siting criteria, the technical victory obtained by the homeowners below is akin to an award of nominal damages in a suit for money damages. While the Fifth Circuit's decision served to maintain the *status quo*, it specifically gave the Dallas Housing Authority the right to build public housing on the contested sites. Thus, like a nominal damages award that pales in comparison to the total amount of damages sought, the homeowners achieved only the barest modicum of success. In the unfortunate case that the Fifth Circuit's decision that the homeowners are prevailing parties is affirmed, the only reasonable fee to which they should be entitled "is no fee at all" for the *de minimus* result they achieved. *See Farrar v. Hobby*, 506 U.S. 103, 112-13 (1992) (fee award reversed where $1 in nominal damages awarded was "one seventeen millionth" of the amount requested). This litigation accomplished little beyond giving the homeowners the moral satisfaction of knowing that a federal court concluded that their rights had been violated, and is not the type of victory that merits an award of fees. *See Farrar*, *supra*, 506 U.S. at 114 and 116 (O'Connor, Justice concurring).

the thrust of this brief is to advocate that a housing authority's compliance with an existing court order rightfully should be included among the "special circumstances" which justify a denial of attorneys' fees under Section 1988. To hold otherwise is inconsistent with this Court's long-standing precedent regarding the respect to be given to orders of the court. As described more fully below, the ramifications of the Fifth Circuit's decision could be disastrous for housing authorities, other public bodies, and the persons that they serve, and could seriously burden and undermine the judicial system.

The Fifth Circuit's majority decision goes beyond the established zone of cases where a defendant's "good faith" belief has not shielded it from an award of attorneys' fees. Those cases generally involve a defendant's unintentional actions, as contrasted with "bad faith" or intentional ones, or a party's incorrect interpretation of the law where there has been no judicial ruling. None of those cases went so far as to add to the list of "not special circumstances" a party's good faith compliance with an existing court mandate that carries a judicial imprimatur. As a result, the Fifth Circuit's leap has serious and far-reaching adverse consequences for the more than 260 public housing agencies that are members of HDLI, as well as all persons and entities that deserve to have confidence in the sanctity of court orders that define the landscape in which their decisions are made.

The Fifth Circuit's decision also is wholly inconsistent with this Court's clear, 100-year-old directive that contempt sanctions flow to any party who fails to follow a court order unless and until it is modified, regardless of how erroneous the order might be. As well articulated by the Magistrate Judge below (Petition, Appendix B, App.

16-17), the circuit court's decision improperly puts a defendant in the irreconcilable predicament of having to defy an existing court order in order to protect itself against a potential future fee award. Choosing to follow either course could very well have severe adverse financial consequences for the defendant – defying the existing order and putting itself into contempt could result in the imprisonment of its officials and/or the levy of heavy fines. Choosing to follow the order could, in the case of the Dallas Housing Authority below, subject the defendant to a potentially crippling fee award should some third party later succeed in overturning some portion of the order.

Research has uncovered no authority relating to the application of the "special circumstances" rule to cases where a defendant's carrying out the provisions of an existing court order is, indeed, the basis for the fee award. Accordingly, public housing authorities and others subject to court orders are left hanging in the balance and are held hostage to the whim of the circuit in which they sit. Without clear guidance from this Court, there will continue to be a mixed bag of standards and outcomes. Accordingly, HDLI urges this Court to resolve this issue in favor of the Dallas Housing Authority and others similarly situated in order to avoid potentially disastrous by-products of the Fifth Circuit's decision.

Finally, HDLI respectfully submits that the Fifth Circuit's focus in the underlying litigation was misplaced. The Fifth Circuit appears to have focused on what it perceived as the Dallas Housing Authority's infringement upon the homeowners' rights, rather than focus on the Dallas Housing Authority's refusal to acquiesce to the aims of the homeowners to block the construction of public housing in their neighborhoods. The Dallas Housing

Authority is legally obligated under the Fair Housing Act to carry out fair housing policy, part and parcel of which is to resist community opposition to actions which support integration. The Fifth Circuit decision erodes these fair housing principles and should be overturned.

ARGUMENT

I. COMPLIANCE WITH AN EXISTING COURT ORDER SHOULD BE INCLUDED AMONG THE "SPECIAL CIRCUMSTANCES" WHICH JUSTIFY A DENIAL OF ATTORNEYS' FEES UNDER 42 U.S.C. SECTION 1988.

Without question the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 (Cum. Supp. 1977) ("Section 1988") gives district courts the discretion to award reasonable attorneys' fees to the prevailing party in a civil rights suit and, generally, a court will award attorneys' fees. *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983). This Court's and Congress' thoughtful corollary to that general rule is that attorneys' fees are not appropriate when "special circumstances" render a fee award unjust. *Id.* at 429; *Newman v. Piggie Park Enter.*, 390 U.S. 400, 402, 88 S. Ct. 1933 (1968); S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912. For the reasons set forth below, it is patently unjust to award attorneys' fees against a party for that party's obedience to a mandate of a federal district court, given the grave consequences that flow from a refusal to follow the court's mandate, as well as the unjust loss of economic and other resources that will result from requiring the party to contest every court order.

A. This Court Has Made Clear That a Refusal to Obey An Existing Court Order Is Unlawful And Constitutes Punishable Contempt.

Over the past century there has been a long line of unmistakable decisions of this Court that clearly hold that unless and until a court order is modified, it ***must*** be followed, no matter how erroneous the order may be. *See*, *e.g.*, *GTE Sylvania, Inc., et al. v. Consumers Union of the United States, Inc., et al.*, 445 U.S. 375, 386-87 (1980) ("persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order"); *Pasadena City Bd. of Ed., et al. v. Spangler, et al.,* 427 U.S. 424, 439 (1976) (" . . . even though the constitutionality of the Act under which the injunction issued is challenged, disobedience of such an outstanding order of a federal court subjects the violator to contempt even though his constitutional claim might be later upheld"); *United States v. Mine Workers*, 330 U.S. 258, 293-94 (1947) (violations of a TRO are punishable as criminal contempt even though the order is set aside on appeal); *Howat v. Kansas*, 258 U.S. 181, 189-190 (1922) (citations omitted); *In re Debs*, 158 U.S. 564, 594 (1895).

This Court enunciated the rule clearly in *Howat v. State of Kansas*, 258 U.S. 181 (1922), where it held that

> [a]n injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be . . .

> and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.

Id. at 189-90.

The Fifth Circuit's decision effectively penalizing the Dallas Housing Authority for obeying, or not objecting to, the siting mandates set forth in the consent decree flies in the face of the foregoing established precedent requiring respect and deference to court orders. It erodes the confidence that parties are entitled to have in federal court orders. The Fifth Circuit is telling defendants that, in an effort to avoid a potential future fee award for the benefit of third parties not subject to an original court decree, they must expend whatever resources necessary to object to proposed consent decrees up to the court of last resort.

Many housing authorities (and arguably other public bodies) simply do not have the financial or human capital resources to litigate every contentious term of a claim or proposed decree.[3] HDLI members report that the practical effect of having to contest every contentious claim or proposed consent decree would not only deprive housing authorities of their duly authorized authority to conduct their own business, but would make litigation exceedingly

[3] A poll of HDLI members taken for the purpose of this brief reveals that, on behalf of forty housing agencies responding to the poll, all believe that they lack the fiscal or other resources to object and defend against all proposed consent orders to the court of last resort in order to ensure they are signing onto a "safe" order. Several members specifically noted that such likely would force them into bankruptcy.

more expensive and combative by virtually eliminating the prospect of settlement. This seriously would stifle ingenuity and innovation in housing policy and practice, as the agencies would fear becoming embroiled in endless appeals. These agencies likely would be forced to obtain legal impact opinions with regard to virtually all of their operations, and would need to increase their public official liability insurance. All of this would have a devastating impact on the morale of agency staff, as well as that of public housing residents. The most tragic consequence is that these public bodies would be forced to expend more precious resources for (or to prevent) litigation, rather than for the public purposes for which they originally were intended.

B. The Dallas Housing Authority's Good Faith Compliance With The District Court's Order Is Not On Par With the "Good Faith" Cases That Previously Have Been Deemed Not to Constitute "Special Circumstances".

In support of its decision, the Fifth Circuit cites three cases in which it previously had held that a state actor's good faith compliance with an official or legal requirement that is later deemed unconstitutional is not a "special circumstance." (Petition, App. 7)[4]. Each of these "good

[4] *Espino v. Besteiro*, 708 F.2d 1002 (5th Cir. 1983) (good faith interpretation of the law was not special circumstances); *Riddell v. Nat'l Democratic Party*, 624 F.2d 539 (5th Cir. 1980) (good faith enforcement of an unconstitutional registration requirement was not special circumstances); *Johnson v. Mississippi*, 606 F.2d 635 (5th Cir.

(Continued on following page)

faith" cases, as well as cases in other circuits that have determined that specific acts of "good faith" are not special circumstances, are distinguishable in a very important respect. Not a single one of these cases deals with the facts *sub judice*, as none of them involve a party's good faith obedience to an existing order of the court.

The Petitioner already has identified the fact that the decisions in other circuits do not squarely address this issue. *See* Petition at pp. 9-11. Additionally, the cases cited by the Fifth Circuit are not reliable authority for the court's decision. For example, in *Espino v. Besteiro*, *supra*, the district court denied a fee petition, reasoning that a fee award was not appropriate because the defendant's position had been in good faith compliance with the defendant's own reasonable interpretation of the Rehabilitation Act of 1973. The Fifth Circuit determined that the defendant's good faith interpretation of the law did not constitute special circumstances. 708 F.2d at 1005-06. In this case, however, the Dallas Housing Authority relied, not upon its own interpretation of the law, but relied in good faith upon the order of the district court, which implicitly declared the decree terms legal.

Similarly in *Riddell v. Nat'l Democratic Party*, *supra*, the district court refused to award fees to one of two later unified groups because of the disruption that a fee award would cause to the new unified organization, and the fact that the latter group had contributed funds to the former group upon unification. The Fifth Circuit determined that

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1979) (good faith belief that a city ordinance was constitutional was not a special circumstance).

these concerns did not constitute special circumstances, stating that the defendants' enforcement of an unconstitutional registration requirement in good faith compliance with their official duty did not constitute special circumstances. 624 F.2d at 545-47. Again, this case is inapposite since, unlike the Dallas district court's approval of the consent decree here, there had been no prior judicial determination as to the propriety of the defendants' actions upon which the defendants relied.

In *Johnson v. Mississippi*, *supra*, the State of Mississippi unsuccessfully argued that because *another* state, Maryland, had an ordinance similar to one at issue in Mississippi, and the Maryland ordinance had been declared constitutional by the *Maryland* district court, Mississippi had a good faith belief that the Mississippi ordinance was constitutional. 606 F.2d at 637. Citing *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977) without discussion, the Fifth Circuit determined that such a belief was "not controlling." 606 F.2d at 637. In *Brown*, the focus actually was on the prevailing party analysis, not the special circumstances rule. The defendants in that case argued that because their conduct was not intentional, the plaintiffs could not be prevailing parties. The court held that the conduct, whether negligent or intentional, in good faith or bad, was irrelevant. *Brown*, *supra*, 559 F.2d at 277-78. *Johnson*, too, is distinguishable because there was neither a prior judicial determination regarding the constitutionality of the ordinance, nor a judicial order requiring the officials' specific actions.

II. THE FAIR HOUSING ACT DEMANDS THAT HOUSING AUTHORITIES RESIST COMMUNITY OPPOSITION TO ACTIONS WHICH SUPPORT INTEGRATION.

The Dallas Housing Authority has a legal obligation under the Fair Housing Act to carry out fair housing policy, part and parcel of which is to resist community opposition to actions which support integration. The Fair Housing Act requires a housing authority to resist community opposition to its fair housing activities. A failure by the Dallas Housing Authority to do so, could subject it to liability for violation of the Fair Housing Act. *See Potomac Group Home Corporation, et al. v. Montgomery County*, 823 F. Supp. 1285, 1297-99 (D. Md. 1993); *United States v. Borough of Audubon,* 797 F. Supp. 353, 361 (D.N.J. 1991), *aff'd*, 968 F.2d 14 (3d Cir. 1992).

The Dallas Housing Authority's actions *vis a vis* the homeowners was consistent with its fair housing responsibilities, and it should be applauded, rather than sanctioned, for not taking the path of least resistance. While the Fifth Circuit clearly was concerned with the housing authority's apparent infringement upon the rights of the homeowners, it appeared to neglect to recognize the housing authority's attempts, consistent with their legal obligations, to protect the fair housing interests of public housing residents. The Fifth Circuit decision erodes these fair housing objectives.

CONCLUSION

For the foregoing reasons, this Court should hold that a housing authority's good faith compliance with an existing court order constitutes "special circumstances" which justify a denial of attorneys' fees under Section 1988 under the circumstances of this case. Accordingly, the decision of the Fifth Circuit Court of Appeals should be reversed.

April 3, 2003

Respectfully submitted,

LISA WALKER SCOTT
Bar No. 238273
Counsel of Record
Executive Director and
General Counsel
HOUSING AND DEVELOPMENT
LAW INSTITUTE
630 Eye Street, N.W.
Washington, DC 20001