IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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| FEDERAL ELECTION COMMISSION<br><br>Plaintiff-Appellant,<br><br>v.<br><br>CHRISTIAN ACTION NETWORK, INC., and MARTIN MAWYER,<br><br>Defendants-Appellees. | No. 95-2600<br><br>RESPONSE TO MOTION FOR DETERMINATION OF PROPER COURT |

**RESPONSE TO DEFENDANTS-APPELLEES' MOTION FOR DETERMINATION OF PROPER COURT FOR EAJA APPLICATION**

The Federal Election Commission ("Commission" or "FEC") hereby responds to the Defendants-Appellees' Motion for Determination of Proper Court for EAJA Application. The Commission submits that the application of Martin J. Mawyer and the Christian Action Network (collectively "CAN") for attorney's fees and other expenses pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, should be determined in the first instance by the district court below.

CAN's motion takes no position about whether this Court or the district court should first review its fee application, but the Commission believes that this Court should remand the fee

application to the district court. Although EAJA does not explicitly state that fee petitions should first be addressed by the district courts, the Supreme Court has repeatedly stressed the discretion afforded to the district courts in these matters, and this admonition would be meaningless if fee applications routinely bypassed those courts' review. In Hensley v. Eckerhart, 461 U.S. 424, 437 (1983), the Court explained the advantages in having the district courts review fee requests and in deferring to their decisions:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.[1]

Similarly, when the Court determined that an abuse of discretion standard was appropriate when reviewing a district court's fee determination under EAJA, it emphasized the district court's superior knowledge and experience:

> To begin with, some of the elements that bear upon whether the Government's position "was substantially justified" may be known only to the district court. Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts. By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record .... Moreover, even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record ....

Pierce v. Underwood, 487 U.S. 552, 560 (1988). See also Trimper v. City of Norfolk, 58 F.3d 68, 76 (4th Cir.) (district court in "best position" to calculate whether "duplicative, excessive, or redundant hours should not be compensated"), cert. denied, 116 S.Ct. 535 (1995).

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[1] Even though Hensley was not decided under EAJA, the Court noted that the "standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" 461 U.S. at 433 n. 7.

This Circuit has followed Pierce and recognized that it is required to review the EAJA decisions of the district courts under an abuse of discretion standard, even when a district court's decision about substantial justification is based on purely legal questions:

> Though recognizing that such a decision may involve both factual, legal, and discretionary components, the Pierce Court concluded that, mainly for concerns of judicial administration, a unitary standard that accords the deference traditionally associated with abuse of discretion review was appropriate for all aspects of this decision, including even those that could be characterized as purely legal.

United States v. Paisley, 957 F.2d 1161, 1165 (4th Cir.), cert. denied, 506 U.S. 822 (1992).

Similarly, the Third Circuit has explained that to maximize the efficient use of judicial resources, the district court should initially rule on an entire fee petition, including work performed at the appellate level. It "is a perfect example of the waste of judicial economy which results when petitions are filed separately in different courts." Garcia v. Schweiker, 829 F.2d 396, 398 (3rd Cir. 1987). The Garcia court thus concluded that the district court should be the first court to decide the merits of the entire fee application. "Clearly, judicial resources could have been saved if both petitions were filed in the district court. Any appeals from the judgment below would have then come up together, thereby insuring uniform appellate consideration." Id.

Although CAN cites McCarthy v. Bowen, 824 F.2d 182 (2d Cir. 1987), for the proposition that an EAJA application should be filed with the appellate court, the holding of this case is actually quite limited. First, it stated only that an "application for appellate fees under EAJA should therefore always be presented to the court of appeals." Id. at 183 (emphasis added). It never suggested that fees for district court work should be determined in the first instance by the appellate court, and indeed, it "defer[red] consideration of [appellate fees] until the District Court determine[d] whether the plaintiffs are entitled to EAJA fees in connection

with proceedings in the District Court." Id. at 184. Second, McCarthy was decided before Commissioner, INS v. Jean, 496 U.S. 154, 158-60 (1990), which undercut its reasoning by conclusively holding that the "position" of the United States is "singular" under EAJA, so that the "court need make only one finding about the justification of [the government's] position." In light of the teachings of Hensley, Pierce, and Jean, as well as the interest in judicial economy, it makes much more sense to adopt the Garcia approach and allow the district court to rule on the entire fee petition in the first instance.

Although we have found no cases in the Fourth Circuit explicitly addressing this issue, we note that every EAJA decision we have found from this Court, as a practical matter, arose after a district court initially ruled on an EAJA fee application. See, e.g., Paisley, 957 F.2d at 1165 ("We are required to review this decision of the district court under an abuse of discretion standard."); Hyatt v. Shalala, 6 F.3d 250, 254 (4th Cir. 1993) ("the decision to award attorneys' fees is often an 'amalgam — an exercise of discretion based upon express or implicit findings of fact and conclusions of law about the availability and scope of discretion' ") (citation omitted); Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 140 (4th Cir.) ("we are left only with the task of reviewing the court's exercise of discretion on the mixed question of law and fact whether to award attorney's fees under the EAJA"), cert. denied, 510 U.S. 864 (1993); Payne v. Sullivan, 977 F.2d 900, 903 (4th Cir. 1992) ("Whether to increase the hourly rate ... remains a decision to be made at the discretion of the district court "); Sullivan v. Sullivan, 958 F.2d 574 (4th Cir. 1992); Abernathy v. Clarke, 857 F.2d 237, 239 (4th Cir. 1988).

Therefore, for reasons of sound judicial economy and the policies underlying the abuse of discretion standard required in EAJA cases, and in harmony with this Circuit's regular practice,

CAN's fee application under EAJA should be decided in the first instance by the district court below.

## CONCLUSION

For the foregoing reasons, this Court should remand CAN's fee application to the district court for initial determination.

Respectfully submitted,

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January 16, 1997

FEDERAL ELECTION COMMISSION

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| FEDERAL ELECTION COMMISSION, | ) | |
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| Plaintiff-Appellant, | ) | No. 95-2600 |
| | ) | |
| v. | ) | CERTIFICATE |
| | ) | OF SERVICE |
| CHRISTIAN ACTION NETWORK et al., | ) | |
| | ) | |
| Defendants-Appellees. | ) | |
| | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of January, 1997, I caused to be served by U.S. Mail, postage prepaid, copies of the foregoing Response to Defendants-Appellees' Motion for Determination of Proper Court for EAJA Application of the Federal Election Commission in the above-captioned case on the following counsel for appellees:

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