EQUAL ACCESS TO JUSTICE REFORM ACT OF 2005

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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EQUAL ACCESS TO JUSTICE REFORM ACT OF 2005

TUESDAY, MAY 23, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 4:07 p.m., in Room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chairman of the Subcommittee) presiding.

Mr. SMITH. The Committee on Courts, the Internet and Intellectual Property will come to order

I believe all of our witnesses are here. I am going to recognize myself for an opening statement, then the Ranking Member. And all other Members' opening statements will, without objection, be made a part of the record.

During the debates that preceded the Constitution's ratification, James Madison wrote in the Federalist Number 51:

"In framing a government which is to be administered by men over men, the great difficulty lies in this,—you must first enable the government to control the governed; and in the next place oblige it to control itself.

Today, our Subcommittee will examine the effectiveness of a law, the Equal Access to Justice Act of 1980, known as EAJA, which was enacted by Congress for the purpose of getting the Federal Government to control itself.

The legislative purpose behind EAJA was characterized in the 2004 case of Scarborough versus Principi. Writing for the Court, Justice Ginsburg stated:

"Congress enacted EAJA in 1980 to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government. . . .[Its] aim was to ensure that certain individuals [and] organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved."

The purpose of EAJA was to shift the expense of defending against unreasonable or overzealous government conduct from the backs of individuals and small entities to the Federal Government, which, in some cases, had initiated and pursued the wrongful action.

According to an estimate by the Congressional Research Service, there are approximately 200 fee shifting statutes that Congress has

enacted as exceptions to the general rule that each litigant in a lawsuit ought to bear the expense of their own legal fees.

While EAJA's purpose is similar to other fee shifting statutes, its precise language, unique restrictions, and historical application have caused many to conclude that the law offers a "false hope" of recovery to the vast majority of citizens who are harmed by unreasonable Federal action.

Despite initial estimates by the Department of Justice that its enactment would lead to a $500 million liability over its first 3 years, a 1998 GAO report could only substantiate $3.9 million in costs over that period and a $34 million expense over the first 13 years that the law was on the books.

When combined with concerns that EAJA has been interpreted in a manner that is inconsistent with Congress original intent, this record has caused a large number of diverse organizations to unite in a call for reform.

Organizations as ideologically diverse as the American Civil Liberties Union, the American Conservative Union, the American Trial Lawyers Association, and the U.S. Chamber of Commerce, have endorsed efforts to amend EAJA.

EAJA was enacted to ensure that agencies of the Federal Government take seriously Mr. Madison's imperative that the Government ought to be obliged to control itself. However, not everyone agrees that reforms are warranted, and that is why this hearing will be of special interest.

That concludes my opening remarks. And the gentleman from California, Mr. Berman, is recognized for his.

Mr. BERMAN. Thank you very much, Mr. Chairman, for scheduling the hearing.

While this issue has come up before the Subcommittee in the past, we once again have an opportunity to engage in fresh discussions. Congress enacted the Equal Access to Justice Act in 1980 as a means of ensuring both individuals and organizations the right to effective counsel in vindicating important civil rights and civil liberties protections.

Congress presumably sought to achieve three interconnected goals through the EAJA: one, to provide an incentive for private parties to contest government overreach; two, to deter subsequent government wrongdoing, and; finally, to provide more complete compensation for citizens injured by government action.

Since in most suits the government is the deep pocket and can marshal more resources in litigation than most private non-institutional parties, private parties may not be able to afford protracted litigation against the government.

The goal of the Equal Access to Justice Act was to make the justice system more accessible to individuals of modest means, small businesses, and nonprofit organizations, by allowing the recovery of their attorney fees when they prevail in disputes with the Federal Government.

The ability to obtain attorneys fees is most often found in civil rights, environmental protection and consumer protection statues in order to help equalize contests between the Federal Government and private parties. But the Equal Access to Justice Act does not

function in exactly the same way as those fee shifting provisions do.

Prevailing here in litigation does not automatically result in an award of attorneys fees. We will hear more about those criteria and how we are changing those criteria, I would think, in the hearing. Although this act has been an important step in providing access to counsel, concerns have been raised regarding the substantial justification defense. Although I also have heard concerns raised about removing the substantial justification defense. I look forward to hearing more about that in this hearing.

The hourly cap rate on attorneys fees of $125, and what constitutes a small business. Even though EAJA has arguably approved the accessibility of the justice system for small parties, we should discuss whether potential barriers remain and what changes, if any, should be made to the mechanism used to determine the recovery of fees.

Thank you.

Mr. SMITH. Thank you, Mr. Berman.

Mr. SMITH. I would like also to thank the gentleman from Virginia, Mr. Forbes, and the gentleman from California, Mr. Schiff, for being in attendance today at this hearing. I, furthermore, want to recognize the gentleman who actually wrote the legislation on which we are having the hearing today and that is the gentleman from Illinois, Mr. Manzullo, for stopping by and joining us as well.

And I may well be asking questions on his behalf when we get to that point. But I appreciate his initiative and his leadership in regard to writing this legislation and seeing it to the point where we are now having a hearing on it.

Before we hear from our witnesses today I would like to invite you to stand and be sworn in if you would.

[Witnesses sworn.]

Mr. SMITH. Our first witness is Ryan Bounds, chief of staff in the Office of Legal Policy at the Department of Justice. In that capacity, he assists the Assistant Attorney General for legal policy in developing and coordinating the Department's views on potential improvements in the civil justice system.

Before joining the Office of Legal Policy in 2004, Mr. Bounds served as an associate at a law firm and as a clerk to a circuit court judge. He holds a bachelor's degree from Stanford University and a JD from Yale Law School.

Our second witness is Michael Farris, who is chairman and general counsel to the Home School Legal Defense Association, an organization with 80,000 member families that he founded in 1983. Mr. Farris is a Constitutional lawyer with extensive appellate experience in the U.S. Supreme Court, seven U.S. circuit courts of appeal, and 10 State supreme courts. He is a prolific author who has written extensively on Constitutional law issues.

Mr. Farris is an honors graduate of Gonzaga University School of Law. He received his BA degree in political science from Western Washington State College, now known as Western Washington University.

Our next witness is Jonathan Hiatt, who is the general counsel of the AFL-CIO, a position in which he has served for 10 years. Prior to that, Mr. Hiatt served as the general counsel of the Service

Employees International Union, and as a partner in a Boston-based union-side labor law firm.

Mr. Hiatt is a graduate of Boalt Hall School of Law at the University of California Berkeley, and Harvard College.

Our final witness is James Knott, who is the President and CEO of Riverdale Mills Corporation. Riverdale Mills Corporation is in Northbridge, Massachusetts.

Mr. Knott also serves on the board of directors of the National Association of Manufacturers. He studied mechanical engineering at Northeastern University and has an economics degree from Harvard.

In addition, he has studied at the Harvard Business School, the Army War College, and was earlier this month awarded an honorary doctorate of science by the University of Maine.

Mr. Knott will relate to the Members of the Subcommittee his own experience with an agency of the Federal Government that targeted him and his business based upon an anonymous tip, an experience that led to a criminal indictment and the threat of a $1.5 million penalty and 6 years in jail.

Welcome to you all. We have your written statements, and without objection your entire written statements will be made a part of the record. But please limit your oral testimony to 5 minutes.

And Mr. Bounds we will begin with you.

STATEMENT OF RYAN BOUNDS, CHIEF OF STAFF, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE

Mr. BOUNDS. Thank you, Mr. Chairman, Mr. Ranking Member, and other Members of the Subcommittee. Thank you for allowing me to testify before you today with respect to the Justice Department's views on H.R. 435, the Equal Access to Justice Reform Act.

The Department of Justice opposes this bill. Before explaining why, I would like to emphasize that the Department shares the desire of H.R. 435's proponents to reduce the burden that excessive litigation and unjust enforcement actions impose on small businesses and individuals and on the courts.

Unfortunately, H.R. 435 will not advance this purpose. Indeed, the enactment of H.R. 435 would create perverse incentives for small businesses, non-profit organizations and individuals to file and to prolong lawsuits and for government agencies that are sued to adhere to rather than reconsider their positions in close cases.

By expanding the number of parties who can recover attorneys fees under the act and the amount of fees that can be recovered, the bill would obviously make litigation with the government cheaper and more frequent. H.R. 435 would thus generate more litigation, not less, between the government on the one hand and small businesses, non-profit organizations, and individuals on the other.

Ultimately, such reliance on lawsuits to guide government policymaking and enforcement decisions substitutes litigation for the political process, a policy that the Justice Department does not support.

H.R. 435 will induce unwise litigation in more subtle ways as well. The bill requires the government to pay attorneys fees to a prevailing party even when the government's action is substan-

tially justified. Therefore, eligible parties will have a fairly good prospect of recovering attorneys fees in close cases, such as those involving new statutes or the application of existing law in novel situations.

In such cases, eligible parties and the government will make equally informed predictions of judicial resolution of the issue, but eligible parties will have simple incentives to pursue litigation. They do not have to reimburse the government for its costs if they lose, and they have individualized stakes in the outcome.

The Department strongly opposes this change not only because it would increase litigation, but because it does not reflect the reality that enforcing the law often requires making judgment calls in close cases. Where a government agency is required to pay attorneys fees in a substantial proportion of such cases, those agencies would simply be deterred from making close calls at all. The government would, at the margin, be relatively timid in enforcing the law, and private parties would exploit that timidity. For this very reason, Congress provided for a substantial justification defense under EAJA in the first place, noting that an automatic fee shifting rule would have a "chilling" effect on proper government enforcement efforts.

To appreciate the perils of timidity, consider immigration enforcement. The Department of Homeland Security's efforts to detain and to remove illegal aliens in the United States has generated more than 13,000 court cases in the last fiscal year as aliens sought to remain at large in the United States.

The government loses some proportion of these cases even when its actions are substantially justified. This happened, for instance, in a 2001 case in which the government sought to remove an illegal alien who was revealed in classified evidence to have been involved in the 1993 bombing of the World Trade Center. The alien successfully challenged the reliance on the classified evidence. By making the government pay attorneys fees in circumstances like these, which the government did not have to pay under EAJA as it is currently drafted, H.R. 435 will either discourage attempts at robust enforcement of immigration laws or divert resources from enforcement to paying for aliens' attorneys.

Neither result is consistent with seeking either to prevent illegal immigration or to combat terrorism. Every time as a deterrent for best law enforcement, H.R. 435 will induce agencies to stick to positions they would otherwise abandon in order to avoid liability for attorneys fees. This result stems from the bill's expansion of the definition of a prevailing party entitled to fees to include any party whose claims against the government are catalysts for voluntary or unilateral changes in policies that the parties sought.

If changing policy would be a part of the agency's assessment, to be legally compelled, the agency will avoid making the change and paying potentially exorbitant attorneys fees. Instead, the agency will successfully conclude litigation and then change its policy for free.

H.R. 435 would thus chill legitimate enforcement activity, encourage and prolong litigation with the government, and impose huge costs on agency budgets. The Department of Justice strongly opposes this legislation.

In the end, political responsive oversight by the President and the Congress can more effectively restrain governmental overzealousness and intransigence in litigation and attorneys fees.

Thank you for the opportunity to present the Department's views on H.R. 435, and I am ready and willing to answer whatever questions you may have. Thank you.

Mr. SMITH. Thank you, Mr. Bounds.

[The prepared statement of Mr. Bounds follows:]

PREPARED STATEMENT OF RYAN W. BOUNDS

Department of Justice

STATEMENT OF
RYAN W. BOUNDS
CHIEF OF STAFF
OFFICE OF LEGAL POLICY
DEPARTMENT OF JUSTICE

BEFORE
THE SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING
H.R. 435, THE EQUAL ACCESS TO JUSTICE REFORM ACT

MAY 23, 2006

Mr. Chairman, Mr. Ranking Member, and other members of the Subcommittee, thank you for allowing me to testify before you today. My name is Ryan Bounds, and I am the Chief of Staff of the Office of Legal Policy in the Department of Justice. I will be presenting the Department's principal views on H.R. 435, the Equal Access to Justice Reform Act. The bill would radically expand the Government's liability for attorneys' fees under the Equal Access to Justice Act (referred to herein as "EAJA" or "the Act"). Most notably, the bill would require the Government to pay a prevailing party's fees even when the Government's position was "substantially justified" based on the facts and law at issue. The bill would also require the Government to pay a party's attorneys' fees even when that party did not prevail in litigation but merely obtained a settlement or voluntary change in the Government's position. In addition, the bill would make the Government liable for attorneys' fees at market rates well in excess of the current presumptive cap of $125 per hour and would expand the universe of parties to whom the Government could be held liable for attorneys' fees under the Act.

I would like to begin by emphasizing that the Administration and the Department of Justice share the desire of H.R. 435's proponents to reduce the burden that frivolous lawsuits and unjustified litigation impose on small businesses and individuals. Just last year, for instance, the Administration supported and the President signed the Class Action Fairness Act and the

Protection of Lawful Commerce in Arms Act. The Administration has similarly supported enactment of the Medical Liability Reform Act and asbestos litigation reform. The Department appreciates the Subcommittee's ongoing efforts to reform and to improve the civil litigation system and will continue to work with the Subcommittee and the full Committee to enact these important measures and others like them.

Notwithstanding the laudable goals of those who support this bill, the Department of Justice must oppose it. The enactment of H.R. 435 would trigger at least four negative consequences. First, it would impose additional costs on the Government by way of attorneys' fees and litigation expenses. Second, it would induce more private lawsuits against the Government, despite the fact that lawsuits are a notoriously inefficient and costly means of settling disputes. Third, it would deter agencies from applying existing law to novel situations, leaving gaps in the law as technology develops and practices change. Fourth, it would deter agencies from voluntarily settling with a party or changing their position after a lawsuit is filed (even in the face of compelling policy justifications for doing so).

These negative consequences would not be offset by any significant improvements in the way EAJA works. In fact, several of the circumstances that are cited as problems and relied upon as justifications for amending EAJA are inconsistent with the Justice Department's experience with the Act. We believe that, as currently written, EAJA has achieved its intended goal of making the judicial system more accessible to small businesses, non-profit organizations, and individuals of modest means. Contrary to the assertions of some critics, the Act has not led to significant collateral litigation over fees, because the Government must stand on the same justifications for its position that it offered in the primary litigation. The Act also has not precluded lawsuits in markets where fees necessarily exceed the statutory cap of $125 per hour, because courts may—and frequently do—increase that cap to reflect increases in the cost of living and other special factors. Moreover, the Act does not typically allow a defending agency to escape the costs of its unreasonable conduct by defraying fee awards with monies from the Treasury's Judgment Fund. Indeed, the overwhelming majority of fee awards under the Act are paid out of the defending agency's appropriations. The current statute thus permits its intended beneficiaries to recover reasonable attorneys' fees directly from agencies that have acted without substantial justification and thereby deters agencies from acting unreasonably. In short, the Act largely fulfills its purpose.

In this testimony, I would like to canvas the most important changes that H.R. 435 would make to EAJA and explain why the Department expects those changes to be counterproductive.

I. Substantial Justification and Special Circumstances in Which Attorneys' Fee Awards Would Be Unjust

Subparagraphs 4(a)(1) and (a)(2) of the bill would amend the Act to allow prevailing parties to recover attorneys' fees against a Government agency even when the agency's position was substantially justified and when special circumstances otherwise make a fee award unjust. The Department very strongly opposes this aspect of the bill. In effect, it would make an agency

liable for attorneys' fees without regard to how close the case is or how reasonable or well-intentioned the agency's position was.

This change would increase agency litigation costs at a time when agency budgets are becoming ever more tightly constrained. Although the additional costs cannot be estimated with any precision, the experience of the Office of Foreign Litigation ("OFL") may shed light on the bill's likely fiscal impact. OFL handles all foreign cases for the Department, and most foreign jurisdictions make the losing party pay attorneys' fees. From a partial analysis of OFL's records, it appears that fee-shifting increases the Government's costs of paying adverse judgments by approximately 15 to 25 percent in most cases. In some cases, of course, the marginal cost may be much greater. In one recent labor case in Italy, for instance, the payment to the attorney was nearly double the amount of the underlying judgment for the adverse party.

By making fee-shifting automatic, H.R. 435 would require fees to be awarded to a prevailing party even when the Government was obligated to take a position in litigation and there was no controlling law, the law was unclear, or the authorities were divided. In this respect, the bill ignores the reality of Government litigation, which is that the Government must often take positions on new and ambiguous statutes and has to "build" the law by litigating the same issue in several circuits. The Government should not be required to pay attorneys' fees while it is in the process of resolving the scope of new laws or the application of existing laws in new areas. At the margin, such a requirement would simply deter the Government from enforcing the law in novel contexts and testing the scope of new statutes. Indeed, Congress provided for a "substantial justification" and "special circumstances" defenses under EAJA expressly because an automatic fee-shifting rule would have a "chilling effect on proper government enforcement efforts."[1]

To the extent that the automatic fee-shifting rule established by H.R. 435 does not entirely deter the Government from enforcing the law in close cases and novel circumstances, it will induce private litigants to bring more lawsuits against the Government in those contexts. Indeed, that result seems to be the very aim of the provision—to make it less expensive for

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[1] The legislative history of EAJA shows that the substantial justification standard was specifically chosen over a variety of alternatives, including a mandatory award to prevailing parties. A system of mandatory awards was rejected because "it did not account for the reasonable and legitimate exercise of governmental functions and thus might have a chilling effect on proper government enforcement efforts." *See* H.R. REP. No. 96-1418 at 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4992. With respect to "special circumstances," the legislative history explains that "[t]his 'safety valve' helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made." H.R. REP. No. 96-1418, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990; S. REP. No. 96-253, at 7 (1979).

private parties to litigate the propriety of the Government's position whenever they have some prospect of prevailing in court. As a result, this reform may increase the overall burden of litigation rather than reduce it.

In addition to these general considerations, the automatic fee-shifting rule provided for in H.R. 435 is likely to wreak havoc on the conduct of critical enforcement proceedings. Foremost among these are *qui tam* lawsuits to recover for fraud against the Government under the False Claims Act. Given the billions of dollars of taxpayers' monies lost to fraud and the integrity of the federal programs at stake, the Government simply cannot refuse to pursue complicated cases for fear of having to pay EAJA fees in every case it loses. Bringing the Government's resources and expertise to bear on these cases is vital: 95% of *qui tam* recoveries are in cases in which the Government intervenes. Moreover, Congress was so concerned with strengthening fraud enforcement under the False Claims Act that the1986 amendments to the Act specifically provided that a prevailing defendant could recover legal costs from a private whistleblower in a *qui tam* case only if the court found the suit to be "clearly frivolous, clearly vexatious or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(3). It makes no sense to extend this level of protection to private whistleblowers while leaving the Government liable for uncapped EAJA fees in every unsuccessful *qui tam* case in which it participates. At least at the margins, this bill will deter the Government from intervening in close *qui tam* cases, even though it is exactly those cases in which the Government's expertise would be most valuable in exposing and recovering for fraud. Worse yet, prevailing defendants in these cases will predictably argue that the Government's having declined to intervene is not enough to protect it from liability for attorneys' fees under EAJA as amended by H.R. 435, because the private whistleblower brought the action in the name of and on behalf of the United States.

Eliminating the substantial justification defense is likely to undermine civil enforcement of immigration laws as well. Without that defense, the Government will face liability for potentially large fee awards in an unprecedented number of immigration cases. In one such case, *Kiareldeen v. Ashcroft*, 273 F.3d 542 (3d Cir. 2001), a terrorist alien prevailed on a habeas corpus petition after the Government attempted to remove him from the United States. The Government had relied on classified evidence, obtained by the FBI's Joint Terrorism Task Force, that suggested that the alien had been involved in the 1993 bombing of the World Trade Center and had made threats against the Attorney General. The district court not only granted the alien's habeas petition but awarded him attorneys' fees in excess of $110,000 under EAJA. The Third Circuit reversed the award of attorneys' fees, holding that the Government had proceeded with substantial justification, but that outcome would not have been possible if H.R. 435 had been in effect.

Not every immigration case involves fees as high as those at issue in *Kiareldeen* (though fees will rise under H.R. 435), but eliminating the substantial justification defense will nonetheless have dramatic implications for civil immigration enforcement. The Department of Homeland Security's efforts to detain and remove illegal aliens from the United States gave rise to more than 14,000 cases in the last fiscal year as aliens challenged the legal justification for the Department's actions in the federal circuit courts. The volume of such challenges are likely to

increase markedly if current efforts to amend the Immigration and Nationality Act are successful, because aliens and their attorneys will want to test the scope and meaning of the new provisions in the courts. Inevitably, the Government will lose some proportion of those cases even when the Department can point to a substantial—but not ironclad—justification for its position. By making the Government pay substantial attorneys' fees in those circumstances, which are pervasive in the complex, politically sensitive, and constantly changing field of immigration law, H.R. 435 will either discourage attempts at robust enforcement or divert substantial resources from enforcement to paying for aliens' trial lawyers. Neither result is consistent with the aim of combating illegal immigration.

The elimination of the substantial justification defense would also directly affect the strength of the Social Security Trust Funds. Like immigration cases, challenges to Social Security decisions would constitute a significant portion of the litigation affected by H.R. 435. EAJA attorneys' fees in Social Security cases are paid from the Social Security Administration's administrative expense account, and that account, in turn, is proportionately funded by the accounts from which Social Security benefits are paid. Accordingly, the increased availability of attorneys' fee awards in Social Security lawsuits—from awards in *some* successful lawsuits to awards in *all* successful lawsuits—will simply increase the amount of funds that are diverted from the Social Security Trust Funds to lawyers for Social Security claimants.

In addition, the elimination of the substantial justification defense would serve as an incentive for claimants to file suit against the Social Security Commissioner in more marginal cases. Even assuming that the Government would prevail in all of these cases and thus avoid an increase in the numbers of fee awards (which is unrealistic), the increase in the number of lawsuits against the Commissioner would increase the resources devoted to defending against them. For cases challenging the denial of title II benefits, these administrative expenses would come from the Social Security Title II Trust Fund.

Although it may be argued that courts liberally award attorneys' fees against the Social Security Administration even under the current version of the Act, the existence of the substantial justification standard is important for settlement purposes. The existence of the defense increases the risk that prevailing claimants will not receive an award and thus gives them an incentive to settle for discounted fees. Although difficult to estimate exactly, the Social Security Administration believes these negotiated settlements result in significant savings. These savings would be lost if the substantial justification defense were eliminated. A similar effect is predicted to result in the diversion of scarce resources from benefits to administrative expenses and litigation in veterans programs as well.

Eliminating the substantial justification defense will have deleterious consequences in another area of litigation in which Congress should have a particular interest: constitutional challenges to federal statutes. In light of the separation of powers, the Department of Justice must defend the laws that Congress enacts if there is any reasonable basis for doing so. If a statute is ultimately invalidated by the courts, as statutes occasionally are, the repeal of the substantial justification defense under section 4 of the bill may result in the Government's

having to pay attorneys' fees to prevailing parties. Consider *Gonzales v. Free Speech Coalition*, 408 F.3d 613 (9th Cir. 2005). In that case, a trade association of businesses involved in the production and distribution of "adult-oriented material" challenged certain provisions of the Child Pornography Prevention Act of 1996 (CPPA). Ultimately, the Supreme Court held that certain provisions were overbroad and unconstitutional. After the Supreme Court's decision, the Free Speech Coalition filed for attorneys' fees under EAJA. The District Court for the Northern District of California found that the Government was not "substantially justified in defending the CPPA because the "constitutional flaw in the CPPA was recognizable from the start" and awarded the Coalition $143,243 in attorneys' fees. The Ninth Circuit reversed and held that the Government's position was substantially justified and that the Coalition was not entitled to EAJA fees. If that case had been decided under the automatic fee-shifting rule contemplated by H.R. 435, the pornographers' attorneys would have been paid by the Government rather than their clients. As this example demonstrates, the enactment of H.R. 435 will result in Congress's subsidizing challenges to its own statutes.

Finally, deleting the substantial justification defense would constitute a fundamental departure from EAJA's original purpose, the deterrence of unreasonable agency conduct. From its perspective as the Government's litigator, the Department of Justice believes this change is unwarranted and also in conflict with the requirement that fee awards be paid out of agency appropriations. To deter unreasonable agency conduct, the Act already provides that awards under 28 U.S.C. § 2412(d) and 5 U.S.C. § 504(a)(1) and (4) are to be paid from the defending agencies' own funds and not from the Judgment Fund. *See* 28 U.S.C. § 2412(d)(4); 5 U.S.C. §§ 504(a)(4), (d). In the absence of the substantial justification defense, however, EAJA becomes simply an automatic fee-shifting statute for all eligible parties that prevail in their litigation against the Government rather than a deterrent against unreasonable agency actions. Consequently, no useful purpose is served by requiring an agency involved in litigation to pay a resulting fee award out of its own appropriations. If the substantial justification defense is eliminated, we believe that attorneys' fees should be paid from the Judgment Fund, as are the awards under other automatic fee-shifting statutes.

II. Rate Caps

Subsection 4(c) of H.R. 435 would eliminate the$125-per-hour cap on attorneys' fees in both judicial and administrative proceedings. The Department of Justice is unaware of any empirical data indicating that meritorious actions are not pursued because of the cap on hourly rates, and the Department opposes repealing the cap for at least two reasons.

First, eliminating the hourly rate cap to accommodate complex and high-risk litigation would not reflect other factors that affect compensation in civil litigation: the number of hours worked and the client's ability to pay. The Department believes it is rare that private sector lawyers are paid for 100% of the time devoted to a particular case—particularly in large cases. Attorneys and clients negotiate bills down to a reasonable amount that the client is willing or able to pay. Additionally, attorneys make decisions about how much time to devote a particular issue or case based, in part, on what the client will pay. Under subsection 4(c), though, there

would be little incentive to apply these market controls to Government litigation.

Second, EAJA currently permits courts to award attorneys' fees in excess of the rate cap in two situations: First, a court can raise the hourly fee on the basis of the cost of living. Second, the court can raise the cap to accommodate a special factor, such as the limited availability of attorneys in a particular practice area. The Department believes that it is better to leave the amount of the hourly fee within the limited discretion of the court rather than burden the Federal agency with steep "market rates" for hourly fees. The rate cap strikes an appropriate balance between the benefits of allowing the recovery of attorneys' fees against the United States and the risk of runaway attorneys' fees where a litigant chooses to use highly paid and sophisticated attorneys to handle routine litigation against the Government.

In the Government's experience, courts routinely take advantage of EAJA's current discretionary authority to exceed the hourly rate cap. For example, the court held that an hourly rate in excess of $125 per hour was justified based on an increase in the cost of living in *Former Employees of Tyco Electronics Fiber Optics Division v. U.S. Department of Labor*, 350 F. Supp. 2d 1075, 1093 (C.I.T. 2004). Other examples abound. *See, e.g., Dewalt v. Sullivan*, 963 F.2d 27 (3d Cir. 1992); *Masters v. Nelson*, 105 F.3d 708 (D.C. Cir. 1997); *Kerin v. U.S.P.S.*, 218 F.3d 185 (2d Cir. 2000); *Greenidge v. Barnhart*, 2005 WL 357318 (N.D.N.Y. 2005).

III. Payment from Agency Appropriations

Subparagraphs 4(f)(1) and (f)(2) would prohibit the payment of EAJA funds and expenses out of the "claims and judgments account of the Treasury from funds appropriated pursuant to section 1304 of title 31." This prohibition would apply both to adversary adjudications at the administrative level and to judicial proceedings. I should emphasize that, under current law, EAJA awards are paid from funds appropriated to the non-prevailing agency. Having said this, routinely awarding legal fees from a non-prevailing agency's budget can create perverse incentives for agencies to take the position least likely to result in litigation rather than the position best designed to implement public policy and the underlying statutory scheme.

Even assuming that the number of EAJA applications remained constant, the lack of a substantial justification defense will result in fees' being awarded in a greater proportion of cases, and the lack of a rate cap will substantially increase the amount of awards when they are made. The resulting increase in liability for fees could have an enormous financial impact on already overburdened agencies. If these changes—which the Department of Justice believes are unwarranted—are imposed, then the awards should be paid from the Judgment Fund.

Additionally, as the Department has noted, under current law, both fees and expenses awarded under 28 U.S.C. § 2412(d) and "bad faith" fees awarded under 28 U.S.C. § 2412(b) are paid out of the agency's funds. In the Department's view, if either the substantial justification or the fee cap were eliminated, then the award should be paid out of the Judgment Fund. This additional change would create symmetry between subsections 2412(b) and (d) because, currently, fee awards under subsection 2412(b) (other than "bad faith" awards) are paid out of

the Judgment Fund. *See* 28 U.S.C. §§ 2412(c)(2), 2414. In addition, fees awarded against the Government under a host of other fee-shifting statutes (including the fee-shifting provision of the Clean Air Act) have historically been paid from the Judgment Fund.

IV. Tax Litigation

Subsection 4(g) of the bill would eliminate the provisions of EAJA stating that EAJA fees and expenses do not apply in cases where 26 U.S.C. § 7430 (an Internal Revenue Code fee provision) applies. *See* 5 U.S.C. § 504(f) and 28 U.S.C. § 2412(e). By its terms, EAJA applies "[e]xcept as otherwise specifically provided by statute." 28 U.S.C. § 2412(d)(1)(A). Elimination of subsection 2412(e) would not change the fact that 26 U.S.C. § 7430 is a Federal statute providing for the award of fees, expenses, and costs in tax cases and that section7430, rather than the EAJA, would continue to apply to tax proceedings. At a minimum, the elimination of this language calls into question whether section 7430 would remain the exclusive remedy for seeking fees and costs in tax proceedings, or whether a taxpayer would be permitted to pick and choose between the two statutes. Accordingly, the Department opposes the amendment to this provision.

Section 7430 was enacted to recognize that differences between tax proceedings and other civil actions to which the United States is a party justify different provisions for recovering litigation costs. For example, section 7430 sets out specific provisions for obtaining administrative costs that are beneficial to taxpayers and that do not appear in EAJA. Further, in recognition of the importance of the administrative process in resolving tax controversies, section 7430 includes a unique requirement that taxpayers exhaust administrative remedies in order to be eligible for an award. As explained in the legislative history of section 7430, the requirement to exhaust administrative remedies preserves "the role that the administrative appeals process plays in the resolution of tax disputes." H.R. Rep. No. 97-404, 97th Cong., 1st Sess. 13 (1981). In addition, there is a question as to whether EAJA even covers proceedings in the Tax Court. Thus, to the extent the proposed legislation purports to allow for the substitution of EAJA provisions in tax litigation, the proposed provisions may not be effective for Tax Court proceedings. In any event, the Department believes section 7430 should remain the exclusive remedy with respect to claims for costs in tax cases and that EAJA should retain the clarifying language in section 2412(e) to this effect.

V. Definition of Prevailing Party

Among other things, section 5 would overturn *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001), by amending the definition of "prevailing party" found in 5 U.S.C. § 504(b)(1) and 28 U.S.C. § 2412(d)(2)(H) to recognize the "catalyst theory" as a basis for achieving prevailing party status. In *Buckhannon*, the Court rejected the catalyst theory (which the majority of circuits had endorsed) and held that a party can obtain prevailing party status only by obtaining a favorable judgment or relief through a consent decree or court-approved settlement. Under *Buckhannon*, a plaintiff who obtained relief only because the defendant voluntarily provided the relief that the plaintiff sought

was *not* a prevailing party.

The catalyst theory had held sway for the previous 15 to 20 years because it had been embraced by almost all of the federal courts of appeals. The Supreme Court's rejection of the theory has reduced the Government's exposure to fee liability in a significant category of cases, however, and has spared the Government from litigating whether governmental actions outside of litigation but resulting in some relief to a particular plaintiff had been caused by that party's lawsuit. The legislative overruling of *Buckhannon* will restore those costs to Government litigation. Moreover, it will encourage attorneys to file claims that they normally would decline, because those attorneys will believe that the Government will pay something if they can prevail, settle, *or* achieve any change in the Government's conduct that allows them to claim catalyst status. It also would deter agencies from making voluntary changes that happen to benefit the claimant.

In addition to reducing the parties' incentives to settle court litigation, the combination of the elimination of the substantial justification defense with the enactment of the catalyst theory may negatively affect settlement of contract disputes or taxpayer litigation at the agency level. If any change in policy that is made after a lawsuit is filed can be a basis for attorneys' fees, and there is no substantial justification defense, the incentive will be for contractors to avoid incurring fees and expenses in attempting to negotiate a resolution of a dispute with an agency prior to filing the lawsuit. Instead, the Department of Justice anticipates that many plaintiffs will simply file their lawsuits without delay so that they immediately accrue attorneys' fees that they may eventually recover.

In some circumstances, elimination of the catalyst theory will actually encourage and fund activists who seek to compel the Government to bring additional enforcement actions against individuals and small businesses. For instance, in *Conservation Counsel for Hawaii v. Norton*, a plaintiff brought suit in federal district court against the U.S. Fish and Wildlife Service, alleging that the Service's failure to take final action on a petition for the designation of critical habitat of seventeen species of Hawaiian forest birds constituted action "unlawfully withheld and unreasonably delayed" under the Administrative Procedure Act. Under a joint stipulation of dismissal filed with the Court, the parties agreed in 2001 to dismiss the case as moot without prejudice to Plaintiff's ability to seek attorneys' fees. Shortly thereafter, however, and before fees were agreed to, the *Buckhannon* decision was issued and the plaintiff withdrew its fee request. If the pre-*Buckhannon* approach of many appellate courts were statutorily reinstated, similar future plaintiffs would be able to recover attorneys' fees for suits seeking to prompt Government enforcement actions that might otherwise not be brought. Such a result would only add to the litigation and regulatory burden borne by small businesses.

A specific example of the application of the catalyst theory serves to demonstrate its adverse effects. The case of *Yacyshyn v. Principi*, No. 04-CV-2091 (N.D. Ohio), arose from an initial effort by the Department of Veterans Affairs to report a doctor to the National Practitioner Data Bank, which consolidates reports on doctors who lose or settle medical malpractice cases or are subjected to discipline by State licensing boards. The District Court denied the Department's

motion to dismiss a lawsuit filed by the doctor and ordered discovery. In the meantime, the Department completed its review of the doctor's conduct and decided not to make the report, thereby mooting the case. The doctor was represented by a large law firm, and under H.R. 435, the EAJA award would have been well over $100,000. After objecting to dismissal unless attorneys' fees were paid, however, the doctor's counsel reviewed *Buckhannon* and willingly abandoned the attempt to obtain fees. Under H.R. 435, the doctor would have recovered attorneys' fees for government action that was not driven by litigation, making his unnecessary lawsuit free to him but expensive to the United States.

VI. Conclusion

H.R. 435 would increase the risks of litigation for the Government, chill legitimate enforcement activities, prolong lawsuits, induce additional lawsuits, and impose huge costs on agency budgets. The Department of Justice strongly opposes this legislation.

Thank you for the opportunity to present the Department's views. I am now ready to answer any questions you may have.

Mr. SMITH. Mr. Farris.

STATEMENT OF MICHAEL FARRIS, J.D., CHAIRMAN AND GENERAL COUNSEL, HOME SCHOOL LEGAL DEFENSE ASSOCIATION

Mr. FARRIS. Chairman Smith, Ranking Member Berman, Members of the Subcommittee, thank you for inviting me to testify on H.R. 435, the Equal Access to Justice Reform Act of 2005.

I am here today to speak in strong support of this bill. The Home School Legal Defense Association normally litigates against State and local governments. We often make claims under section 1988 for attorneys fees when the State and local officials have violated either the Constitution or the civil rights statutes of the United States.

We have never made an EAJA claim, and so, we appear today not in self-interest of any sort, but simply out of principle that the justice of the situation requires the Federal Government to essentially follow the same rules that State and local governments are expected to follow under section 1988 of the Civil Rights Act.

This bill is about small parties having a chance in court against the Federal Government. It is about small parties having a chance to protect and defend their legal rights when they are violated by the Federal Government. This act is designed to fix the good intentions of the EAJA, but I would submit that the current law is terribly flawed.

The reason it is flawed is basically in the use of the substantially justified rule, which imposes an artificial barrier on the ability to collect attorneys fees. Most people would say the common sense of the situation is, if you prove that the government has violated the law of the United States or the Constitution of the United States, the Federal Government simply ought to pay for the attorney fees of the prevailing party. That is not the case under this substantially justified rule.

The intentions of the officials are weighed, and it imposes a barrier that is simply not in place in the case of State and local litigation. The "parade of horribles" that we hear against this legislation and the rare cases that are offered for justification for opposing this legislation would be true in principle, at least, in State and local governments as well. The State and local governments would be bankrupted in their ability to have legitimate law enforced, activities have been curtailed, or we simply make the State or local governments pay attorneys fees when it is proven that they violate the law or the Constitution of the United States.

Just plain equity ought to say that the Federal Government ought to obey the same rules that it imposes on State and local governments. There is no moral justification for this Congress to impose a rule in State and local governments, that it is not willing to follow for itself.

Now, State and local governments have to not only pay attorney fees whenever the other side is the prevailing party, they have to pay at market rates. The $125-an-hour rate for attorneys may have been the market rate at one point in time, or is a general approximation, but it is simply not the case anymore. You would not be able to pay in most law firms a brand new lawyer fresh out of law

school at that rate, much less someone who has 20 or 30 years of experience.

Again, it is one more burden upon the Federal Government shouldering its responsibilities when it has violated the law. Also, rather than encouraging litigation, this bill would discourage the ongoing pursuit of litigation when it is obvious who should win and who should lose. If the Federal Government is willing to say, okay, we violated the law, we are going to give you a consent decree or something like that, the incentive right now is to continue the case on to litigation, not take the consent decree because you lose your ability to recover attorney fees for all of the hundreds and perhaps thousands of hours that you have invested in the case.

This promotes settlement. This promotes getting rid of the cases clogging our courts. And so the definition of prevailing party needs to be shifted so that the plaintiffs have an incentive to settle up their case and to get on with their life rather than simply litigating to the end for the sole reason of being able to recover their attorney fees.

The thing that strikes me most of all is if there is this "parade of horribles" what it indicates is not that the Federal Government is going to have to pay all of these attorney's fees, but there is an epidemic of illegal activity on the part of the Federal Government, that we are violating, our government is violating the Constitution of the United States, or the laws of the United States so often that we have to worry about how many millions of dollars in attorneys fees we are going to have to pay.

I think that the incentive should be on the part, as the Chairman correctly read, from James Madison, the government, first of all, needs to obey the law. When it does not, it should have to pay the attorneys fees of those who have suffered in that illegal activity.

Thank you very much.

Mr. SMITH. Thank you, Mr. Farris.

[The prepared statement of Mr. Farris follows:]

PREPARED STATEMENT OF MICHAEL P. FARRIS

Chairman Smith, Ranking Member Berman, and Members of the Subcommittee:

My name is Michael P. Farris. Thank you for inviting me testify on H.R. 435, the Equal Access to Justice Reform Act of 2005. I am here today to speak in strong support of this bill.

For the record, I founded and continue to serve as Chairman for the Home School Legal Defense Association (HSLDA), the largest home schooling organization in the nation. We represent over 80,000 member families, with approximately 320,000 children. We are informally affiliated with dozens of other home schooling organizations. It is estimated that there are over two million children being homeschooled in this country today. I am also the founding President of Patrick Henry College, where I teach constitutional law. Today, I speak only on behalf of HSLDA, a 501 (c)(4) organization.

This bill is about small parties having a chance in court against the Federal Government. It is about small parties having a chance to protect and defend their legal rights when they are violated by the Federal Government. The Equal Access to Justice Act of 1980 (EAJA) was designed with that purpose, but it is terribly flawed. H.R. 435 would fix it.

The ability to pursue justice and fairness is not a partisan issue. Nor is this bill partisan. In fact, HSLDA is just one of many groups from across the political spectrum giving its strong support to this bill—groups ranging from the American Civil Liberties Union and Sierra Club to the Heritage Foundation and American Conservative Union to what appears to be the entire business community. The breadth and diversity of this support is rare, but not unique.

In the early 1990s, I had the honor to be the co-chairman of the drafting committee for the Coalition for the Free Exercise of Religion, which helped draft and pass the Religious Freedom Restoration Act of 1993 (RFRA). That Coalition was as broad as the present EAJA Coalition and had many of the same participants. It was gratifying to work side-by-side with attorneys from organizations I often face as opponents in the courtroom. While we disagreed and still disagree on the outcome of many cases, we share an unwavering commitment to the principle that the free exercise of religion should be treated as a fundamental freedom.

We also share an unwavering commitment to the ability to assert and defend and protect such fundamental freedoms in the courts. That's why we incorporated into the RFRA the Civil Rights Attorneys Fee Awards Act of 1976, 42 U.S.C. 1988 ("Section 1988"), the primary fee-shifting statute against State and local governments, which allows prevailing parties under the RFRA to recover their attorneys' fees at the end of the case.

The Constitution serves as a restraint on government, not private parties. It protects some rights explicitly from government infringement. Other rights it protects implicitly by restraining the powers of the government. Many statutes serve similar purposes. When rights guaranteed by the Constitution and such statutes are infringed, the infringer always is the government. The party filing pleadings or taking action against you is the government. The party across the aisle in the courtroom is the government. The party threatening your freedoms is the government.

Freedom means little if there is no real way to stop the government from violating the higher laws designed to restrain its power. But ordinary Americans cannot resist the government for very long. With its skilled litigators and virtually unlimited resources, the government can outlast most litigants. There must be a leveling mechanism that gives a small party at least a prayer against the government in court.

Section 1988 was among the first of such leveling mechanisms. Congress passed it 1976 to protect people from violations of federal law by state and local governments. For 30 years, Section 1988 has provided attorney fee recovery against state and local governments in cases where those governments were proven to have violated the Federal Constitution or Federal statutes. For 30 years, it has provided a chance to withstand illegal action by State and local governments. For 30 years, it has been accepted by the state and local governments and administered by the courts without a fuss. As an example of federal policy, it stands as a model. It works.

The way it works is simple. Section 1988 and similar "prevailing party fee-shifting statutes," including EAJA, encourage competent attorneys to take good cases, meritorious cases, against the government on a contingency-fee basis—i.e., by providing legal services throughout the case at no cost to the client in the hopes of recovering legal fees at the end of the hopefully-successful case. The calculation that every attorney must make at the outset is this: Can I afford to represent this client who is being pursued wrongfully by the government but cannot come close to paying my hourly rates or monthly bills, especially when I know that 1) the government can expend great resources and drag out the case, 2) there is no guarantee I'll win in the end and therefore ever recover any of my fees, 3) the government will manage to get any fee award reduced well below the fees I actually incur, and 4) I'll have to carry any hope of fee recovery for potentially many years.

Such fee recovery statutes encourage only appropriate litigation. Few attorneys in their right minds would take such a case unless they were reasonably confident of winning in the end, becoming eligible to attempt to collect at least part of his fees. Therefore, such statutes provide hope for parties who suffer actual wrongs at the hands of the government, they bring accountability to erring government officials, and they help refine public policy through useful adjudication. No such statute ever inspires the filing of a frivolous claim or defense, or even a "close" or marginal one. In the vast majority of cases, the case is not filed unless it has considerable merit—that is, where the government is pretty clearly wrong and acting illegally. Otherwise, it is rarely worth the risk in terms of time and treasure. Most attorneys have to earn a living and can afford to take very few cases pro bono-especially lengthy, complex cases against the government. They need a chance to get paid.

Thus, the cases and defenses encouraged by such statutes are precisely the kind of cases that everyone would agree should be brought.

And Congress did agree. Just four years after passing Section 1988, Congress passed the EAJA to serve as a fee recovery counterpart applicable to the Federal Government—where the federal law violator was the Federal Government. Under the EAJA, the Federal Government would be held to account for its violations of the federal Constitution and federal laws, much as the State and local governments have been held to account under Section 1988. But EAJA is very different.

Under Section 1988, a prevailing party against a State or local government recovers attorneys' fees in any case where the party succeeds in an important respect. When that party "prevails," it becomes eligible for attorney fee recovery and submits a fee application documenting the legal services provided. The courts determine the amount of fees to be awarded, based on what the court determines to be reasonable in the case and based on local market rates that the court determines to be appropriate for the kind and quality of legal services provided.

Under Section 1988, there is no escape clause that enables the State or local government to avoid paying attorneys fees to the prevailing party. There is no size standard for eligible parties. There is no rate cap on the hourly rates for the legal services provided.

Under the EAJA, there is each of these and many other unjustifiable differences.

First, EAJA has size standards. EAJA applies only to small parties defined as small businesses with up to 500 employees and a net worth of up to $7,000,000, nonprofit charitable organizations with up to 500 employees, and individuals with a net worth of up to $2,000,000. But H.R. 435 takes no issue with EAJA having size standards (applying only to small parties). Nor do I.

Second, EAJA contains an escape clause for the Federal Government even after it loses a case, having been proven to have violated Federal law. It's called "substantial justification." Prevailing small parties must argue in their fee applications—after winning their case—that the legal position taken by the Federal Agency in the case was not "substantially justified."

In other words, the prevailing small party must win again. While the burden of proof may technically be on the Federal agency to show that its position was indeed substantially justified, in reality it is the prevailing small party that must overcome this hurdle. Regardless, the "substantial justification" defense initiates in every case a second, lengthy series of legal proceedings that rehash the merits of the case.

A few minutes of electronic research of cases involving the EAJA confirm what many in this hearing room already know. That is, in a great many cases, after years of litigating and following multiple appeals, a party that has won a final judgment in its favor is still determined ineligible for fee recovery on the theory that the Federal Government's position, although proven illegal, was not so unreasonable or abusive as to be "not substantially justified."

Third, EAJA contains a cap on hourly rates for legal services of $125. Indexed for inflation, many courts now award up to $150 per hour. Such a rate—whether $125 or $150 or something in between—is far below market rates, especially for complex and usually contingent litigation against the federal government. In the major legal markets where such litigation often occurs such as New York, Boston, Washington, Chicago, San Francisco, Los Angeles, the typical hourly rates range from $200 to $750. The EAJA rate will not pay for the most recent law school graduate, let alone an experienced attorney.

This rate cap represents a significant disincentive to qualified attorneys to take good cases against the federal government. Perhaps because it is so counterproductive, this kind of rate cap has no counterpart in fee shifting against state and local governments under Section 1988, which employs a "reasonable hourly" or "market" rate. Indeed, EAJA itself employs a "market" rate. EAJA states that "the amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished." But then it caps this rate by way of exception: "except that . . . attorney or agent fees shall not be awarded in excess of $125 per hour." H.R. 435 simply would remove that exception, which leads to absurd results.

Let me give just one example. In a case called Sorenson v. Mink, 239 F.3d 1140 (9th Cir. 2001), where social security claimants prevailed against both the federal Social Security Administration and relevant state agencies, the court awarded market rates under Section 1988 against the state agencies but had to award much lower rates under EAJA against the federal agency—for the same federal law violations in the same case. This cap is a big disadvantage for small parties in disputes with Federal agencies.

Thus, at the outset, the attorney must know whether the client is being pursued by the Federal Government or by a State or local government. If the violation of Federal law is by a State or local government, the attorney stands a good chance of recovering his fees under Section 1988. If the very same Federal law violation is by the Federal Government, he stands a very good chance of receiving nothing or very little at the end of a long case even if he wins it completely.

Put yourself in this attorney's shoes. In a typical situation, a client comes in with a very sympathetic case and very little financial resources. The attorney listens long enough to determine that the client's rights under the Constitution very likely were

violated. But the government agency involved is Federal. This means several things to the attorney.

First, the Federal Government has more resources than any other government, can maintain the case for years, and is filled with competent attorneys who sometimes seek to win at any cost. Federal attorneys often worry about reputation and career advancement, as do their private sector counterparts. They also often seek to "make law" or create precedents quickly, which often means pressing cases rapidly against those who cannot hire entire law firms to fight back.

Second, the Federal Government, even at the end of a long case that it has soundly lost, will almost never concede liability for attorneys' fees. Under EAJA, it certainly will claim that its position, although proven illegal, was substantially justified. This will prolong the litigation by many months or even years, requiring the attorney to re-litigate the merits of the case and carry his hope for eventual fee recovery that much longer.

Third, the attorney knows that, even if he can overcome the substantial justification defense, EAJA will cap his hourly rate at $125 (or $150)—which happens to be just half of his regular hourly rate. Which means that, even if he soundly wins, not once but twice (on the merits and again during fee recovery phase), he will get, at the very most, half the fees he incurred.

Fourth, he knows that in every fee recovery case under any fee recovery statute the government always objects to most services provided—e.g., there were many attorneys involved who spent too much time on this service or that one. He knows the government will seek, and the court will agree, to strike any legal services not directly related to the winning claims or defenses—even though the attorney was obliged, ethically and in good faith, to assert all reasonable claims and defenses on the behalf of the client (and not just the ones that hindsight will reveal to have been winners). He knows he will get "nickeled and dimed" to death—and this is his best case scenario.

And this ignores the possibility that the Federal Government will concede the case before a judge can rule on the merits, which will deprive the attorney of any fee recovery at all. After years of litigating a case, the Federal Government may decide to throw in the towel and drop its enforcement action against the client, repeal or modify a regulatory action that had burdened the client, or otherwise provide the relief sought by the client. The government may do this for many reasons. Maybe it has grown weary of the case or moved beyond it in terms of office agenda or policy. Maybe it has become convinced of its error. Or maybe it expects to lose and wishes to avoid the embarrassment of an adverse court judgment and/or payment of attorneys' fees. Under current court precedents, the attorney recovers nothing, even if he was working the case for many years and even if he clearly was succeeding and would have won a court judgment in time.

In sum, the attorney knows that, if he's very lucky, some years later and probably without recovering any interest for lost time, he will get about one-third of the fees he incurred years earlier from a case he thoroughly and completely won. Again, this is his best case scenario.

Contrast the very same case against a State or local government. Under Section 1988, if he wins, he will recover his fees at the going market rate—which in the real world is usually the rate he routinely charges his paying clients—i.e., the rate the market will bear for an attorney of his skills providing certain services in the particular location. No substantial justification defense. No rate cap. No Federal Government resources to fight indefinitely. No other nonsense under EAJA.

Because the case would be against the Federal Government, in our scenario, the attorney gives his regrets to the prospective client and tries to encourage him and give him a referral. Thus, a case that definitely should be brought, could be brought, only if the wrongdoer was a State or local government, not the Federal Government. This happens all the time.

And it is complete nonsense. Section 1988 has worked very well for 30 years. It has been administered fairly and without fuss and it has not bankrupted any State or local treasuries. Nor has it caused any severe hardships on State or local treasuries. There is no reason for EAJA to retain these counterproductive differences.

The same Federal legislature (Congress) that passed that passed Section 1988 passed the EAJA only four years later. But Congress filled EAJA with new and unique exceptions and loopholes, making it much harder for litigants to recover fees against the Federal Government. This results in gross disincentives for small parties to attempt to resist illegal Federal actions. It results in gross disparity in accountability to Federal law among the different levels of government in the United States, giving the Federal Government a pass. And it should be remedied now.

I therefore urge this Committee, and this Congress, to act swiftly to pass H.R. 435, the Equal Access to Justice Reform Act. Thank you for you time and consideration of this important matter.

Mr. SMITH. Mr. Hiatt.

STATEMENT OF JONATHAN HIATT, GENERAL COUNSEL, AMERICAN FEDERATION OF LABOR, CONGRESS OF INDUSTRIAL ORGANIZATIONS, AFL-CIO

Mr. HIATT. Thank you, Mr. Chairman, Ranking Member. I am Jonathan Hiatt on behalf of the AFL-CIO. We oppose this bill as currently drafted. We believe it would seriously weaken enforcement of the National Labor Relations Act, of the Occupational Safety and Health Act, of the Fair Labor Standards Act, of the Mine Safety Health Act and other labor and employment laws, but also housing laws, consumer protection laws, environmental and other laws that are enacted to promote the public welfare.

Our written testimony focuses on two major sets of concerns: One, the elimination of the requirement that to be eligible for the award of attorney fees, a prevailing party has to show that the government's position was not substantially justified, and the other, the size requirement, increasing of the size requirement for eligibility as a so-called small business, the increase which would effectively bring 98 percent of all U.S. firms within that definition.

I want to focus primarily on the first of these concerns concerning the substantially justified standard. This standard applies in two distinct sets of circumstances, and I think it is very important to make that destinction especially in connection with the other—with the points that the other witnesses have made. The first is where the government is a defendant, that is where a private party is claiming that the government has engaged in wrongdoing or has violated—has acted illegally by denying a benefit or violating a Federal right, and the second is where the government is acting as a public prosecutor where the government has brought an action against a private party to enforce a Federal law, and the private party has prevailed.

Those two sets of circumstances involve very different sets of concerns, and removing the substantially justified standard would impact the two types of cases in very different ways.

In the first, where the private party is the plaintiff and the government is found to have acted illegally, making attorneys fees automatically available to the prevailing party would penalize the government for wrongful conduct, would deter future misconduct, would make it easier for plaintiff's rights who have been violated to gain access, and we do not disagree with the NAACP, with the Leadership Conference on Civil Rights, with the ACLU, with prior witnesses who believe that that change may very well serve a salutary public purpose. But in the second case, where the government is the public prosecutor, you have a situation somewhat different from 1988, and the case of a State and local government law, there is no issue of the government having acted illegally, no issue of the government having violated private parties' rights. To the contrary, to where the government brings an action that is substantially justified, it is doing exactly what Congress intended.

In the case of the National Labor Relations Act, for example, the Board's General Counsel brings an unfair labor practice complaint only if he or she believes that there has been reasonable cause to believe that the law has been violated. The same with the Fair Housing Act, with the Americans with Disabilities Act, with the Agriculture Fair Practices Act, with various whistleblower laws and so on.

So, perversely, the premise of this proposed law is that agencies enforcement responsibilities like the NLRB should be deterred even where there is a substantial justification for believing that the law has been violated.

And indeed the result, we believe, would be a very loud message to agencies only to bring complaints where they are absolutely certain to prevail and would have many of the effects that Mr. Bounds described.

For example, the impact on the Department of Labor in bringing minimum wage or overtime actions under the Fair Labor Standards Act or fiduciary duty violation actions under ERISA would be subdued, and not just in labor and employment laws, but where there is substantial justification to believe that companies are putting unsafe products on store shelves, or where the SEC was substantially justified in believing that a company is bilking its investors, or where EPA is substantially justified in believing that a company has violated pollution regulations.

Those are not the kinds of situations where automatic attorney's fees should go to the prevailing party unless the government is found to not have had substantial justification in bringing its action.

Meanwhile, it is hardly as if—and I hope that the Committee will keep this in mind—that it is hardly as if that Federal agencies are currently being overly aggressive in the enforcement of regulatory statutes. If anything, we believe the current problem is one of underenforcement. Since we submitted our written testimony, five more miners died—six more miners have died under a statute that is so weak in its enforcement that the average violation for serious and substantial violations is $156 and where there has been a reduction of 190 full-time inspectors in the last 5 years.

Lastly, with respect to the definition of small business, as I mentioned at the beginning, the notion that somehow extending special relief to small businesses defined in a way that would bring 98 percent of all firms in the United States within that definition, we believe, is not what Congress must have in mind; and moreover, we have cited in our written testimony a good deal of evidence showing the disproportionate violations that take place in small business and ask that the Committee be mindful of that.

Thank you.

Mr. SMITH. Thank you, Mr. Hiatt.

[The prepared statement of Mr. Hiatt follows:]

PREPARED STATEMENT OF JON HIATT

Testimony of AFL-CIO General Counsel Jon Hiatt

Before the House Committee on the Judiciary
Subcommittee on Courts, the Internet,
and Intellectual Property

On the
Equal Access to Justice Reform Act of 2005 (H.R. 435)

May 23, 2006

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Testimony of AFL-CIO General Counsel Jon Hiatt
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On behalf of the more than 9 million working men and women of the AFL-CIO, I appreciate the opportunity to testify regarding the Equal Access to Justice Reform Act of 2005 (H.R. 435). In our view, H.R. 435 would seriously weaken enforcement of the National Labor Relations Act, the Occupational Safety and Health Act, the Fair Labor Standards Act and other labor laws, as well as consumer protection laws, environmental laws and other statutes enacted by Congress to promote the public welfare. Because of its likely deterrent effect on legitimate government enforcement activities, we oppose the bill in its present form and urge the Committee to make the revisions necessary to avoid any such impact.

My testimony today will focus on two aspects of H.R. 435 that are the source of our concerns about the impact of the bill on government enforcement activities. The first is the elimination of the requirement that in order to be eligible for an award of attorneys' fees, a prevailing party in an action involving the government must show that the government's position was not substantially justified. The second is the change in the size requirement for eligibility, which would allow entities with a net worth of as much as $10 million -- a category that includes more than 98% of all U.S. firms --to qualify for fee awards.

In order to put the AFL-CIO's concerns about these provisions in proper context, we emphasize at the outset that there are two types of situations in which an award of attorneys' fees to a prevailing party is permitted under the existing statute.

The Equal Access to Justice Act provides a limited exception to the longstanding American Rule, under which each party to litigation pays its own expenses. Under current law, organizations with no more than 500 employees and a net worth of no more than $7 million can recover their fees and expenses if they prevail in administrative or judicial proceedings against the federal government, provided the government's position was not substantially justified. In creating this limited exception to the American Rule, Congress had two goals: to encourage access to administrative forums and the courts by parties who might not otherwise have the resources to seek vindication of their rights, and to deter abusive or marginal enforcement actions by federal agencies. Thus, EAJA allows fee awards both in cases where the government is the defendant – i.e., where a private party has prevailed in an action against the government for denial of a benefit or violation of a right – and in cases where the private party is the defendant—i.e., where the government, acting as a public prosecutor, has brought an action against a private party to enforce a federal law and the private party has prevailed.

Although current law treats both types of cases the same way, from a public policy standpoint they involve two entirely different sets of concerns, and therefore eliminating the "substantially justified" standard and providing for automatic attorneys' fee awards would impact the two types of cases in very different ways.

In the first class of cases, where the private party seeking an attorneys' fee award is the plaintiff, the government has been found to have acted illegally, in violation of the

plaintiff's rights. Making attorneys' fees automatically available to the plaintiff in such cases would penalize the government for its wrongful conduct, deter the government from future misconduct, and make it easier for plaintiffs whose rights have been violated to obtain access to courts and administrative forums to vindicate those rights. For that reason, the AFL-CIO agrees with the NAACP, the Leadership Conference on Civil Rights and the American Civil Liberties Union that an amendment to the Act authorizing automatic attorneys' fee awards to prevailing plaintiffs in such cases would serve a salutary public purpose.

In the second class of cases, however, where the government is acting as a public prosecutor and has simply not prevailed in an enforcement action that it was justified in bringing, there is no issue of the government having acted "illegally." Indeed, when the government brings an enforcement action that is substantially justified, not only is it not violating any law, it is doing exactly what Congress intended that it do. Under the National Labor Relations Act, for example, when an unfair labor practice charge is filed with the agency, the General Counsel investigates the charge and issues a complaint if he finds "reasonable cause to believe" that the Act has been violated. Having "reasonable cause to believe" a statutory violation has occurred is also the standard for initiating enforcement actions under numerous other federal statutes, including the Fair Housing Act, the Americans with Disabilities Act, the Agricultural Fair Practices Act, and various whistleblower statutes. Congress has instructed the agencies that enforce these statutes to take enforcement action when that standard is met. Yet perversely, the premise of H.R. 435 seems to be that agencies with enforcement responsibilities like the NLRB need to be

deterred from bringing enforcement actions even when there is substantial justification for doing so. It is for that reason that the AFL-CIO opposes the bill in its present form. When Congress enacted EAJA, it considered and rejected automatic attorneys' fee awards to prevailing parties precisely because such an approach "did not account for the reasonable and legitimate exercise of government functions and, therefore, might have a chilling effect on proper government enforcement efforts." GAO, "Equal Access to Justice Act: Its Use in Selected Agencies," Jan. 14, 1998, at 9. Instead, Congress crafted the "substantially justified" standard "to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." H.R. Rep. No. 1418, 96th Cong., 2d Sess. at 11. H.R. 435, by eliminating the substantial justification standard and requiring enforcement agencies to pay attorneys' fees whenever they lose an enforcement action, rejects the balance Congress wisely struck in favor of an approach that discourages not just "marginal Federal enforcement actions" -- to quote from the purpose section of the bill – but *all* enforcement actions that an agency is not certain of winning. In our view, this is the wrong message for Congress to send, not just to agencies responsible for enforcing labor and employment protections, but to all federal agencies and departments with enforcement responsibilities.

If the Department of Labor is substantially justified in believing that a company is violating minimum wage or overtime requirements, or its fiduciary duties with respect to a pension plan, we see no possible public purpose could be served by deterring the Department from bringing an enforcement action under the appropriate statute. The same is true if HUD has substantial justification for believing that a company is violating the

Fair Housing Act; the Consumer Product Safety Commission has substantial justification for believing that a company is putting unsafe products on the market, EPA has substantial justification for believing that a company is violating pollution regulations, or the SEC believes with substantial justification that a company is bilking investors. Yet H.R. 435, in its purposes section, characterizes the bringing of an enforcement action in which the agency does not prevail as a form of "misconduct" that should be penalized in a way that deters the agency from bringing any such actions in the future.

Contrary to the premise of the bill, which is that federal agencies are being overly aggressive in their enforcement of regulatory statutes, what the AFL-CIO and its affiliated unions see on a daily basis is a crisis of *underenforcement* of federal statutes intended to protect workers and their families. Chronic underfunding of enforcement activities, a focus on voluntary compliance and "compliance assistance" rather than enforcement, and the pathetically weak penalties that are imposed when enforcement activity is undertaken have combined to create a climate in which businesses can violate basic worker rights with virtual impunity.

Just this past January, the nation witnessed the tragedy at the Sago mine in West Virginia, where 12 coal miners died in an explosion. As the news media reported after the explosion, in the year preceding the tragedy, the Mine Safety and Health Administration had issued 208 citations or orders against the mine operator, 96 of them for serious and substantial violations. But the average penalty for these violations was only $156. In 2001 the Bush administration named as MSHA director a mining company executive who proceeded to withdraw 17 proposed health and safety rules. In coal enforcement, there was a reduction of 190 FTEs between 2001 and 2005. Not

surprisingly, the cost of MSHA's neglect of health and safety enforcement has been paid with the lives of miners. Already this year, 26 coal miners have died as a result of mining disasters.

The penalties assessed by the Occupational Safety and Health Administration are as weak as those assessed by MSHA. In FY 2005, the average penalty for a serious violation of the Occupational Safety and Health Act -- one that poses a "substantial probability of death or serious injury" -- was $873. And staffing levels at the agency are so low that at current levels, it would take the agency more than 100 years to inspect each jobsite in America just once. This is despite the fact that millions of workers are injured or made ill each year by hazards on the job, and the number of workplace fatalities averages 15 per day, not including deaths from occupational diseases such as mesothelioma and black lung disease.

Enforcement of basic wage and hour laws is also marginal at best. The Department of Labor employs fewer than 1,000 inspectors to regulate a workforce of 150 million spread out among 7 million separate workplaces. Department of Labor surveys have found that compliance with certain wage and hour requirements in the garment and poultry industries is virtually nonexistent, and violations are rampant in white-collar occupations as well as in low-wage workplaces.

Equally notorious is the lack of effective mechanisms for enforcement of the National Labor Relations Act, which protects the right to organize. Penalties under that statute are so weak — requiring no more than a notice posting for violations as serious as threatening to fire the entire workforce if the employees vote for union representation — that employers regard them as little more than a routine cost of doing business.

Moreover, employers found to have violated worker rights are provided so many opportunities for appeal that it is typically a matter of years before an employer who has illegally fired or disciplined a worker is required to take any remedial action whatsoever. Not surprisingly, as a result of this culture of impunity, a worker is fired every 23 minutes for exercising his or her statutorily protected right to engage in union activity.

Against this backdrop, the notion that Congress should be legislating measures designed to further *reduce* rather than increase regulatory enforcement activity strikes us as a case of severely misplaced priorities.

Neither are we moved by claims that this is a necessary measure to remove unreasonable burdens on small business.

Violations of worker rights occur at workplaces across the United States, in businesses large and small. Just because a business is small does not mean that it is less likely to be hazardous, or that the employer is less likely to violate the law.

The Bureau of Labor Statistics' fatality data – which, unlike injury data, is based upon a government census, and not employer self-reports – shows that in high-risk industries such as construction, small firms account for a disproportionately high percentage of fatal injuries. For example, according to BLS, firms with fewer than 20 employees employed 38.2 percent of the construction workforce but accounted for 55.5 percent of all construction fatalities. (BLS, 2002 Census of Fatal Occupational Injuries). Similarly, a study of Hispanic construction workers in Texas found that 40 percent of fatalities among these workers occurred in establishments of less than 10 employees. (Fabrega and Starkey, Fatal Occupational Injuries among Hispanic Construction Workers of Texas, 1997 to 1999, Human and Ecological Risk Assessment, 2001; 7:1869-1883).

And a study of fatalities among teenage construction workers found a similar result. Sixty three percent of the teenage construction fatalities investigated by OSHA from 1984-1998 occurred at firms with fewer than 11 employees. (Suruda et al., Fatal Injuries to Teenage Construction Workers in the U.S., American Journal of Industrial Medicine, 2003, 44:510-514.

The situation in the mining industry is similar. According to MSHA, 48% of the nation's mines (6,918 out of 14,478), and 28% of coalmines (560 out of 2,800) were very small with 5 or fewer employees. In 2003, 73% of all coal mine fatalities occurred in mines with fewer than 200 employees.

As these statistics indicate, employees of small businesses need vigorous enforcement of the laws to protect their rights on the job. And in any event, the coverage provisions of these bill sweep a vastly greater number of firms than those traditionally considered to be small business. Indeed, the Economic Policy Institute, using data from the Internal Revenue Service and the Census Bureau, estimates that new size requirements in the bill, which would extend coverage to all business with fewer than 500 employees and less than $10 million in net worth, would encompass more than 98% of all firms in the U.S. In contrast, Congress traditionally defines "small business" for the purpose of establishing coverage under a range of other employment-related laws by imposing a far smaller ceiling on the size of the workforce. The Age Discrimination in Employment Act, for example, applies to employers who have twenty or more employees. 29 U.S.C. § 630(b). Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(b), covers employers with fifteen or more employees.

H.R. 435 would provide a monetary incentive for more business to challenge regulatory enforcement actions -- to spare no expense, and to drag out litigation of the case, because at the end of the day they could recover their attorneys' fees and costs if they prevailed.

And the bill would allow even the worst employers -- ones with repeated and egregious violations -- to recover fees if they prevailed on a particular violation. Take for example Eric Ho, who was cited for 11 willful violations of OSHA's respirator and training standards after he exposed his immigrant workforce to asbestos by requiring them to perform building renovation work behind locked gates at night without any respirators or training. Eric Ho was criminally convicted of violating the Clean Air Act. But he succeeded in persuading the Occupational Safety and Health Commission to throw out 10 of the 11 willful OSHA violations, on grounds that OSHA was not allowed to cite Ho for each employee exposed to asbestos hazards, but could only issue one citation. *Secretary of Labor v. Ho,* Nos. 98-1645 & 98-1646 (OSHRC, Sept. 29, 2003). H.R. 435 would require taxpayers to pay the attorneys fees and costs of rogue employers like Eric Ho.

The AFL-CIO has no objections to the portions of H.R. 435 that would require the Attorney General to study and report to Congress on how effective EAJA has been in achieving its intended purpose and to make recommendations as to any reforms believed to be necessary, or to the provisions of the bill eliminating the rate cap, establishing an offer of settlement procedure, or providing assistance to small businesses seeking fee awards. And as noted above, we would also be supportive of amendments to the bill that

would eliminate the substantially justified standard in cases where the government as a defendant has been found to have violated the prevailing party's rights.

However, in our view, no rational public policy would be furthered by discouraging government agencies from initiating enforcement actions that are in fact substantially justified but as to which the government ultimately is unable to carry its burden of proof. Thus, as long as H.R. 435 contains such provisions, we will vigorously oppose its enactment into law.

Mr. SMITH. Mr. Knott.

STATEMENT OF JAMES M. KNOTT, SR., PRESIDENT AND CHAIRMAN OF THE BOARD, RIVERDALE MILLS CORPORATION

Mr. KNOTT. Good afternoon, Chairman Smith and Members of the Subcommittee. I thank you for the opportunity to testify before you today on behalf of the National Association of Manufacturers about the need for H.R. 435, the Equal Access to Justice Reform Act of 2005. H.R. 435 would update and improve the Equal Access to Justice Act.

My name is James M. Knott, Sr. I am the Founder and President of Riverdale Mills Corporation. In addition, I serve on the board of directors of the NAM, and I have been in the manufacturing business in Massachusetts since October 1, 1956.

The National Association of Manufacturers is the Nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. Through its direct membership and affiliate organization—the Council of Manufacturing Associations, the Employer Association Group and the State Associations Group—it represents more than 100,000 manufacturers.

I believe my story demonstrates why a small company needs the protections of the EAJA when it challenges the Goliath called the United States government.

Simply put, the government has a lot of resources and is loathe to admit to mistakes when it takes action against a company. The history of the EAJA shows that government takes a very dim view of granting requests for reimbursement and thus it has been underutilized.

I came here today to tell you about what the EPA did to my company, Riverdale Mills Corporation, founded in 1979 in an abandoned mill building in the economically depressed town of Northbridge, Massachusetts.

However, telling you about that event in which the EPA falsified evidence to get me indicted for a felony that carried the penalty of a $1.5 million fine and 6 years of my life in jail would take much longer than the 5 minutes I can speak here today. Therefore, what I would like to do today is to ask you to go to the Riverdale Mills Corporation Web site at www.riverdale.com and look at "news." There you can see a 60-Minute show about how the EPA people falsified the evidence with which to put me out of business.

The fact that the evidence was falsified was proven in Worcester Federal court, and the U.S. Justice Department asked the judge to dismiss the case. I sued the EPA for falsifying the evidence and severely damaging the company. The judge found in my favor and awarded me and my company damages of only about 20 percent of the actual out-of-pocket costs.

However, in my case, the First Circuit Court of Appeals ultimately determined that neither my company nor I were eligible for reimbursement under the Hyde amendment, overturning the ruling of the district court that my company was entitled to reimbursement. The Hyde amendment is a special provision dealing with criminal rather than civil prosecutions and sets a higher standard for reimbursement.

Since the Supreme Court of the United States denied my case in a writ of certiorari, I will not use that forum to argue the First Circuit Court's decision was in error. But I think it is very important for the Subcommittee to learn what a small business faces when a U.S. Government agency decides that it is going to go after a company on charges even when they emanated from an anonymous tip and there was no true basis for prosecution.

When I bought the abandoned mill to manufacture plastic-coated zinc-galvanized welded wire mesh to be used to make traps for the New England lobster fishing industry, the only habitable portion of the mill was 20,000 square feet.

Today, after adding nine additions, it is about 372,000 square feet and employs about 100 people. Twenty to 25 percent of its products are shipped out of the U.S.A. To Canada, Europe and South America.

As you will see in the 60-Minute show, on the 7th of November, 1997, 21 EPA personnel swarmed into my offices, many of them with pistols holstered on their hips and they announced they were going to do a search and seizure. They seized about 7 and a half feet of documents, 95 percent of which had nothing whatsoever to do with the Riverdale Mill wastewater treatment plant, as they were authorized to seize.

I see that it is time to stop, and I would be delighted to answer any questions that you might have.

Mr. SMITH. Thank you, Mr. Knott.

[The prepared statement of Mr. Knott follows:]

PREPARED STATEMENT OF JAMES M. KNOTT, SR.

Chairman Smith and members of the subcommittee on Courts, the Internet and Intellectual Property, thank you for the opportunity to testify before you today on behalf of the National Association of Manufacturers (NAM) about the need for H.R. 435, the Equal Access to Justice Reform Act of 20005. H.R. 435 would update and improve the Equal Access to Justice Act (EAJA). My name is James Knott, Sr., and I am president and chief executive officer of Riverdale Mills Corporation. In addition, I serve on the Board of Directors of the NAM and have been in the manufacturing business in Massachusetts since October 21, 1956.

The National Association of Manufacturers is the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 states. Through its direct membership and affiliate organizations—the Council of Manufacturing Associations, the Employer Association Group and the State Associations Group—it represents more than a hundred thousand manufacturers.

I believe that my story demonstrates why a small company needs the protections of the EAJA when it challenges the Goliath of the United States government. Simply put, the government has a lot of resources, and is loathe to admit to mistakes when it takes action against a company. The history of the EAJA shows that the government takes a very dim view of granting requests for reimbursement and thus it has been underutilized.

In my case, the First Circuit Court of Appeals ultimately determined that neither I nor my company were eligible for reimbursement under the Hyde Amendment. It is important to note, however, that this decision overturned the ruling of the District Court that my company was entitled to reimbursement, although even that award was far below my company's out-of-pocket expenses. The Hyde Amendment is a special provision dealing with criminal rather than civil prosecutions and sets a higher standard for reimbursement. Since the Supreme Court of the United States denied my case a writ of certiorari, I will not use this forum to argue the First Circuit's decision was in error. But, I think it is very important for the subcommittee to learn what a small business faces when the U.S. government decides that it is going to go after a company on charges, even when they emanated from an anonymous tip and where there is no true basis for prosecution.

I started a manufacturing business called Coatings Engineering Corporation, the day after I was honorably discharged from the United States Army where I served two years of active duty in Oklahoma, Texas and Louisiana as the Motor Officer in the 91st Armored Field Artillery Battalion. As the Battalion Motor Officer, a position normally filled by a Major, not a Second Lieutenant, I received a Meritorious Service medal for having 365 of the best-maintained wheeled and tracked vehicles in the 1st Armored Division.

The building I started the business in was built in 1858 on the Charles River in South Natick, Massachusetts. It had fallen into serious disrepair, in need of windows, doors and patches on the roof to stop rainwater from flooding its interior. All of those things were done, the business boomed and, six years later I sold the growing and successful business to a large manufacturer of wire fencing headquartered in Georgetown Connecticut, The Gilbert & Bennett Manufacturing Company. I managed it for them for 16 years, and in 1978 I decided it was time to start over; I bought an abandoned mill building, originally built in 1852, which straddled the Blackstone River in the village of Riverdale, part of the Town of Northbridge, an economically-depressed area, about 13 miles Southeast of Worcester, Massachusetts.

I bought the abandoned mill to manufacture plastic-coated, zinc-galvanized, welded-wire-mesh, to be used to make traps for the New England lobster fishing industry. The only habitable part of the mill was about 20,000 square feet; it was there that I designed and built the machinery to make the product and I began producing it in 1980. Today, after adding nine additions to the mill it now is about 372,000 square feet in area and employs about 100 people; 20 to 25% of its products are shipped out of the USA to Canada, Europe and South America.

On the 7th of November 1997, I was sitting in my office at the mill talking on the telephone, when a local patrolman walked into the lobby followed by a man in a black jacket with the word POLICE on its back in large white letters. Within a few seconds the lobby was filled with 21 similarly attired men, many of them carrying pistols holstered on their belts.

I got off the telephone, went out into the lobby and said, "What's going on here?" One of the EPA people detached himself from the group and said, "We are looking for James Knott." I said, "I am James Knott, what are you doing?" The EPA person said, "We are here to do a search and seizure." I said, "Show me the warrant authorizing you to do this." The EPA "CID (Criminal Investigation Division)" agent said, "We will leave you a copy when we leave." I said, "If you don't show me the warrant right now, I will call the police and have you removed from these premises." Reluctantly, the agent gave me the warrant. I read it and learned that the EPA people had been authorized to search the premises and seize documents related to the operation of the Riverdale Mills Corporation Wastewater Treatment Plant. Seven hours later, the EPA people left the plant taking about seven feet of documents with them, only about 5% of which had anything whatsoever to do with the Wastewater Treatment Plant. Nine months later, on the 12th of August 1998, the indictment, with penalties of a $1.5 million fine and six years of my life in jail, was issued.

I knew without any doubt that I had never discharged any acidic wastewaters to the publicly-owned sewer, but the problem was how to prove it and how could I bear the expenditure of time and money it would take. The first step was to examine logbooks kept by EPA inspectors who had tested wastewater discharges 17 days before the invasion. I hired a retired FBI Agent who was a handwriting expert and we went to the EPA offices in Boston. The retired FBI Agent was able to show me that the EPA inspectors who had tested the wastewaters 17 days before the invasion had found all of the discharges to the publicly-owned sewer to be the perfectly neutral pH of 7—neither acidic nor caustic. One of the 7's had been altered to a 4 and a number of other 7's had been altered to 2's with a ballpoint pen that embossed the alterations through the pages they were on and engraved them into the following pages.

The next step was to confront the EPA inspector in whose logbook the numbers had been altered on the stand, in court in front of a judge. The EPA inspector admitted the numbers had been altered and the judge ruled that that falsified evidence could not be used by the EPA in their case against me and Riverdale Mills Corporation. Without evidence that the Rivers Protection Act had been violated, the U.S. Justice Department asked the judge to dismiss the case and the judge complied.

The out-of-pocket cost to prove that corruption existed in the EPA and also in the US Justice Department—where no one observed the very obvious fact that numbers had been altered—cost me about $218,000, which is a substantial part of the annual profits with which Riverdale Mills has expanded its production facilities, provided new jobs and paid taxes to the local, state and federal governments. With the limita-

tions of the EAJA as it now exists, the district court awarded my company fees of only $68,726, which was ultimately overturned by the First Circuit.

This is why it is very important that the "Equal Access to Justice Reform Act of 2005" become law. The ability of small businessmen like me to be compensated for the costs of protecting themselves and their businesses from the attack of overzealous bureaucrats. That's why I think that the provision that would charge EAJA awards to the budget of the agency that took the action, rather than the general treasury, is very important. Right now, the agencies themselves are not punished when they are so egregiously overzealous that EAJA compensation requests are granted. Award amounts, where warranted of course, also need to be raised.

The NAM will be submitting additional and more detailed comments about the provisions of H.R. 435 for the record.

Thank you Mr. Chairman and members of the subcommittee for your time and attention to this matter. I would be happy to answer any questions you may have for me.

Mr. SMITH. Mr. Bounds, let me direct my first question to you. And say that the Department of Justice may not have the most credibility on this particular issue. As you know, they opposed the original EAJA bill saying that the cost would be excessive. I think they projected that the cost would be $500 million for the first 3 years. The cost probably was closer to 1 percent of that than to what the DOJ estimated.

Furthermore, it would be a rare government agency indeed who would encourage lawsuits against them and then have to pay attorneys' fees. So I understand all of that.

However, I wanted to give you an opportunity to redeem yourself when it comes to credibility and just focus on one aspect of the bill at hand, and that is the attorney's fees. Attorneys' fees have only been raised once in 25 years. They are now capped at $125 an hour, as I recall.

Don't you think that you might support an increase in the cost or the amount of attorney's fees? And not getting into the other issues, but doesn't that sound like an improvement that could be made to the system, that if you are going to have these lawsuits, and if we do not change anything else, that we should at least change that?

Mr. BOUNDS. Thank you.

First, I would like to respond to the question by underscoring that the presumptive cap of $125 under the statute is regularly deviated from under——

Mr. SMITH. You mentioned that in your testimony. I am aware of that.

But sometimes it is not, and in the case of Mr. Knott, for instance, his attorneys' fees were limited because of that statute. So why don't we go on and say, raise the cap so that everyone—there would be no doubt, you don't have to ask for a special consideration by the court.

Mr. BOUNDS. Well, the Department of Justice is delighted to comment on legislative proposals as they are made by Members of Congress or circulated by the Committee.

The Department does not think that the attorney fees are necessarily too low now because of the court's capacity and agencies' capacities to deviate from the fee cap in particular cases when the circumstances would merit.

To the extent that there are specific proposals to raise the cap, those obviously would have to be considered on a case-by-case

basis. Obviously, there would be no effective cap if the cap were raised to cover, you know, Manhattan law firms.

Mr. SMITH. But certainly we could raise the fees by a certain amount, and then that would enable individuals who might be bringing the lawsuit to at least get what they consider to be very competent counsel and not be deterred from doing that.

Mr. BOUNDS. I understand the appeal of raising the cap. As I say, the Department would be delighted to consider the merits of any potential that——

Mr. SMITH. Which is to say that you cannot say anything more right now.

Mr. BOUNDS. I am not myself authorized to do so.

Mr. SMITH. Okay. Thank you, Mr. Bounds.

Mr. Farris, Mr. Hiatt mentioned in his written testimony two different classes of EAJA cases, one involved violation of a right; the other one involved enforcement action. And he concludes that automatic attorney fees are appropriate in the first instance, that is, where someone has obtained a judgment against the Federal Government for violation of their rights, but not in the second case involving enforcement actions.

What do you think of that distinction.

Mr. FARRIS. Well, I think it is too easy to become a plaintiff, rather than a defendant, to raise exactly the same arguments. Bringing declaratory judgment, if I had an agency that was threatening my client with an enforcement action, I would bring a declaratory judgment action wherever it was permitted and simply be the plaintiff, so that I could win attorneys' fees and beat them to court, in effect. There is no substantial difference at the end of the day.

The question is, did the government violate the law? Did the government violate the Constitution? And wherever that is true, whether plaintiff or defendant, commonsense justice says that the government ought to pay.

Mr. SMITH. Okay. Thank you, Mr. Farris.

Mr. Hiatt, you heard Mr. Knott's testimony, which I think is pretty compelling. And what I wanted to ask you, if you have a situation like this where the government apparently falsified the evidence, they actually changed the numbers—I think it was changing 2s to 9s or 9s to 2s, something like that—if this was a civil case, doesn't that cry out for automatic recovery of attorney fees? Don't you think that is a compelling case where attorneys' fees should be awarded?

Mr. HIATT. Well, I think if this were a civil case, you would not need automatic award of attorney fees, because it would be so clear, if the facts are as Mr. Knott describes them, and I have no reason to doubt that there was no substantial justification for the action; that would be sufficient. And that is exactly the right; that should be the standard.

Mr. Knott says that under a special provision, and I am not familiar with the details of the Hyde amendment, but under the special provisions of that, you have an exception where apparently even the substantial justifications standard does not apply.

I am very sympathetic if the facts are as they are, but I do not think that that in any way detracts from——

Mr. SMITH. You just do not want to expand, you do not want to eliminate the defense or increase the number of eligible plaintiffs to 98 percent of all businesses?

Mr. HIATT. Well, to think if it is going to deter the government—and, respectfully, I do not really think the cost being any different from Mr. Bound's estimate is the issue as much as it is how much of a deterrent will it be for the government to have to worry about costs.

Mr. SMITH. I am going to squeeze in one question if other Members do not mind. But, Mr. Hiatt, before I get to that last question, would you have any objection to raising the cap on attorney fees?

Mr. HIATT. We have absolutely no objection to the provisions of the bill, as I understand it right now, requiring the Attorney General to study and report to Congress about how effective the act has been or whether the rate cap should be changed. We are quite open to hearing more about that.

Mr. SMITH. Okay, great.

Mr. Knott, thank you for your personal experience. Boy, do I regret you had to go through that—the threats to you, the threats to your freedom, the cost to you all. I mean, that is where you almost believe there ought to be double or triple damages when the government acts in that kind of almost malicious manner; and maybe I should stop there.

But, nevertheless, my question is this. Do you know of any instances where people have failed to bring lawsuits just because of the cost? And has that been a deterrent, and is that another argument for the bill itself?

Mr. KNOTT. I know of many cases where they have avoided these things. I was offered—you know, would I like to settle this case? And I said, I do not want to settle it, I want to settle you. And that is what I embarked upon.

When, in the Hyde amendment, the lawyers' fees were capped at $75 an hour, I haven't been able to find many of those lawyers. What that meant was, I had to do three-quarters of the work for them, you know, in order to get the job done.

Mr. SMITH. Thank you, Mr. Knott.

Mr. Bounds, would you get back to us? And I know that you are limited in what you can say today, but would you get back to us specifically on the issue of increasing the cap on attorney fees and see if the Department of Justice might revisit that issue for us.

Mr. BOUNDS. I will see what I can find out.

Mr. SMITH. Okay. Thank you, Mr. Bounds.

[The Department of Justice did not provide the Subcommittee with a response to this inquiry, as was requested, prior to the closing of the Hearing Record]

Mr. SMITH. The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. While you are at it, Mr. Bounds, could you get back to us on what the cap is on paying private lawyers to represent defendants in criminal cases where the Federal public defenders office is conflicted out? I am curious whether we are looking at rates or just some rates here. Thank you.

[The Department of Justice did not provide the Subcommittee with a response to this inquiry, as was requested, prior to the closing of the Hearing Record]

Mr. BERMAN. The problem—it is very interesting, the interplay here. I am focused on this substantial justification issue because, Mr. Farris, you said—first of all, your arguments basically are not about small versus big, they are about government versus individuals, or companies or non-profit associations who might be suing or being sued by the government.

But this is an effort to incentivize the smaller guy both to defend and to bring lawsuits. But you do in the context of the big government versus the small guy—but in the National Labor Relations Board case, in spite of the fact that—I am not sure what Mr. Hiatt's basis is for thinking that this will dilute the otherwise vigorous enforcement of that act, as I am unaware of the vigorous enforcement of that act. But in any event, it is sometimes about an even smaller party going to the government to pursue enforcement of that person's legal rights against a company that might be small, but is a lot larger and is a lot more able to handle the cost of litigation than the individual.

So an individual, the National Labor Relations Board's General Counsel does not go out there just issuing unfair labor practice complaints; it is because some worker came to the National Labor Relations Board or one of their regional offices saying that he was fired because he had joined a union or that other rights protected by that law were violated by that employer.

Now the General Counsel decides whether or not what this guy says is true, and if he thinks it is true and he has a substantial basis for thinking it is true and there is a substantial basis for thinking that that conduct violated the law, the General Counsel brings this unfair labor practice complaint on behalf of this single individual; and the employer fights it, and maybe the employer prevails at the end.

But a court determines that they were not out on an abusive witch hunt, or this was not a frivolous complaint, it was a close question and they lost.

Why shouldn't that—why isn't what Mr. Bounds talks about, albeit in the context of immigration cases, true that that General Counsel, now thinking that, particularly the way this bill works, the costs of it are going to come out of the budget for the National Labor Relations Board, is going to think twice about taking anything which is a close question because he is going to end up facing his agency with attorneys' fees burden. And in the end the small guy will really get hurt because they will have no agency to go to, even though we created these agencies to protect that guy against the abuse of his rights.

Mr. FARRIS. Mr. Berman, I understand the logical difference between the plaintiff case that I typically am involved with and the situation that you are describing here. I do not think that the proposed distinction of being the plaintiff or defendant really is the right distinction, and so through some other means of accomplishing some objective there.

Mr. BERMAN. I agree. I am not sure I like the analysis that says do it one way but not the other way.

Mr. FARRIS. Right.

Mr. BERMAN. But my point wasn't, who was plaintiff and defendant; my point is, who is really the small guy and who is going to get shafted as a result of this. It is one thing to have an overzealous government but it is another thing to be hurting the even smaller party.

Mr. FARRIS.I think that the government should do what is right in every circumstance.

If it has to pay attorney fees for doing what it thinks is right, you are not going to have an absolutely perfect system, whichever way you go, and basically we have to decide as a matter of principle, whether or not the government pays attorney fees when it has wronged someone.

I don't favor personally the small or big rule. I do not think it should matter. I think the principle is the same, and the government should act on behalf of all of the citizens whether it is a small group or a large group and should vigorously enforce the law that is before it.

But when it is found that the government has behaved illegally, I think the government should pay, period.

Mr. BERMAN. These words, "found that the government has behaved illegally," I mean, if that is—if that is true, I do—I think I have great sympathy for what you are saying. But the fact that a particular enforcement case and a close question before an independent judge is found against the government does not mean the government acted illegally, and in a weird way the substantial justification test is sort of a term of art in a process that decides whether the government was acting in good faith or not.

Mr. FARRIS.Let me give you an example.

Mr. SMITH. Mr. Farris, please be quick. I want to have time for Mr. Forbes to ask questions.

Mr. FARRIS. I will not respond to that.

Mr. SMITH. Okay. Thank you, Mr. Berman.

The gentleman from Virginia, Mr. Forbes, is recognized for his questions.

Mr. FORBES. Thank you, Mr. Chairman, and thank all of you for being here today.

My comment and question is a little bit bigger in scope than just this bill. Mr. Farris mentioned something that I think is important, that we forget when it is the government we are interested in doing what is right, not always just what is legal.

And, Mr. Bounds, you talked to us about political oversight. That is why I am here today. This may not be a perfect bill, but I am groping for, really my question is not the close calls that you have talked about, but what I am worried about is what I see oftentimes as unfair balance of power and sheer heavy-handedness that the government brings.

I mean, I could bring a notebook of cases that I have actually seen, but three of them I am going to do real quick, and they are not all ones that would be pertinent to this legislation.

I watched a young man, just a short period of time ago, late 20's; the government came at him, and they acknowledged because they thought his father was wealthy, they had seven lawyers coming at him. It cost him $1.4 million to defend. At the end, he has to reach

a plea agreement because they threaten to go after his father and his mother if he did not do it, and he to this day doesn't think that he was guilty.

In the late 1990's, DOJ—and this was before your time maybe—but they went after hospitals across the country for coding violations. And if you remember, this was an enforcement situation. But they sent out to the hospitals demand letters that basically said, if you do not pay this amount of money, we are coming after you for treble damages and attorneys' fees, and we are going to get you the PR for your hospital.

I bet you 80 percent of the hospitals that got those letters paid them and did not feel they were liable because of the unfair balance they felt they had to go against.

Mr. Berman raised an excellent point when he talked about, sometimes you have a small guy going after a corporation. I watched that enforcement action go against a small Dunkin Donuts franchise owner, mom-and-pop operation. I watched him go in three times where the government just continued the case each time.

He looks at me finally and says, How can I do this? How can I possibly stand up? And the government even looks at him and says, We know you have done nothing wrong, but we want you to reach a settlement anyway.

And the question I have for you is, you mentioned in your testimony the negative consequences of this bill would not be offset by any significant improvements in EAJA.

What will get significant improvements in what the Justice Department is doing, one? And are you doing anything internally to adjust that balance of power when you see situations like Mr. Knott talked about, you see these situations where you know the government is going at it with just absolutely unfair, unequal balance against some of these?

What are your suggestions? What are you guys doing internally so we do not have to take this kind of action? Because that is what the political oversight is. If you cannot police yourself, we have got to do it. What are you doing?

Mr. BOUNDS. Well, I want to assure the Committee that when cases involving excessive force or overbearing prosecutions or miscarriage of the law come to the attention of the Attorney General and the leadership of the Department, those cases are taken very seriously; and obviously there is a managerial function, a supervising prosecutor in the U.S. Attorneys' Offices around the country as well as within the Department of Justice offices.

And that is this entire point of my testimony, which is that is how it should function. You will never have an attorney fee shifting statute that is going to overcome the disparity between a single individual and the government. So the management of these cases has to be a political oversight, which means the President and the Congress, and the members of the Cabinet have to police the actions of the government in particular cases.

And so to the extent that any specific case comes to someone's attention, it would be reviewed and remedies would be sought. But without any specific case, I really cannot——

Mr. FORBES. But just to understand, that is what we are here today trying to do, to do that oversight. And my time is running out too.

But the question I would ask you, do you have any reports or anything that you can get back to us of what efforts you have been making in DOJ to do that policing effort that you are talking about, and maybe give us a list of, you know, what remedies that you have put out and how you have tried to stop it.

I would be interested to see how many cases you guys have looked at and what you have done over the last year or so, if you could do that.

Mr. BOUNDS. I would be happy to look into it. Thank you.

[The information referred to follows:]

[The Department of Justice did not provide the Subcommittee with a response to this inquiry, as was requested, prior to the closing of the Hearing Record]

Mr. FORBES. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Forbes.

We, as you just heard, have had some votes called. In fact, we have six votes coming up, and we will need to head over to the House floor. Thank you all for your testimony. It has been very helpful, very instructive, and perhaps there will be some ways, as we have discussed today, that we can have some reforms at least to the process.

Thank you all.

[Whereupon, at 4:55 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Statement of Representative Howard L. Berman

for the

Judiciary Subcommittee on Courts, the Internet, and Intellectual Property

Hearing on H.R. 435:
Equal Access to Justice Reform Act of 2005

May 23, 2006

Mr. Chairman,

Thank you for scheduling this hearing on H.R. 435- the Equal Access to Justice Reform Act of 2005. While this issue has already come before the Subcommittee several times in the past, we have an opportunity today to engage in fresh discussions.

Congress enacted the Equal Access to Justice Act (EAJA) in 1980 as a means of ensuring both individuals and organizations the right to effective counsel in vindicating important civil rights and civil liberties protections. Congress presumably sought to achieve three interconnected goals through the EAJA: (1) to provide an incentive for private parties to contest government overreaching; (2) to deter subsequent government wrongdoing; and (3) to provide more complete compensation for citizens injured by government action.

1

Since in most suits, the government is the "deep pocket" and can marshal more resources in litigation than most private noninstitutional parties, private parties may not be able to afford protracted litigation against the government. The goal of the Equal Access to Justice Act was to make the justice system more accessible to individuals of modest means, small businesses, and non-profit organizations by allowing for recovery of their attorneys fees when they prevail in disputes with the Federal Government.

Even though the EAJA has arguably improved the accessibility of the justice system for small parties, we should discuss whether potential barriers remain and what changes, if any, should be made to the mechanisms used to determine the recovery of fees.

I yield back the balance of my time.

THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

Statement of Congressman John Conyers, Jr.
Subcommittee on Courts, the Internet, and Intellectual Property
Hearing on H.R. 435, the Equal Access to Justice Reform Act of 2005
Tuesday, May 23, 2006, 4PM, 2141 Rayburn

I am pleased to join Chairman Smith and Ranking Member Berman at today's hearing on H.R. 435, the Equal Access to Justice Reform Act of 2005.

Today's bill comes to us from the Chairman of the Small Business Committee, Donald Manzullo (R-IL), and Representative Earl Blumenauer (D-OR). I commend this bipartisan sponsorship and thank both Representative Manzullo and Representative Blumenauer for their hard work on this bill. I understand that both Members intend to strengthen the current Equal Access to Justice Act (EAJA) that was enacted in 1980. They want to make sure that the true intent of EAJA is realized – that parties have the proper means to recover their expenses when they prevail in lawsuits with the federal government.

Joining us today to discuss such EAJA reform efforts are: (1) Ryan W. Bounds, Chief of Staff at the Department of Justice's Office of Legal Policy; (2)Michael P. Harris, Chairman and General Counsel for the Home School Legal Defense Association, (3) Jonathan Hiatt, General Counsel with the AFL-CIO, and (4) James M. Knott, President and Board Chairman for the Riverdale Mills Corporation. I welcome our witnesses and thank them for participating in this hearing.

Some of our witnesses will describe that EAJA, as it currently stands, does little more than provide false hope to small businesses and individuals that want to challenge federal agency action. These witnesses and the bill's sponsors believe that EAJA's "substantial justification" defense and cap on attorneys' fees prevent parties from successfully defending themselves in

suits with the federal government.

This bill has the support of groups representing the entire political spectrum. The American Civil Liberties Union (ACLU), the Association of Trial Lawyers of America (ATLA), and the National Association of Manufacturers (NAM) are among the several organizations that support this bill. However, there is one noticeable absence from this support and that is the American Federation of Labor - Congress of Industrialized Organizations (AFL-CIO).

It is my understanding that the AFL-CIO believes that this bill would have a chilling effect on government agencies who may want to pursue legitimate enforcement suits. Agencies like the National Labor Relations Board (NLRB) and the Occupational Safety and Health Administration (OSHA) would find their budgets threatened every time an adverse administrative decision was made. The Department of Justice has also been vocal in its opposition to EAJA, finding EAJA to be a costly burden on the federal government.

Today's hearing will provide us with the opportunity to discuss such opposition and support of H.R. 435. I look foward to exploring the merits of this bill with our witnesses. Thank you.

STATEMENT OF THE HONORABLE EDWIN MEESE III, RONALD REAGAN DISTINGUISHED FELLOW IN PUBLIC POLICY AND CHAIRMAN, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION

STATEMENT OF

EDWIN MEESE III

RONALD REAGAN DISTINGUISHED FELLOW IN PUBLIC POLICY AND CHAIRMAN, CENTER FOR LEGAL AND JUDICIAL STUDIES THE HERITAGE FOUNDATION[1]

214 MASSACHUSETTS AVENUE, NE WASHINGTON, DC 20002

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

REGARDING

THE EQUAL ACCESS TO JUSTICE REFORM ACT, H.R. 435

MAY 23, 2006

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Chairman Smith, Ranking Member Berman, and Members of the Subcommittee:

Thank you for inviting my views on H.R. 435, the Equal Access to Justice Reform Act of 2005. I regret that my schedule would not permit me to testify in person. For the record, I served as the United States Attorney General from 1985-1988. I am currently the Ronald Reagan Distinguished Fellow in Public Policy at The Heritage Foundation and also serve as Chairman of the The Heritage Foundation's Center for Legal and Judicial Studies.

As I have testified to this committee previously in a different context, I believe in serving the legal needs of those who cannot afford competent legal services. I have worked with the legal profession to ensure that no one goes without necessary legal representation because of the inability to pay. Throughout my professional career, I have stood with many colleagues as firm advocates for this position and have sought to promote public interest law. A central feature of our legal system should be the protection of those who cannot protect themselves from government overreaching.

The Equal Access to Justice Act (EAJA) was enacted in 1980 to do just that – ensure that no small party facing the overwhelming resources of the Federal government goes without necessary legal representation because of the inability to pay. EAJA was supposed to do this by requiring losing Federal agencies to pay the legal fees of small parties that prevail in legal proceedings against the agencies. These eligible small parties included small businesses (up to 500 employees and $7 million net worth), small public charities (up to 500 employees, regardless of net worth), and individuals of modest means (up to $2 million net worth).

By promising payment from the government at the end of a successful case against the government, EAJA would encourage competent attorneys to take meritorious cases on behalf of small parties that could never afford the legal fees to defend themselves, especially in lengthy, complex litigation against the Federal government. In this way, EAJA would enable good attorneys to take "good cases," cases where the attorney's initial investigation indicated that the Federal government's legal position was unwarranted or unfounded, legally or factually.

Nothing in EAJA would encourage a competent attorney to take frivolous or marginal cases because losing cases would pay nothing. Only the meritorious cases would pay, and would do so many months or years after the attorney began litigating the case and carrying the small party's legal fees. This was the idea that became EAJA. And it was a good one.

Unfortunately, EAJA has flaws and loopholes that effectively allow the government, in cases that it loses, to determine whether and how much to pay in attorneys fees. EAJA reform is needed. Properly crafted amendments, such as those in the key provisions of H.R. 435, would remedy these flaws and put the Federal government on the same legal and accountability footing as state and local governments that violate Federal law. These provisions would help ensure that, when facing the substantial resources of the Federal Government, small parties have access to competent legal counsel, providing them access to the justice system and enabling them to pursue their claims and defenses.

In this brief statement, I will highlight just two of the key provisions of H.R. 435. The first is the proposed legislation's elimination of the "substantial justification" defense which is available to the Federal government. This defense significantly undermines EAJA, and it is notably absent in the analogous fee-shifting provision that applies to state and local governments, i.e., section 1988 of Title 42 (Section 1988). It negates EAJA's protections because it effectively requires a small party who has already prevailed in court or an adversarial administrative proceeding to then prove that the position the Federal government advanced was not "substantially justified." This defense requires small parties, who are least able to afford it, to incur additional expenses of time and money to prove that the defense should not be applied after they have already prevailed against the Federal government. The defense reduces the likelihood that a small private party will recoup the potentially enormous expense of vindicating its rights against the Federal government. It also greatly reduces the likelihood that a competent attorney will agree to provide representation to a small private party. Even if the attorney concludes that the case is meritorious and a clear winner, he or she will still have to litigate whether the Federal government's case was "substantially justified" and not just a loser. The "substantially justified" defense also provides the Federal government an advantage against small parties that Congress has not seen fit to extend to state and local governments in Section 1988.

When Congress first enacted EAJA, it explained that it included the "substantially justified" defense in order "to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts."[2] Some parties opposed to eliminating the "substantially justified" defense have suggested that doing so would have a chilling effect on Federal government actions intended to expand the law or build the law. This is not an appropriate justification for retaining the defense. From the standpoint of safeguarding individual liberty and the Framers' design to protect it, it is unclear that the executive branch should have a significant role in expanding federal power or adopting novel positions to extend a statute's reach or to "make the most" of any ambiguities inadvertently left in a congressional enactment. Even if the Framers had intended such a role for the executive branch, they surely did not intend for such law-building efforts to come at the expense of individual Americans or small businesses. The Framers also recognized that Americans are entitled to know in advance what the law requires of them and should not be forced to learn it at the short end of a civil judgment or guilty verdict resulting from a "novel yet credible" position advanced by the Federal government.

A second key provision of H.R. 435 is its elimination of EAJA's $125 an hour rate cap for attorney fees (to which I recognize some courts generally apply an inflation-based adjustment to arrive at a rate of around $150 an hour). A rate of $125-150 an hour is about one half of the going rates for competent attorneys in major U.S. markets of which I am aware. In order for EAJA to achieve Congress's goal of ensuring that no individual American or small business must succumb to unjustified conduct by the Federal government because of an inability to pay, the EAJA must enable them to obtain competent counsel. EAJA already requires – and will

[2] H.R. Rep. No. 96-1418, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990.

continue to require even if H.R. 435 is enacted – the attorney representing the individual or small business to wait until after all proceedings are complete in order to get paid. This in itself is a significant obstacle to engaging a leading attorney. But only being able to pay half of the market rate is an almost insurmountable obstacle to engaging a competent attorney. Our courts have extensive experience under various Federal and state statutes in determining what the market rates are for competent attorneys practicing within their respective jurisdictions. Eliminating EAJA's artificial cap on attorney fees and entrusting the determination of the proper rate to the courts' sound discretion should go a long way toward improving EAJA's effectiveness.

These two key provisions of H.R. 435 – the elimination of the Federal government's "substantially justified" defense and the removal of the Act's artificial cap on hourly rates for attorney fee awards – merely remove obstacles to EAJA's effectiveness that have *never* been imposed to hinder the effectiveness of Section 1988. If EAJA "burdens" Federal enforcement actions, Section 1988 has for over three decades imposed even greater "burdens" on state and local government than would EAJA even after enactment of H.R. 435. Section 1988 includes no "substantially justified" defense for state and local governments to rely on when they are deciding whether to assert a novel position. Moreover, Section 1988 allows courts to exercise their discretion when awarding attorney fees to determine what the proper fee is based on relevant market rates.

I pause here to point out that, if H.R. 435 is enacted, EAJA will still include burdens on prevailing parties that are not imposed by Section 1988. Section 1988 is not limited to small parties – a private party of any size may receive an award of attorney fees against a state or local government. EAJA also precludes a substantial number of fee awards to small parties that prevail in administrative proceedings by requiring that a proceeding be an "adversary adjudication" within the technical meaning provided by the Administrative Procedures Act. By contrast, Section 1988 makes attorney fee awards potentially available "[i]n any action or proceeding."

Despite the absence of these many advantages that the Federal government enjoys under EAJA, Section 1988 has not bankrupted state and local governments. I am aware of no significant movement among state and local governments to eliminate or reform Section 1988. State and local governments apparently recognize the inherent justice of Section 1988's provisions and have learned to accommodate its costs within their budgets, which are of course modest when compared with the Federal budget.

I thus believe appropriate provisions to reform EAJA, such as those included in H.R. 435, would improve the statute and further balance the legitimate needs of Federal government litigators with the rights and legitimate interests of individuals and small businesses.

As Attorney General, I developed a great respect for the litigators in the Department of Justice, whose overall professionalism is exemplary. Nevertheless, I also shared former Attorney General (later Supreme Court Justice) Robert Jackson's understanding of a federal litigator's role (whether a prosecutor or civil litigator), which is to do justice rather than exploit every advantage

the government has to win every case brought. EAJA helps the federal government follow the just course, and the provisions of H.R. 435 move us further in that direction.

Not only would the changes contained in H.R. 435 improve the opportunity for prevailing small entities to recoup their attorneys' fees and expenses, the provisions likely would lead to increased early assessment and settlement of claims. More importantly, the provisions in question will provide small entities a better chance of obtaining legal representation when they believe the federal litigation is unwarranted. All of these ends serve the public interest, and may even result in a reduction of overall federal outlays for litigation.

The Department of Justice opposed the bills that led to passage of EAJA in 1980. The Department also has opposed some attempts to improve or expand EAJA. This opposition appears to be institutional and based on a view of EAJA's potential costs to the government and the possibility it may have a chilling effect on appropriate legal enforcement efforts. I appreciate those concerns but do not think they should be dispositive.

In opposing the original enactment of EAJA, the Department estimated its costs at $500 million over its first three years. The Congressional Budget Office estimated EAJA's cost at $368 million over that same three-year period. Experience has now demonstrated that both predictions were greatly overblown. In fact, EAJA cost just $34 million over its entire first 13 years of existence, from Fiscal 1982 through Fiscal 1994 (the entire period for which cost data are available).[3] Moreover, "of the $34 million, applications involving the Social Security Administration accounted for at least 83 percent of the claims granted ...."[4]

Members of the House and Senate responded skeptically to the Department's arguments. According to Senator DeConcini, what the Department was really saying was that American citizens would be damaged to the tune of $500 million because of costly, unreasonable, and burdensome government litigation and regulation. In an August 1979 House Judiciary Committee hearing, Senator Nelson summed up the controversy:

> [T]here is a great deal of bureaucratic arrogance in both the federal government and in the states .... The argument will be made, and is made by some, that if the government is required to reimburse for attorney fees in those circumstances where they pursue an action and do not prevail, it will have a "chilling effect." I say, my God, I hope so. That's exactly what we want, a chilling effect.... We are loaded in this government with people who make mistakes and they are honest. Even if it's an honest mistake, too bad; the government ought to pay for it.

It is important to remember that EAJA encourages small parties to fight back only when

[3] GAO Report, "Equal Access to Justice Act: Its Use in Selected Agencies," Rept. No. B-278335, at 2-5 (Jan. 14, 1998) (hereinafter "GAO Report").

[4] GAO Report, *supra* note 3, at 3.

they have a good case and ought to fight back. It encourages competent attorneys to take meritorious cases only when they feel they should win – that they should prevail over illegal government actions and bad public policies. Such claims and defenses ought to be made, both to avoid the injustice to the small party caught over the proverbial barrel and to avoid the damage to the legal system and public confidence of unjustified government actions, precedents, and policies.

H.R. 435 should in fact further the Department's goals of refining public policy and promoting a clear understanding of what Federal law requires. When small parties are properly represented, thanks to EAJA, our adversarial system is able to function at its best to sharpen the opposing sides' arguments and direct official scrutiny to areas of the law that may cause problems to third parties subject to the same laws. Without an effective EAJA, the Federal government may too often avoid opposition and develop precedent along the path of least resistance.

I applaud the authors of H.R. 435 for their efforts to make the justice system more accessible to small parties engaged in litigation with the Federal government.

I hope the Department of Justice also supports these efforts and works constructively with the Congress on such legislation.

Thank you for inviting me to share my views.

NEWS ALERT FROM THE NATIONAL ASSOCIATION OF MANUFACTURERS

NEWS ALERT NAM National Association of Manufacturers

06-119

FOR IMMEDIATE RELEASE

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SMALL MANUFACTURING CEO TELLS CONGRESS WHY EQUAL ACCESS TO JUSTICE ACT NEEDS TO BE UPDATED

Small Companies Need Protection From "Overzealous Bureaucrats"

WASHINGTON, D.C., May 23, 2006— The head of a small New England manufacturing company today gave Congress a dramatic account of how "overzealous bureaucrats" of the Environmental Protection Agency employed falsified documents to support a false charge against his company, but that he was unable to recover the $218,000 he was obliged to spend in legal expenses because of limitations in the Equal Access to Justice Act (EAJA).

James Knott, Sr., President and Chief Executive Officer of Riverdale Mills Corporation in Massachusetts, told the House Judiciary Committee's Subcommittee on Courts, the Internet and Intellectual Property that agents from the EPA altered test results of discharges from his factory's water treatment plant to show it was releasing acidic compounds. A retired agent of the Federal Bureau of Investigation identified the falsification of the test results that had been made with a ballpoint pen.

A Board Member of the National Association of Manufacturers, Knott told the legislators that the EPA inspector admitted on the witness stand that the test results had been altered. "Without evidence that the Rivers Protection Act had been violated, the U.S. Justice Department asked the judge to dismiss the case and the judge complied," he said.

But Knott was unable to recover any of the $218,000 he had spent on his defense under the existing EAJA. "With the limitations of the EAJA as it now exists, the district court awarded my company fees of only $68,726, which was ultimately overturned by the First Circuit," he said. Knott expressed support for the Equal Access to Justice Act of 2005 to enable "small businessmen like me to be compensated for the costs of protecting themselves and their businesses from the attack of overzealous bureaucrats."

Knott also endorsed provisions in the legislation that would increase the penalties under the law and require that penalties be paid from federal agency budgets, not the U.S. Treasury. "Right now, the agencies themselves are not punished when they are so egregiously overzealous that EAJA compensation requests are granted," he said.

-NAM-

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country. Visit the NAM's award-winning web site at www.nam.org for more information about manufacturing and the economy.

1331 Pennsylvania Ave. NW, Suite 600, • Washington, DC 20004 • (202) 637-3000

A DEAR COLLEAGUE FROM THE UNITED STATES SENATE ON ORGANIZATIONS SUPPORTING THE EQUAL ACCESS TO JUSTICE REFORM ACT OF 2005, H.R. 435/S. 2017

United States Senate
WASHINGTON, DC 20510

May 23, 2006

The Equal Access to Justice Reform Act:
Fair Treatment for Small Businesses

Dear Colleague:

We recently introduced the "Equal Access to Justice Reform Act" (S. 2017). This bill would improve the existing Equal Access to Justice Act ("EAJA") statute and help small businesses that prevail in lawsuits against the government.

Enacted in 1980, EAJA provides for the recovery of reasonable attorneys' fees by small businesses, individuals of modest means, and small nonprofit organizations when they prevail in litigation with the federal government. Its purpose was to ensure that ordinary citizens would be able to defend themselves against federal actions. EAJA has failed to meet this goal. The bill we have sponsored is designed to strengthen EAJA, enabling it to accomplish its intended goal without unduly restraining federal agency actions.

Current law authorizes the award of attorneys' fees when a party prevails against the federal government. Yet, in practice, that simple notion is so riddled with exceptions that it generally provides false hope to small businesses and individuals that want to challenge federal action. The federal government may avoid the payment of attorneys' fees when it has lost its case by simply convincing a court or agency that its litigation position was "substantially justified." Such a claim initiates additional, time-consuming, risk-laden, and expensive litigation over the fee recovery itself, all of which provides a significant disincentive for individuals and small businesses to pursue the statutory remedy available to them. Further, EAJA currently caps hourly attorneys' fees at well below the market rate, creating an additional hurdle for small businesses and individuals, especially for complex litigation against the federal government.

Our bill would: (1) encourage settlement; (2) create a more efficient government; and (3) provide Congress with an excellent oversight tool to track fee awards. It eliminates the restrictive standard for recovery of attorneys' fees that requires the government's claims to be "not substantially justified" before a court may award fees.

While requiring agencies to be more accountable for their decisions, our bill would protect the health, safety, and welfare of small businesses and individuals throughout the United States. S. 2017 differs from the House version (H.R. 435) by exempting four agencies that have special responsibility for enforcing the labor laws from paying fees from their own appropriations.

Our proposal is supported by groups representing the entire political spectrum, from the American Civil Liberties Union and the Sierra Club to the Heritage Foundation and the American Conservative Union. There is good reason for this broad support. A well-intentioned statute, EAJA essentially has become a dead letter.

The Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia*, 532 U.S. 598 (2001), further exacerbated these problems. In that case, the Court held that the term "prevailing party" for all federal fee-shifting statutes, including EAJA, only applies if the litigant obtains a judgment in the litigant's favor rather than when the litigant achieves its objective through an out-of-court settlement or unilateral concession by the government. This creates an incentive for litigants to refuse accept settlements and concessions by the government, further clogging the federal courts. Our bill reverses the *Buckhannon* decision in cases covered by EAJA.

There are at least 100 federal-fee shifting statutes in the United States Code, and only EAJA includes the "substantial justification" defense and caps on attorneys' fees. It has become increasingly important to make the proposed changes to EAJA for small businesses. EAJA is frequently the only way for small businesses and individuals to afford counsel who will defend them against the government or assist them in pursuing claims for government benefits.

These reforms to EAJA will ensure that federal agencies will more carefully consider the implications of their actions against small businesses and individuals in the same way that they might when considering action against larger businesses with substantial financial and legal resources.

Our proposal removes flaws and strengthens EAJA. The changes will increase efficiency in EAJA litigation and help reduce delays in the federal courts by reducing the amount of EAJA-related litigation. Finally, by requiring most federal agencies to pay EAJA fees out of their appropriated funds rather than a general government account in the Treasury, our bill will force decision makers to critically assess their enforcement and litigation. Ultimately, the changes to EAJA will create a less burdensome and more efficient federal government.

For more information about this bill or to cosponsor, please contact Alex Hecht (Snowe) at 202-224-5175 or Bob Schiff (Feingold) at 202-224-5323.

Sincerely,

OLYMPIA J. SNOWE
United States Senator

RUSSELL D. FEINGOLD
United States Senator

ORGANIZATIONS SUPPORTING THE EQUAL ACCESS TO JUSTICE REFORM ACT OF 2005 (H.R. 435 / S. 2017):

American Center for Law & Justice (ACLJ)

American Civil Liberties Union (ACLU)

American Conservative Union (ACU)

American Dental Association (ADA)

American Medical Association (AMA)

Association of Trial Lawyers of America (ATLA)

Chamber of Commerce of the United States (CHAMBER)

Heritage Foundation/Ed Meese (HERITAGE)

Home School Legal Defense Association (HSLDA)

Illinois State Bar Association (ISBA)

Leadership Conference on Civil Rights (LCCR)

National Association for the Advancement of Colored People (NAACP)

National Association of Manufacturers (NAM)

National Federation of Independent Business (NFIB)

Natural Resources Defense Council (NRDC)

Sierra Club (SIERRA)

Small Business EAJA Coalition (SBEAJC) (27 major trade associations, representing *millions* of businesses)

STATEMENT OF THE HONORABLE DONALD A. MANZULLO, CHAIRMAN, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

Statement of Representative Donald A. Manzullo
Chairman, U.S. House of Representatives Committee on Small Business

Hearing on H.R. 435, the Equal Access to Justice Reform Act of 2005

Before the U.S. House of Representatives Committee on the Judiciary
Subcommittee on Courts, the Internet, and Intellectual Property

May 23, 2006

Chairman Smith, Ranking Member Berman, and Members of the Subcommittee:

On behalf of myself and my cosponsor, Representative Earl Blumenauer of Oregon, I want to thank you for inviting me to submit written testimony on our bill, H.R. 435, the Equal Access to Justice Reform Act of 2005, which has been referred to both the Judiciary Committee and the Small Business Committee. As the chairman of the Small Business Committee, I know how important this bill is to our nation's small businesses. As a lawyer who practiced law for 22 years before coming to Congress, I know how vital this bill is to fulfilling the promise of the Equal Access to Justice Act: enabling the little guy to resist illegal federal action.

1. Summary.

H.R. 435 would improve the Equal Access to Justice Act of 1980 – "EAJA." It would make EAJA work as intended, providing incentives for competent attorneys to represent small businesses in cases against the federal government through the promise of payment of their legal fees by the losing government agency at the end of a successful case.

Our bill also would hold the federal government just as accountable to federal law as we have held state and local governments accountable to federal law. Our bill would do no more, and no less, than put the federal government on parity with state and local governments when it comes to the consequences of violating federal law.

Congress has passed many so-called fee-shifting statutes that require losing government agencies to pay the legal fees of the citizen they wronged. The primary one that applies to state and local governments, the Civil Rights Attorneys Fee Awards Act of 1976, has been on the books for thirty years. It has worked well with little controversy. The primary law that applies to the federal government – EAJA – works miserably.

EAJA is supposed to give a small business a fighting chance in court by helping it secure legal counsel to battle the federal government. In fact, EAJA is so flimsy that it permits the losing federal agency to determine if, when, and how much legal fees will be paid. This opportunity for the agency to avoid fee liability comes, not before the final result is known, but *after* the agency has been beaten in court and proven to have violated the federal rights of the small business.

As it turns out, then, the primary fee-shifting law that we have passed to make the federal government accountable to federal law is far weaker, and far less effective, than the primary law we have passed to make state and local governments accountable to federal law. This means a small business targeted by a government agency is far more likely to obtain a good attorney to defend it if the government in question is state or local. In an identical case, that same small business will have a much harder time where the government in question is federal. This holds state and local governments to a much stricter standard of accountability than the federal government. It gives the federal government a pass and makes it very difficult for little guys to get quality legal representation in disputes with federal agencies.

So our bill is about government accountability. It's about making the federal government as accountable to federal law as state and local governments have been. This is the least we can do. There is a strong argument that the federal government should be more, even much more, accountable. The laws being violating here are federal laws. Shouldn't the United States Government be more accountable than state and local governments to the Constitution and laws of the United States? Also, shouldn't the government with the greater power and resources, and greater potential for abuse, also be held to the greater standard?

Our bill also is about fairness. It's about fairness to the little guy facing a reckless citation from the EPA – a vindictive prosecution by the IRS – an *ultra vires* enforcement action by the FCC – an unconstitutional summons from the SEC – an abusive investigation by the FBI – or just the routine enforcement of a rule or regulation that happens to violate the highest law of the land.

It's about fairness to the little guy when the *U.S. Department of "fill-in-the-blank"* or the *Federal "fill-in-the-blank" Commission* or *Administration* comes after him illegally, by exceeding its authority under the Constitution, its enabling statute, or its own regulations. It's about fairness in the courtroom when a small business confronts the enormous resources and determination of an unreasonable, unauthorized, or misbehaving federal government.

It's about fairness to our small business and other citizens who must live under the regulatory polices and enforcement regimes established by illegal-but-unchecked actions of federal agencies. It's about arbitrary and capricious regulations that remain on the books because they were never tested by parties with the resources to mount a meaningful challenge. It's about unconstitutional enforcement regimes that federal agencies sometimes have established on the backs of small business owners who were forced to roll over rather than fight back.

It's about fairness to state and local officials who are held to a much higher standard than their federal counterparts. It's about fairness to the treasuries of state and local governments that Congress has ordered tapped to pay the prevailing party's legal fees when the state or local government has been proven to have violated federal law. It's about fairness to the attorneys who in good faith and public service undertake needful but expensive litigation against an often overwhelming federal government – and should be paid, as promised by EAJA, when they prevail in the end for their small business client.

2. **BACKGROUND.**

This crusade began for me early in the 107th Congress, when I learned about longstanding efforts to improve EAJA and widespread public support for such reforms. I studied EAJA reform bills, most notably the then-current one by Senators Russ Feingold and Tim Hutchinson (S. 106), and introduced a more comprehensive EAJA reform bill as H.R. 5179. In the 108th Congress, I reintroduced my bill with some changes and the co-sponsorship of my friend, Congressman Earl Blumenauer, as H.R. 2282. We introduced the same bill in this 109th Congress as H.R. 435.

H.R. 435 has strong support in the Senate, as demonstrated by the attached letter cosigned by Senators Snowe and Feingold, the cosponsors of the current Senate companion bill (S. 2017). See the letter of December 16, 2005 signed by all House and Senate principals, attached hereto and incorporated herein. S. 2017 is virtually identical to H.R. 435, but has a shorter findings section, an inflationary index for small business eligibility, and a continuation of current law on payment of EAJA fees for four specially situated agencies (more on this below).

H.R. 435 has tremendous support among the public, as demonstrated by the attached support letters from 17 groups ranging from the American Conservative Union and Heritage Foundation to the major business and trade associations to the Sierra Club and ACLU. Most of these supporting groups serve as umbrella organizations representing many more groups. All these support letters are attached to the December 15, 2005 letter of Manzullo, Blumenauer, Snowe, and Feingold, which is attached to this statement as an appendix and incorporated herein.

2.1 Overview.

H.R. 435 would improve EAJA, whose legislative purpose is well known and oft-repeated by the courts. "Congress enacted EAJA in 1980 to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government.... [Its] aim was to ensure that certain individuals [and] organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved."[1]

The essential beneficiaries of EAJA are small businesses, defined as those with up to 500 employees and $7 million net worth. "One can hardly dispute that the purpose of the Equal Access to Justice Act was to ease the burden upon small businesses of engaging in litigation with the federal government."[2] Eligible small parties also include public charities (26 U.S.C. §501(c)(3)) with up to 500 employees and individuals with up to $2 million net worth.

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[1] *Scarborough v. Principi*, 541 U.S. 401, 406-407 (2004) (quoting EAJA's legislative history).

[2] *Texas Food Industry Ass'n v. U.S.D.A.*, 81 F.3d 578, 585 (5th Cir. 1996) (citation omitted).

In my view, EAJA has seriously underperformed for two main reasons. First, it contains an absolute defense for a losing government agency to escape fee liability if the agency can show that its position, although proven illegal, was nonetheless "substantially justified." Second, it contains a cap on the legal fees that may be charged. Neither of these limitations is contained in the primary federal fee-shifting statute applicable to state and local governments. Neither is justified by policy or experience. Both disable EAJA. Both would be removed by H.R. 435.

H.R. 435 also would plug other holes. A few examples include renewing annual reporting to Congress on the number and kind of EAJA claims filed and granted against federal agencies (such reporting ceased in 1995), adding a mechanism to encourage early settlement of EAJA claims by prevailing small parties (similar to Federal Rule of Civil Procedure 68), and stopping losing federal agencies from paying their EAJA liability from the General Treasury via the Claims and Judgment Account or Judgment Fund (instead paying the liability from their appropriation, seeking reprogramming of funds if necessary, as intended by the Congress that enacted EAJA). These and all other provisions of H.R. 435 are discussed in detail below.

My view that EAJA has seriously underperformed is supported by its surprisingly small cost. Despite the Justice Department's estimate that EAJA would cost $500 million over its first three years – and CBO's estimate of $330 million over the same period (an overestimate of some 10,000 percent) – EAJA in fact cost just $3.9 million over its first three years and only $34 million over its first 13 years (from fiscal 1982 through fiscal 1994, the entire period for which cost data are available).[3] Moreover, "of the $34 million, applications involving the Social Security Administration accounted for at least 83 percent of the claims granted ...."[4]

The cost to individual federal agencies has been stunningly small. During fiscal 1994 (the most recent year for which data are available), the following major federal agencies – with which one might assume scores of legal controversies involving small entities covered by EAJA – incurred the following amounts of EAJA liability:[5]

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[3]*See* GAO Report, "Equal Access to Justice Act: Its Use in Selected Agencies," Rept. No. B-278335, at 2-5 (Jan. 14, 1998) (http://archive.gao.gov/paprpdf1/159815.pdf) ("GAO Report"); H. Rept. 105-453 (Mar. 18, 1998); H. Rept. 99-120(I) (May 15, 1985). "The CBO projected the EAJA would cost an estimated $92 million in fiscal year 1982, $109 million in fiscal 1983, and $129 million in fiscal 1984." *Berman v. Schweiker*, 713 F.2d 1290, 1299 n. 22 (7th Cir. 1983) (citing H. Rept. 96-1418). Actual awards were "dramatically less than the $100 million annual cost estimated by [CBO] in 1981 and higher amounts predicted by the Justice Department." H. Rept. 99-120(I), *supra*. "[CBO] was off on its original scoring of the EAJA by roughly 10,000 percent (100 times)." H. Rept. 105-453, *supra*.

[4]GAO Report, *supra* note 4, at 3.

[5]GAO Report, *supra* note 4, at Table II.3 (Enclosure II).

Agency: $ Total EAJA Liability for FY 1994

DOD:	$ 468,321
DOE:	$ 51,458
HUD:	$ 6,899
DOJ:	$ 36,960
DOL:	$ 990
DOT:	$ 157,449
Treas:	$ 190,519
VA:	$ 491,240
NLRB:	$ 35,000[6]
SEC:	$ 17,627

These sums certainly appear small, given the size and scope of these agencies. Moreover, the vast majority of all federal agencies had no reported EAJA liability at all for fiscal 1994. These data suggest that EAJA has been ineffective, underutilized, or both.

Finally, my view that EAJA has seriously underperformed is supported by strong and diverse public support for reform. The following have provided strong letters of support for H.R. 435:

- American Center for Law & Justice (ACLJ)
- American Civil Liberties Union (ACLU)
- American Conservative Union (ACU)
- American Dental Association (ADA)
- American Medical Association (AMA)
- Association of Trial Lawyers of America (ATLA)
- Chamber of Commerce of the United States (CHAMBER)
- Heritage Foundation/Edwin Meese III (HERITAGE)
- Home School Legal Defense Association (HSLDA)
- Illinois State Bar Association (ISBA)
- Leadership Conference on Civil Rights (LCCR)
- National Association for the Advancement of Colored People (NAACP)
- National Association of Manufacturers (NAM)
- National Federation of Independent Business (NFIB)
- Natural Resources Defense Council (NRDC)
- Sierra Club (SIERRA)
- Small Business EAJA Coalition(27 associations, representing millions of businesses)

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[6]As of a 1998 Judiciary Committee report, "fee applications filed under the Equal Access to Justice Act have cost the [NLRB] a total of roughly $1.42 million since 1982." H. Rept. 105-453, *supra*.

As noted, these support letters are attached to the appendix to this statement. Clearly, there is widespread public interest in EAJA reform. Clearly, there is widespread support for H.R. 435.

Finally, as this statement hopefully will show, there is no sound reason to oppose H.R. 435. One potential reason should be refuted right here. While the bill strengthens EAJA, which could result in increased federal litigation, it will not, probably could not, increase *frivolous* litigation. Because EAJA promises payment only at the end of a *successful* case, it encourages good cases, strong cases, only. No attorney in his right mind would take on a formidable opponent in a *contingent* case unless he was confident of winning and collecting at least some of his fees.

By all accounts, §1988 has encouraged only appropriate litigation. How could EAJA do less? With EAJA, your opponent is the federal government, with all its resources and determination. As an attorney considering such a case, you must weigh the prospects of battling for years, *unpaid*, against the most formidable of all opponents, in the hopes of collecting some (never all) of your investment *if you win*. You cannot afford to take such cases lightly. One loss could ruin your law practice or seriously harm your livelihood or law firm.

Therefore, EAJA provides hope for parties who suffer actual wrongs at the hands of the federal government; it brings accountability to erring federal officials; and it helps refine public policy through useful adjudication. EAJA has never inspired the filing of a frivolous claim or defense, or even a "close" or marginal one. Only sure-bets -- where federal agencies are pretty clearly wrong and acting illegally – are worth the risk. Thus, the cases and defenses encouraged by such statutes are precisely the kind of cases that everyone would agree should be brought.

2.2 Legislative History of EAJA.

From 1973 to 1978, Congress held 14 hearings on fee shifting, including at least five on two EAJA bills, S. 1001 and S. 2354. The intent was to (a) provide an incentive for private parties to contest government overreaching, (b) deter subsequent wrongdoing, and (c) provide more complete remedies for citizens injured by government action.

The landmark fee-shifting statute enacted during this period was the Civil Rights Attorneys Fee Awards Act of 1976,[7] which remains the primary federal fee-shifting statute applicable to state and local governments. EAJA was to be its counterpart, applicable to the federal government.

The proposed EAJA legislation was originally named the Small Business Equal Access to Justice Act (H.R.6429). It was reported by the House Small Business Committee on May 16, 1980 (H. Rept. 96-1005), the same day that Committee reported H.R. 5612 (H. Rept. 96-1004), which later

[7]Revised Statutes §722, codified at 42 U.S.C. 1988(b).

incorporated EAJA.[8] Specifically, tracking both the House bill (H.R.6429) and the Senate bill (S.265), EAJA became Title II to H.R.5612, known as the Small Business Export Expansion Act of 1980.[9] It was reported by the Conference Committee on September 30, 1980 (H. Conf. Rept. 96-1434) and enacted on October 21, 1980 (P.L. 96-481).[10] EAJA remains codified at 5 U.S.C. §504 (for administrative agency proceedings) and at 28 U.S.C. §2412 (for judicial proceedings).

EAJA originally contained a three-year sunset, but was reenacted permanently in 1985, amended in Subtitle C of the Small Business Regulatory Enforcement Fairness Act (SBREFA) in 1996,[11] and extended to certain criminal proceedings in 1997 ("Hyde Amendment").[12] This bill does not affect the more stringent eligibility criteria for criminal defendants.[13]

2.3 What H.R. 435 Would *Not* Do.

Before outlining what the bill would do, it should be useful to summarize briefly what it would not do. Specifically, the bill leaves intact the following sensible limitations of EAJA:

(a) EAJA applies only to specified proceedings, *excluding all tort actions* and *excluding all administrative proceedings that do not qualify technically as "adversary adjudications"* within the Administrative Procedures Act, 5 U.S.C. §504(b)(1)(C).

(b) EAJA applies only to *prevailing parties*.

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[8]*See also Fanning et al. v. West*, 160 F.3d 717, 722 (Fed. Cir. 1998) (EAJA's history).

[9]Also known as the Small Business Assistance and Reimbursement for Certain Fees Act of 1980. Technically, the legislation was described as "An Act to amend the Small Business Act, to provide for the payment of the United States of certain fees and costs incurred by prevailing parties in Federal agency adjudications and in civil actions in courts of the United States, and for other purposes."

[10]For the legislative history, *see generally* H. Rept. 96-1004 (House Small Business); S. Rept. 96-974 (Senate Small Business); H. Rept. 96-1418 (House Judiciary) and S. Rept. 96-253 (Senate Judiciary); and H. Conf. Rept. 96-1434 (House-Senate Conference).

[11]Title II, Pub. L. No. 104-121 (Mar. 29, 1996).

[12]P.L. 105-119, Title VI, §617, 18 U.S.C.A. §3006A Note (which incorporated EAJA).

[13]To qualify under the Hyde Amendment, a criminal defendant must show that the federal prosecutor acted vexatiously, frivolously, or in bad faith. This special standard in criminal cases is much higher than for all other (civil) cases under EAJA. In both/all kinds of cases, the amount of any award remains subject to EAJA. *See, e.g., U.S. v. Adkinson*, 360 F.3d 1257 (11th Cir. 2004).

(c) EAJA applies only to *small* parties: *individuals* with net worth up to $2 million; *small businesses* with net worth up to $7 million *and* workforce up to 500 employees; and charities with up to 500 employees (regardless of net worth).

(d) EAJA requires prevailing small parties to meet additional eligibility criteria.

(e) EAJA precludes a fee award to otherwise eligible prevailing small parties to the extent they unreasonably protract the proceedings.

(f) Any fee award remains subject to certain equitable doctrines, such as *unclean hands*, which may require fee reduction or denial to prevailing small parties that meet all legal criteria but engaged in misconduct during the proceedings.

(g) "Courts will always retain substantial discretion in fixing the amount of an EAJA award."[14]

All these limitations remain intact under the bill. Moreover, as stated above, the bill does not affect the more stringent eligibility criteria for criminal defendants.

2.4 What H.R. 435 *Would* Do.

EAJA has failed to meet its goals. Reform is needed that will strengthen EAJA without unduly crimping federal legal enforcement. One strong supporter of H.R. 435 is former Attorney General Edwin Meese. His support letter, dated March 11, 2005, summarizes the key issues as follows:

> [W]e believe the key provisions of ... H.R. 435 would improve the statute and further balance the legitimate needs of government litigators and the rights and legitimate interests of individuals and small businesses.
>
> As Attorney General, I developed a great respect for the litigators in the Department of Justice, whose overall professionalism is exemplary. Nevertheless, I also shared former Attorney General (later Supreme Court Justice) Robert Jackson's understanding of a federal litigator's role (whether a prosecutor or civil litigator) which is to do justice rather than exploit every advantage the government has to win every case brought. The Equal Access to Justice Act helps the federal government follow the just course, and the provisions of H.R. 435 move us further in that direction. I hope the Department of Justice also supports your efforts and works constructively with you on such legislation.

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[14] *INS v. Jean*, 496 U.S. 154, 163 (1990).

The changes contained in H.R. 435 would improve the opportunity for small entities to recoup their attorneys' fees and expenses if they prevail in cases brought against them by the federal government. The provisions likely would also lead to increased early assessment and settlement of claims. More importantly, the provisions in question will provide small entities a better chance of obtaining legal representation when they believe the federal litigation is unwarranted. All of these ends serve the public interest, and may even result in a reduction of overall federal outlays for litigation.

I certainly agree with Mr. Meese. The EAJA reforms of H.R. 435 would help ensure that, when facing the substantial resources of the federal government, small parties have access to competent legal counsel, providing them access to the justice system and enabling them to pursue their claims and defenses. In addition, H.R. 435 would:

- Help minimize future abuses of federal power by ensuring that victims of current abuses have access to legal remedies.
- Make the federal government more accountable to federal law by providing Congress, through annual reporting, with a useful oversight tool to stem abuses.
- Put federal agencies/officials that violate federal law on the same legal footing as state and local agencies/officials that violate federal law, resulting in the same consequences and equalizing accountability to federal law.
- Encourage small parties that would otherwise succumb to federal pressure to contest unreasonable or illegal agency actions, thereby serving to refine public policy.
- Help ensure that small parties are not steam-rolled or even innocently made to bear a disproportionate burden for the operation of federal regulatory and enforcement regimes.
- Create less costly government by causing agencies to consider less burdensome options before imposing regulatory burdens or taking unreasonable enforcement actions.
- Create virtually no new spending, since it requires agencies to pay for their mistakes out of their preexisting appropriations (seeking reprogramming, if necessary, as intended by the Congress that enacted EAJA).

3. **SECTION-BY-SECTION SUMMARY OF H.R. 435.**

EAJA authorizes the award of attorneys' fees against the federal government when a party prevails against the federal government. Yet, that simple notion is riddled with so many

exceptions that it often provides false hope to those wishing to challenge illegal federal action. In each of its six sections, H.R. 435 does the following:

Section 1. Short Title.

Simply states that this "Act may be cited as the "Equal Access to Justice Reform Act of 2005."

Section 2. Findings and Statement of Purpose.

The findings and purposes provided in H.R. 435 should help interested parties understand its provisions. These explicit findings and purposes also should help courts interpret H.R. 435's provisions consistently with congressional intent. They are provided here in full:

(a) FINDINGS.–the Congress finds that–

(1) the Equal Access to Justice Act was intended to make the justice system more accessible to individuals of modest means, small businesses, and nonprofit organizations (collectively referred to as "small parties") through limited recovery of their attorneys' fees when they prevail in disputes with the Federal Government;

(2) although EAJA has succeeded, at modest cost, in improving access to the justice system for small parties, EAJA retains formidable barriers to attorneys' fees recovery (even for small parties that completely prevail against the Government), as well as inefficient and costly mechanisms for determining the fees recovery;

(3) among the barriers retained by EAJA are–

(A) EAJA's "substantial justification defense," whereby the Government can deny attorneys' fees recovery to prevailing small parties if the Government can show that its position, although proven illegal, was not abusive or entirely unreasonable;

(B) EAJA's hourly rate cap on attorneys' fees of $125, which is well below the market rate for competent legal services in many legal markets (especially for complex and high-risk litigation against the Federal Government) and thus prevents fair reimbursement of attorneys fees for small parties and discourages competent counsel from undertaking meritorious cases on a contingency or reduced-fee basis; and

(C) EAJA's outdated small business eligibility requirements, which have not increased or indexed for inflation the net worth threshold of $7,000,000 established in 1985.

(4) among the inefficiencies retained by EAJA are–

(A) EAJA's "substantial justification" defense, which initiates collateral litigation over attorneys' fees recovery that both consumes significant Federal resources and prolongs the time, expense, and risk of pursuing fees recovery to the prevailing small party;

(B) EAJA's omission of any mechanism (such as the offer in compromise feature of Federal Rule of Civil Procedure 68) that would apply after a small party has prevailed on the merits of its claim to encourage both sides to reach a prompt and reasonable settlement of attorneys' fees;

(C) EAJA's failure to create an educational and technical assistance function within an appropriate agency to facilitate more efficient use, settlement, and payment of claims under EAJA; and

(D) EAJA's failure to reassign congressional reporting obligations to an appropriate, existing agency (EAJA lodges annual congressional reporting with the Administrative Conference of the United States, an agency which ceased to exist in 1995, and with the Department of Justice, whose sunsetted reporting obligations ceased in 1995).[15]

(5) none of these barriers or inefficiencies exists in the primary Federal fee-shifting statute applicable to State and local governments, Revised Statutes §722 (42 U.S.C. 1988(b)), resulting in–

(A) an unequal level of accountability to Federal law among governments in the United States (shielding the Federal Government to a greater degree than State and local governments from the consequences of violating Federal law);

(B) an uneven playing field for small party victims of Federal law violations (discouraging resistance to illegal action by the Federal Government); and

(C) an inefficient use of Federal agency resources (burdening the Federal budget);

(6) a further barrier and inefficiency is the practice of Federal agencies of paying their EAJA liabilities from the General Treasury rather than their own agency budgets, relieving those agencies of the financial consequences of their misconduct (i.e., EAJA liability) and burdening the Federal budget unnecessarily;

(7) it is in the national interest to remove these barriers and inefficiencies for small parties, particularly small business owners, involved in disputes with the Federal

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[15]GAO Report, supra note 4, at 4.

Government in order to develop sound policies relative to the national economy in which small businesses play a significant and strategic role; and

(b) PURPOSE.–It is, therefore, the purpose of these Amendments to remove existing barriers and inefficiencies in EAJA in order to–

(1) equalize the level of accountability to Federal law among governments in the United States;

(2) discourage marginal or abusive Federal enforcement actions directed at small parties;

(3) stop the practice of paying EAJA liabilities from the General Treasury, which has insulated agencies from the financial consequences of their misconduct and burdened the Federal budget unnecessarily;

(4) refine and improve Federal policies through adjudication;

(5) promote a fair and cost-effective process for prompt settlement and payment of attorneys' fees claims; and

(6) provide a fairer opportunity for full participation by small businesses in the free enterprise system, further increasing the economic vitality of the Nation.

Section 3. Reporting and Technical Assistance by Office of Advocacy.

Annual EAJA reporting ground to a halt twelve years ago. The reason is simple. EAJA lodged annual reporting for *administrative litigation* with the Administrative Conference of the United States, an agency which ceased operations in 1995, and reporting for *judicial litigation* with the Department of Justice, whose sunsetted reporting obligations ceased in 1995.[16] This lapse in annual reporting to Congress apparently was not intentional and certainly was not helpful. There is no cost data or other data on the EAJA since fiscal year 1994.

This section of H.R. 435 renews the reporting to Congress and bolsters the role in that process of the SBA's Office Advocacy, headed by a Chief Counsel for Advocacy. This office had a statutory role in assisting EAJA reporting before such reporting lapsed. Because this office enjoys a measure of independence from both the SBA and the White House, and because it is charged with minimizing federal governmental burdens on small businesses (EAJA's prime beneficiaries), it is assigned a larger role in the reporting function. It also is assigned a technical assistance and educational function to help EAJA work more smoothly.

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[16] *See* GAO Report, *supra* note 4, at 4.

Specifically, this section of H.R. 435 assigns all EAJA reporting to the Department of Justice in cooperation with SBA's Office of Advocacy. It adds a similar annual reporting requirement to the annual small business reporting requirement of the President. To help remedy the twelve-year lapse in reporting, it requires a one-time comprehensive report within six months of enactment, in addition to the less extensive annual reporting. All such reports will aid Congress in conducting oversight of agencies and making any needed adjustments in the future.

Section 4. Equal Access for Small Parties in Civil and Administrative Proceedings.

(a) Elimination of Substantial Justification Standard.

This subsection eliminates EAJA's "substantial justification" requirement. EAJA's worst flaw, this requirement allows a losing federal agency to completely avoid the payment of attorney fees by convincing a court or agency that its position or action was "substantially justified."

As one might expect and is corroborated by countless reported cases, when a federal agency is adjudged to have violated the rights of a small party covered by EAJA, the agency usually claims that its position was actually fairly reasonable. That is, in fact, what "substantial justification" has come to mean: fairly reasonable. Thus, in nearly every case that a federal agency loses, it will argue that its position, although ruled illegal, was not so unreasonable as to warrant fee recovery. Where does this leave the small party that was counting on EAJA to pay its longsuffering and successful attorney who took the case in good faith and public service on the promise of EAJA that he would be paid in the end if he won?

This "substantial justification" requirement has no counterpart in the primary federal fee shifting law applicable to state and local agencies, 42 U.S.C. §1988, or in any other fee-shifting statute.[17] Among the more than 100 federal fee-shifting statutes, it is unique to EAJA, and it has two main effects: discouraging good attorneys from taking good cases on behalf of EAJA's small beneficiaries and failing to hold federal officials as accountable to federal law as state and local officials. In other words, it protects federal dollars far more than Congress sought to protect state and local dollars, and it protects mistaken federal agencies far more than Congress sought to protect mistaken state and local agencies.

There is simply no reason in logic or experience to justify this requirement, or its continued existence. For decades, the other federal fee-shifting statutes have functioned well without it. Once again, consider 42 U.S.C. §1988.

The vast majority of all cases against governments involve state and local governments, subject to §1988. The reason for this prevalence of §1988 cases is simple. In addition to the 50 state

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[17] "Unlike other fee-shifting statutes, the EAJA presents the additional hurdle of showing that the government's position was not substantially justified." *Paris v. HUD*, 988 F.3d 236, 238 (1st Cir. 1993).

governments, there are thousands of counties, cities, towns, and other local governments throughout the United States – each one capable of violating federal law. These countless state and local agencies, which are subject to §1988, far outnumber federal agencies, which are subject to EAJA. So §1988 is older and far more used than EAJA ever has been or ever could be. Yet, §1988 has not resulted in the bankruptcy of state and local agencies, or in the breakdown of their law enforcement efforts. Rather, §1988 has worked well with little mischief or heartburn.

The substantial justification requirement is bad policy. Before a prevailing small party can recover any attorneys fees, it must allege (and in practice, prove) that the losing federal agency had no substantial justification for its position – the very position over which the litigation already was fought and the federal agency already lost. This requirement means a small party must win *twice* in order to qualify for fee recovery – first on the merits of the dispute (which often takes years) and then again to justify fee recovery (which can add many more months or even years). It initiates additional, time-consuming, risk-laden, and often expensive litigation over the fee recovery itself, all of which provides a significant disincentive for small parties to pursue the statutory remedy now available to them.

In sum, this substantial justification requirement is a serious disincentive to competent attorneys to take meritorious cases, since they know from the outset that even strong cases against the government that the attorney should win will not necessarily result in payment in the end. It means having to re-litigate the whole merits of the case a second time, wasting time and money, clogging the courts, delaying justice for the prevailing small party, and delaying payment for the attorney. It also means relieving federal agencies of the financial responsibilities and accountability for their mistakes and misconduct.

(b) Eligibility of Small Businesses for Fee Award.

As an inflationary adjustment, this subsection increases the small business net worth threshold from $7 million to $10 million. As enacted in 1980, EAJA applied to small businesses essentially as then-defined by SBA: 500 or fewer employees and net worth of $5 million or less. A few years later, in 1985, Congress increased EAJA's small business net worth threshold to $7 million, to help keep pace with inflation. Over 20 years have passed without further inflationary adjustment, which is long overdue. Thus, this subsection raises the small business net worth threshold from $7 million to $10 million. It does not alter any other small business eligibility criteria.

(c) Elimination of Rate Cap.

This subsection removes EAJA's rate cap of $125 for legal services. Indexing for inflation, many courts now award up to $150 per hour. This range of $125 to $150 is only a fraction of market rates, especially for complex and contingent litigation against the federal government. In the major legal markets where such litigation usually occurs – such as New York, Boston, Chicago, Washington, San Francisco, Los Angeles – hourly rates range from about $200 to $500 (and

more). The EAJA rate will not pay for a paralegal let alone a competent attorney. It represents a serious disincentive to qualified attorneys to take good cases against the federal government.

Such a rate cap has no counterpart in fee shifting against state and local governments under 42 U.S.C. §1988, which employs a "reasonable hourly" or "market" rate.[18] This can lead to absurd results. In *Sorenson v. Mink*,[19] where social security claimants prevailed against both the federal Social Security Administration and relevant state agencies, the court awarded market rates under §1988 against the state agencies but had to award much lower rates under EAJA against the federal agency – for the same federal law violations in the same case.

Moreover, EAJA's cap always runs counter to its core goal of encouraging competent counsel to take good cases. Any attorney considering a case covered by EAJA knows that in order to recover his fees at the end, he must win twice. He must win on the merits, however long that may take and however long he must carry his fees, and then overcome the substantial justification defense during the fee proceedings. To compound these risks, he knows that, even assuming he can run the gauntlet, EAJA will cap his hourly rate at $125 to $150 – which happens to be just one-third or one-half of his regular hourly rate. Which means that, even if he endures to the end victorious, he will get, at the very most, one-third to one-half of the fees he incurred.

Ironically, EAJA itself employs market rate, providing that "the amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished."[20] But then it caps this rate via exception: "except that ... attorney or agent fees shall not be awarded in excess of $125 per hour."[21] EAJA had it right before that exception language was inserted. This subsection of H.R. 435 simply removes that exception language, putting EAJA on the same footing with 42 U.S.C. §1988.

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[18] *See Sorenson v. Mink*, 239 F.3d 1140, 1149 (9th Cir. 2001) ("prevailing market rates in the relevant community"; rates "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation").

[19] *Id.*

[20] See 5 U.S.C. §504(b)(1)(A) and 28 U.S.C. §2412(d)(2)(A).

[21] *Id.* This exception includes another exception: "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." As noted, courts allow a cost of living premium, taking the EAJA rate up to $150. But courts have almost never found "special factors" justifying further increases. "The difficulty or undesirability of the case, the work and ability of counsel, and the results obtained do not qualify as 'special factors' under the statute." *Select Milk Producers v. Johanns*, 400 F.3d 939, 950 (D.C. Cir. 2005) (citing Supreme Court precedent).

(d) Offers of Settlement.

This subsection adds provisions similar to Federal Rule of Civil Procedure 68, which encourage prompt settlement and penalize unreasonable or overreaching behavior by either party.

Specifically, after an EAJA application is submitted at the end of a case, the losing federal agency is encouraged to serve upon the small party a written offer of settlement of its legal fees. The small party may accept such offer in writing within ten days, in which event there is no need to further litigate the fee recovery and the entire case is concluded. If the small party does not accept, however, and continues to litigate over fee recovery, it runs the risk of forfeiting *any new fees incurred after the date of the offer*. In the words of H.R. 435: "If any award of fees and expenses for the merits of the proceeding finally obtained by the applicant is not more favorable than the offer, the applicant shall not be entitled to receive an award for fees or other expenses incurred (in relation to the application for fees and expenses) after the date of the offer."

Thus, if the small party rejects a settlement offer on legal fees in order to continue litigating over legal fees, it had better end up winning more in legal fees from the court than the agency had offered in settlement. Otherwise, the small party forfeits all its legal fees incurred chasing a greater fee recovery and prolonging the litigation. The risks are clear. Small parties and their attorneys are cautioned against "throwing good money after bad" while losing agencies are encouraged to cut their losses by attempting a prompt reasonable settlement of the legal fees. This concept, embodied in Federal Rule of Civil Procedure 68, has worked well in general federal litigation for many years. It should be incorporated into EAJA.

This mix of incentives and penalties surely will encourage prompt settlements of attorneys fees and reduce collateral burdens of litigation over fee recovery. Under these provisions, serious risks attach to unreasonable conduct during the fee recovery process. Agencies making prompt and reasonable offers are protected, whereas overreaching or unreasonable attorneys are penalized. EAJA also continues to require the outright denial of any fee recovery to the extent a prevailing party is determined to have unreasonably prolonged the litigation.[22]

(e) Declaration of Intent to Seek Fee Award.

This subsection provides that the court or administrative law judge "may (and if requested by a party shall) require a party to declare whether such party intends to seek an award of fees and expenses against the agency should such party prevail." This provision is designed to increase accountability and limit cost by encouraging early notice of intent to seek fee recovery. It should encourage the parties early on to contemplate the potential risks and costs of the litigation and therefore consider further the possibility of settlement.

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[22] *See* 5 U.S.C. §504(b)(1)(E); 28 U.S.C. §2412(d)(2)(D); *see also* 5 U.S.C. §504(a)(3); 28 U.S.C. §2412(d)(1)(C).

(f) Payment of Attorneys' Fees from Agency Appropriations.

This subsection would close the Judgment Fund (or Claims and Judgment Account) of the Treasury to agencies seeking to have their EAJA liability paid from the Treasury. Thus, this subsection aims to increase accountability and limit cost by ensuring that costs associated with illegal agency conduct are paid from the agency's existing appropriation – requiring the agency to seek authority from Congress to reprogram existing appropriated funds, if necessary.

This subsection would end current law that allows the Treasury to cover an agency's EAJA fees. *It means H.R. 435 actually saves money.* The Senate companion, S. 2017, would add back slight cost by continuing current payment law for four agencies – NLRB, OSHA, MSHA, and EEOC – allowing the Treasury to continue covering their EAJA fees, on the theory that Congress created special enforcement regimes that mandated worker dependency on those agencies for protection of their workplace rights.[23] This would ease any financial burden of this EAJA reform on those agencies. Such burdens have been very modest. For example, NLRB's total EAJA liability for the most of the life of EAJA was only $1.4 million.[24]

(g) Eligibility of Taxpayers for Fee Award.

This subsection eliminates the prohibition on prevailing small parties from seeking fee recovery under EAJA in federal tax proceedings.

The Internal Revenue Code, codified in Title 26 of the U.S. Code, contains its own fee recovery statute,[25] which is even weaker than EAJA. Small taxpayers, who otherwise would be entitled to seek recovery under EAJA when they prevail against the IRS, are barred by an exception in EAJA: "No award may be made under this section for costs, fees, or other expenses which may be awarded under section 7430 of the Internal Revenue Code of 1986." This subsection of H.R. 435 eliminates that exception.

There is no reason to discriminate against small taxpayers contesting illegal IRS and other federal tax actions. There is no reason to protect the IRS over all other federal agencies. Indeed, there may be less. This subsection removes EAJA's prohibition against prevailing taxpayers choosing to seek fee recovery under EAJA. This subsection does not repeal or otherwise affect the less accommodating fee shifting provision of §7430 of the Internal Revenue Code. It simply repeals EAJA's prohibition, giving prevailing small taxpayers the option of choosing EAJA.

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[23]Further discussion of H.R. 435's expected (minimal) costs is provided below.

[24]"[Fee] applications filed under the Equal Access to Justice Act have cost the [NLRB] a total of roughly $1.42 million since 1982." H. Rept. 105-453 (March 18, 1998) (House Judiciary Committee).

[25]26 U.S.C. §7430.

(h) Conforming Amendment Relating to Reporting under Small Business Act.

This subsection merely makes conforming amendments to EAJA that correspond to the annual reporting amendments that H.R. 435 makes to the Small Business Act, including substituting "Attorney General" for the "Chairman" of the defunct "Administrative Conference of the United States" and referencing the obligations of the Attorney General and the President to consult with the "Chief Counsel for Advocacy." Despite apparent similarities, the various reporting obligations, as revised by H.R. 435, do not duplicate one another. For instance, the reporting obligations added to the President's annual report on small business focus on EAJA's impact on *small businesses*, while the annual reporting obligations of revised subsection (e)(1) of 5 U.S.C. §504 focus on EAJA fees awarded to *individuals*.

(i) Applicability.

This subsection simply provides an effective date for the application of this section of H.R. 435: "The provisions of this section and the amendments made by this section shall apply to all proceedings pending or filed on or after the effective date of this Act."

Section 5. Definition of Prevailing Party in EAJA Cases.

This section of H.R. 435 restores the "catalyst" rule for fee recovery as explicitly intended by Congress in enacting EAJA and as uniformly applied by all federal appellate courts but one.

As provided by this section, for purposes of EAJA, the term "'prevailing party' includes, in addition to a party who prevails through a judicial or administrative judgment or order, a party whose pursuit of a nonfrivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought." This formulation is a synthesis of the catalyst rule as applied by the federal appellate courts in all fee-shifting cases, including those under EAJA and 42 U.S.C. §1988.[26]

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[26]"The prevailing party inquiry under the EAJA is consistent with that under other federal fee-shifting statutes.... The party either must enjoy bottom-line success in the litigation or act as a catalyst in causing the desired alteration." *Paris v. HUD*, 988 F.3d 236, 238 (1st Cir. 1993). There are hundreds of such cases going back two decades. As a few recent examples, see *Miley v. Principi*, 242 F.3d 1050, 1054-55 (Fed. Cir. 2001) (under catalyst rule, a party can "prevail" under EAJA if its litigation caused the agency to take action it otherwise would not have taken; and causation can be shown by the timing of events alone); *Gregory v. Shelby County*, 220 F.3d 433, 447 (6th Cir. 2000) ("We have recognized that when no judicial relief is ordered a plaintiff may qualify for 'prevailing party' status if he can show he was the 'catalyst' for the defendant's changed behavior."); *Sinajini v. Board of Education*, 233 F.3d 1236, 1241(10th Cir. 2000) ("[T]he Tenth Circuit uses the catalyst test to determine whether a party prevailed when the relief pursued eventuates but there is 'no final judicial determination.'"); *Morris v. Lindau*, 196 F.3d 102, 116 (2nd Cir. 1999) ("Under the 'catalyst doctrine,' a plaintiff who obtains a settlement or a voluntary cessation of the challenged activity is a 'prevailing party' entitled to attorneys

The catalysis rule was applied routinely, effectively, and with little controversy until the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia*.[27] The Court there held that the term "prevailing party" for purposes of federal fee-shifting statutes applies only if the litigant reaches an adjudicatory decision in the litigant's favor rather than when the litigant achieves its objective through out-of-court settlement or unilateral concession by the government. This has created an incentive for litigants to fully litigate cases before the federal judiciary rather than accept settlements and concessions by the government, further clogging the federal courts.

First, there is no doubt that Buckhannon has required uniform denial of EAJA fees to otherwise potentially eligible small parties.[28] Second, there also is no doubt that this result flatly contradicts the explicit intent of Congress in enacting EAJA. Indeed, the House-Senate Conference Committee that reported EAJA stated specifically that "the phrase 'prevailing party' is not to be limited to a victor only after entry of a final judgment following a full trial on the merits," but should include cases where the prevailing "party obtains a favorable settlement of his case," obtains "a voluntary dismissal of a groundless complaint," prevails on fewer than "all issues," or prevails "on an interim order which was central to the case."[29]

In most cases involving a government, the private party is defending against or seeking a change in the government's action or position, rather than money damages. In the real world, the government often concedes and moots litigation prior to an adverse final court judgment. It may do so for any number of reasons, including a change in its internal policies or personnel that reduces support for its legal position in the case, a change in statutory law or judicial precedent that undermines its legal position in the case, a fear that the case is going badly and will result in an adverse judgment on the merits with associated costs and embarrassment, or the mere desire to avoid paying the private party's attorney fees.

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fees ... if the lawsuit was a catalyst or a substantial factor for the defendant's favorable action.").

[27]532 U.S. 598 (2001). This 5-4 ruling, which rejected the position of all federal Circuits but one, denies *prevailing party* status to parties who prevail prior to court-ordered victory: "Numerous federal statutes allow courts to award attorney's fees and costs to the *prevailing party*. The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not." 532 U.S. at 600.

[28]*See, e.g., Akers v. Nicholson*, 409 F.3d 1356, 1358 (Fed. Cir. 2005) ("This court follows the Supreme Court's decision in *Buckhannon* in deciding prevailing party status under EAJA."); *Thomas v. Nat'l Science Found.*, 330 F.3d 486 (D.C. Cir. 2003) (same result); *Perez-Arellano v. Smith*, 279 F.3d 791 (9th Cir. 2002) (same).

[29]H. Conf. Rept. 96-1434 (Sep. 30, 1980) at §14 ("Agency Actions–Award of Fees and Other Expenses in Certain Agency Actions").

Before *Buckhannon*, in every Federal Circuit Court of Appeals but the Fourth, the prevailing party still would recover fees if it showed that its litigation was a *catalyst* for the government's change in position. *Buckhannon* sided with the Fourth Circuit, however, and eliminated the catalyst rule. Now, whenever the government's case is going badly, or for any reason it wishes to moot the litigation prior to court judgment, it can "voluntarily" change its position and deprive the prevailing party of its attorneys fees (as well as judicial vindication and valuable precedent). Thus, *Buckhannon* effectively allows the government to determine whether it will pay fees, and encourages parties to litigate every case to the bitter end to preserve their fee recovery.

This section of H.R. 435 codifies, for EAJA, the *catalyst* test that, until *Buckhannon*, had been well accepted and routinely applied by all Federal Circuit Courts save one.

Section 6. Effective Date.

This section simply provides an effective date for H.R. 435: "The provisions of this Act and the amendments made by this Act shall take effect 30 days after the date of the enactment of this Act."

4. RESPONSES TO POTENTIAL OPPOSITION TO H.R. 435.

4.1 Cost of H.R. 435: Nothing to Fear.

H.R. 435 should receive a low score from CBO, consistent with its scoring of the Judiciary Committee's Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act,[30] which requires agencies to repay discrimination settlements and judgments paid on their behalf. The No FEAR Act is similar to the Contract Disputes Act, which holds agencies accountable for payment in contract disputes. Under both laws, federal agencies must reimburse the Judgment Fund, a permanent and indefinite appropriation administered by Treasury. Before the No FEAR Act, agencies did not have to repay the fund.

CBO estimated the administrative costs of the No Fear Act to be "minimal" and GAO later found its actual cost to be minimal.[31] The cost estimate for H.R. 435 should be similarly minimal.[32]

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[30]Pub. L. No. 107-174, 116 Stat. 566 (May 15, 2002).

[31]H. Rept. 107-101 at pp. 10-12 ("CBO estimates that the total costs for the 100 or so Federal agencies to comply with the bill's requirements would be no more than about $5 million annually."). GAO reported actual costs at under $500,000. See GAO's Report, "Treasury's Estimates of Claim Payment Processing Costs Under the No FEAR Act and Contract Disputes Act" (http://www.gao.gov/new.items/d04481.pdf).

[32]It may be necessary or expedient to alter H.R. 435 to track the repayment mechanism of the No FEAR Act.

4.2 Widespread Public Support for H.R. 435.

The breadth of support for H.R. 435 makes it a better-than-usual candidate for passage in this pre-election political climate, and the many supporting organizations can be expected to work to overcome any remaining opposition to the bill.[33]

4.3 Likely Opposition from the Administration.

The Department of Justice testified against the bills that led to passage of the EAJA and, even after exacting important concessions to the final bill, opposed EAJA as enacted. President Carter thus signed EAJA into law over the objections of his Justice Department, perhaps because EAJA had veto-proof bipartisan support in the Congress. The Justice Department also has opposed most major attempts to improve or expand EAJA.

This opposition appears to be institutional and based on a view of EAJA's potential costs to the government and its potential chilling effect on appropriate legal enforcement efforts. In opposing EAJA's predecessors in the 1970s, the Justice Department estimated EAJA's costs at $500 million over its first three years. The CBO estimated EAJA's cost at $330 million over the same period. Both predictions were overblown – in CBO's case "by roughly 10,000 percent"[34] and in Justice's case by even more. In fact, during EAJA's first three years, "between October 1, 1981 (the effective date of the Act) and October 1, 1984, approximately $3.9 million have been awarded under the Act."[35] Over its entire first 13 years of existence, from Fiscal 1982 through Fiscal 1994 (the entire period for which cost data are available), EAJA cost just $34 million.[36]

Members of Congress reacted skeptically to such criticism. As Senator DeConcini was reported to have framed the issue, the $500 million cost estimate by the Justice Department cut both ways; what Justice really was saying was that American citizens annually would be damaged to the tune of $500 million because of costly, unreasonable, and burdensome government litigation and regulation. I also agree with how Senator Nelson was reported to have summarized the controversy before the House Judiciary Committee in August 1979:

> [T]here is a great deal of bureaucratic arrogance in both the federal government and in the states .... The argument will be made, and is made by some, that if the government is required to reimburse for attorney fees in those circumstances where they pursue an action and do not prevail, it will have a "chilling effect." I

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[33]See the 17 letters of support located in the appendix to this Statement.

[34]H. Rept. 105-453, supra note 4.

[35]H. Rept. 99-120(I), supra note 4.

[36]GAO Report, supra note 4, at 2-5.

> say, my God, I hope so. That's exactly what we want, a chilling effect....[37] We are loaded in this government with people who make mistakes and they are honest. Even if it's an honest mistake, too bad; the government ought to pay for it.

Staff of the Judiciary and Small Business Committees have met with Justice Department officials about H.R. 435, and discussions are ongoing. Justice appeared open to discussions over changes to the bill. For example, Justice proposed (informally) an exception to the provision of H.R. 435 that stops agencies from sending their EAJA liability to the Treasury where the federal government is merely defending the constitutionality of an Act of Congress, as the federal government is obliged to do. Such a change to H.R. 435, and other such changes to the pay-from-your-own-budget provision, may be good policy and may soften opposition to the bill.

But no such changes are warranted to the other substantive provisions of EAJA or H.R. 435. A small party under EAJA must be allowed to recover his fees – whether from the agency's own budget or the General Treasury – when he meets EAJA's criteria. First, that's the law. Second, why should a small party involved in a dispute over the constitutional validity of a federal law or action be made to bear the costs of that necessary determination for all society? Third, since EAJA and similar statutes apply only when the private party prevails against the government, this kind of argument arises only when the challenged government action is ruled unconstitutional. In such cases, the government acted illegally – precisely the circumstances for legal fee recovery. The following analysis of the Eighth Circuit, made under §1988, applies equally to EAJA:

> It is true that a [government] attorney may not know for certain whether a state law is valid or not, and that he may feel obliged to enforce the law until a determination as to its validity has been made. This, however, is not a special circumstance justifying the denial of the customary award of fees. Presumably it will always be true that state officials enforcing a law or otherwise defending state action will believe, or at least hope, that the law or action in question will be upheld against a federal constitutional attack. The point of §1988 is that such officials proceed at their peril. If in fact they are wrong, and the law they are enforcing turns out to be invalid, §1988 puts the financial burden on the state officials. The judgment of Congress is that the burden rests more properly on them than on the party who has been wronged by the application of an invalid law.[38]

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[37] Any hope for a chilling effect has been frustrated. "Nor can we foresee a substantial chilling effect caused by the possibility of a fee award. If the issue is important enough, government officials, who of course are not personally liable for the payment of fees, should not be dissuaded by the prospect of an award of fees to a private party's counsel. Any chilling effect would be minimal, because attorneys' fees may be paid from the government's judgment fund rather than the offending agency's budget." Keasler v. U.S., 766 F.2d 1227, 1235 (8th Cir. 1985) (citing 28 U.S.C. §2412(d)(4) (1982); S. Rep. No. 586, 98th Cong., 2d Sess. 20 (1984)).

[38] *Carhart v. Stenberg*, 192 F.3d 1142, 1152 (8th Cir. 1999).

4.4 Likely Opposition from the AFL-CIO.

The Small Business Committee has discussed H.R. 435 and its predecessor with AFL-CIO and other labor organizations over the past five years. Essentially, the position of AFL-CIO has been that this bill reminds them too much of other bills that have targeted the federal agencies that enforce workplace rights, such as OSHA and NLRB. The position of AFL-CIO is that such fee-shifting statutes may chill legitimate enforcement of workers' rights by those targeted agencies. We have spent a good deal of time explaining how H.R. 435 is nothing like those other bills that target NLRB and OSHA for potentially chilling levels of fee-shifting.

First, unlike the OSHA-specific or NLRB-specific fee-shifting bills of the past, H.R. 435 is broad based, applying equally to all federal agencies.

Second, H.R. 435 provides a major benefit to all union members across the country. Indeed, it would help ensure good legal representation of every union member in the country who otherwise qualifies under EAJA – i.e., every one whose net worth does not exceed $2 million – in any qualifying legal action whatsoever brought by or against the federal government or any of its agencies, from tax proceedings involving the IRS to employment actions involving any federal agency employer to civil or criminal actions involving the Department of Justice, etc.

Third, as provided already in our Senate companion bill (S. 2017), we are willing to entertain special financial relief for the four main worker-advocacy agencies – NLRB, OSHA, EEOC, and MSHA. Section 4(f) of S. 2017 would continue existing law as to those four agencies, allowing them to continue paying their EAJA liability from Treasury's Judgment Fund. In other words, those four agencies would be exempted from the provisions of H.R. 435 and S. 2017 that would change existing law, close the Judgment Fund to payment of EAJA claims, and require agencies to pay EAJA claims from their own appropriations/budgets instead. This would help ensure against an undue chill on those agencies' enforcement of workplace rights.

It should be noted the House Small Business Committee proposed such special relief several years ago, as a change to be considered in committee or thereafter. In one of the few changes between H.R. 435 and S. 2017, this relief was added to S. 2017 in the hopes that it would relieve the concerns of AFL-CIO. The authors of S. 2017 – Senator Feingold and Senator Snowe, Chair of the Senate Small Business Committee, remain committed to it. We, Representatives Manzullo and Blumenauer, the sponsors of H.R. 435, remain willing to entertain this relief for these four agencies if it addresses the concerns of AFL-CIO. Such relief would be acceptable in our view because Congress deprived workers of the right to sue their employers over federal workplace rights in favor of mandated reliance on the advocacy and enforcement of those agencies. Thus, it could be argued that those agencies stand in a unique position. Continuing current law on payment of EAJA liability as to those four, as provided in S. 2017, may be acceptable.

We therefore see no reason for AFL-CIO to oppose our EAJA reform, given that: (1) our reform applies equally to all federal agencies and targets none; (2) our reform provides every union

member with the ability to obtain a competent attorney in any illegal or abusive federal action confronting that union member; and (3) far from targeting NLRB, OSHA, EEOC, and MSHA for special penalties, our reform would secure for them special financial relief to minimize any chill.

5. CONCLUSION.

There are well over 100 federal fee-shifting statutes in the United States Code. None has the same flaws as EAJA. Small businesses suffer the most when arbitrary or illegal action is taken by the federal government and EAJA frequently is the only way for these businesses to afford counsel that will vindicate their rights. H.R. 435 would help ensure that federal agencies consider the implications of their actions on small business in the same way they might when considering action against a large business with substantial legal and financial resources.

By eliminating the EAJA-specific flaws and barriers that do not exist in myriad sister fee-shifting provisions, H.R. 435 brings both accountability and parity. The loss of these EAJA provisions that protect federal agencies from the consequences of their illegal actions will no more harm the federal government than the host of other fee-shifting provisions – which never contained such extra protections for the government – has harmed state and local governments.

The other provisions of H.R. 435 should increase efficiency in EAJA litigation and unclog federal courts by reducing the amount of EAJA-related litigation. Finally, by requiring federal agencies to pay EAJA fees out of their appropriated funds rather than a general account in the Treasury, decision-makers will be forced to critically assess their enforcement and litigation stands to ensure they are rational and appropriate. Ultimately, the changes to EAJA will create a less burdensome and better federal government for all.

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DONALD A. MANZULLO
MEMBER OF CONGRESS AND
CHAIRMAN, HOUSE COMMITTEE ON SMALL BUSINESS[39]

[39]Questions regarding this statement may be directed to Small Business Committee Chief of Staff Matthew Szymanski at matthew.szymanski@mail.house.gov or 202-225-5821. Questions regarding this hearing may be directed to Judiciary Counsel David Whitney at 202-225-3951.

SUPPLEMENTAL STATEMENT OF THE HONORABLE DONALD A. MANZULLO, CHAIRMAN, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

Supplemental Statement of Representative Donald A. Manzullo
**Submitted to the Subcommittee on May 26, 2006*

Hearing on H.R. 435, the Equal Access to Justice Reform Act of 2005

Before the U.S. House of Representatives Committee on the Judiciary
Subcommittee on Courts, the Internet, and Intellectual Property

May 23, 2006

Dear Chairman Smith:

On behalf of myself and my cosponsor, Representative Earl Blumenauer of Oregon, thank you for holding a legislative hearing on my bill, H.R. 435, and for inviting me to join you and your colleagues on the dais. The witnesses' testimony and the questions from the panel raised some questions that time did not permit anyone to answer. I am submitting this supplemental testimony to respond briefly to key objections raised to H.R. 435.

Objection 1A: Eliminating the federal government's "substantial justification" defense would hinder essential functions of the federal government.

The main objection to H.R. 435 by the Department of Justice (DOJ) and the American Federation of Labor (AFL) was that the federal government's "substantial justification" defense was vital to the essential governmental function of clarifying and enforcing the law. Eliminating this defense, DOJ reasoned, would ignore "the reality of Government litigation, which is that the Government must often take positions on new and ambiguous statutes and has to 'build' the law by litigating the same issue in several circuits." DOJ Statement at 3. Thus, DOJ concluded, the "Government should not be required to pay attorneys' fees while it is in the process of resolving the scope of new laws or the application of existing laws in new areas." *Id.* As for AFL, it had no objection to eliminating the defense in instances where the small party was a plaintiff, pursuing relief from illegal government action. AFL Statement at 3. But AFL thought the defense was vital where the federal government is the plaintiff and is acting as public prosecutor but fails to prevail in a "substantially justified" enforcement action. *Id.* In such instances, AFL thought federal agencies, such as NLRB and OSHA, needed the defense to shield them from the prospect of paying legal fees, or else they might be tempted to avoid close cases and end up under-enforcing the law.

Response 1A: Eliminating the federal government's substantial justification defense – which exists only in EAJA – would simply put the federal government on the same footing *with everyone else*. The most commonly invoked fee statute, 42 U.S.C. 1988, has never had such a defense and it has been applied to hundreds of state and local governments over its 30-year history without ever causing any of the problems predicted by DOJ and AFL.

We are not writing on a clean slate. We have had over thirty years of experience with federal fee-shifting statutes. As much discussed at the hearing, the primary fee statute applied to state and local governments, 42 U.S.C. 1988, has been on the books for over 30 years. It has been invoked in federal litigation far more than EAJA ever has or could be. EAJA itself has been on the books for 26 years. *Here, we are not predicting the possible effects of new laws*, as DOJ was doing 27 years ago with the *proposed EAJA*, when DOJ overestimated EAJA's cost by 12,800 percent.[1] As Chairman Smith stated at the hearing, such wild predictions about EAJA in the past undercut DOJ's credibility on EAJA today. But we need not be in the "predicting" business here. The relevant laws have been around and enforced for decades. We *know* what has happened.

> "Unlike other fee-shifting statutes, the EAJA presents the additional hurdle of showing that the government's position was not substantially justified."[2]

Section 1988 – *which-has-never-had-any-kind-of-substantial-justification-defense* – has been applied against many hundreds of state and local governments over the past thirty years and has not led to any of the horribles predicted by DOJ or AFL. In other words, §1988 does not provide the special protection of such a defense. It lacks such a provision. It is substantial-justification-defense-*less*. Yet it has not bankrupted any state or local agency. It has not caused a meltdown in state and local law enforcement. It has not left citizens of the states, counties, cities, and towns throughout the country direction-less and guessing at the requirements of state and local law.

In short, the tens of thousands of state and local agencies in the United States have managed just fine for the past 30 years without the special protections of a substantial justification defense. Why in the world should we believe federal agencies cannot manage under the very same standards? Why in the world should we continue to provide special protection for the federal government when it loses its case?

We also have the experience of *federal* agencies that, in certain circumstances, are subject to substantial-justification-less fee statutes, and they have suffered no such horribles. Although EAJA is the catch-all fee provision that applies to the federal government, there are many instances where a more specific fee statute is applicable. In fact, many of the 200 federal fee

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[1] DOJ estimated that EAJA would cost $500 million over its first three years, but in fact EAJA cost just $3.9 million over its first three years, and only $34 million over its first 13 years. *See* GAO Rept. No. B-278335, at 2-5 (Jan. 14, 1998) (http://archive.gao.gov/paprpdf1/159815.pdf); H. Rept. 105-453 (Mar. 18, 1998); H. Rept. 99-120(I) (May 15, 1985).

[2] *Paris v. HUD*, 988 F.3d 236, 238 (1st Cir. 1993). The only other fee statute containing the substantial justification hurdle that we have ever found is the weaker version of EAJA contained in 26 U.S.C. 7430(c)(4)(B), governing federal tax proceedings. Of course, our EAJA reform bill would give prevailing taxpayers the choice to forego Section 7430 in favor of EAJA.

provisions[3] are contained in statutes that erect whole regulatory regimes enforced by certain federal agencies, e.g., the Sherman Antitrust Act, the Clean Air Act, and Title VII of the Civil Rights Act of 1964. These federal fee shifting provisions have been on the books for many years. They do not, repeat not, contain the special protections of a substantial justification defense, shielding the federal agencies to which they apply. Yet, none of the federal agencies charged with enforcing these regulatory regimes has suffered the horribles predicted by DOJ or AFL.[4]

Indeed, the Congressional Accountability Act of 1995, passed by Congress to make congressional offices subject to workplace and civil rights laws such as Title VII above, includes its own fee-shifting provision – incorporating Title VII's fee provision, 42 U.S.C. 2000e-5(k). Like all others, it does not contain any substantial justification defense. *Thus, Congress has subjected itself and the states to stricter standards than it has imposed on the federal government at large.* Why in the world should we *not* impose these same standards on the federal government? Why should we hold the *federal* government *less* accountable to *federal* law?

Objection 1B: As noted above, AFL is willing to remove the substantial justification defense where government is the defendant but wishes to retain it where the federal government is the plaintiff and is acting as public prosecutor enforcing laws such as workplace safety laws.

Response 1B: My first response here is the same as Response 1A, above. All state and local governments throughout the United States have been subject to federal fee recovery statutes, primarily §1988, for decades. Even many federal agencies have been, in certain instances, subject to specific fee recovery statutes other than EAJA. None, repeat none, of these fee recovery statutes contains a substantial justification defense. Not for plaintiffs. Not for defendants. Not for anybody, regardless of their position in the case or courtroom. And none of these state, local, and federal agencies has suffered the harms to law enforcement feared by AFL.

My second response is, what difference does it make to the goals of fee recovery *which* roles the parties assume? Whether the small party is plaintiff and the government is defendant (the situation where AFL is comfortable removing the government's defense), or the small party is defendant and the government is plaintiff (the situation where AFL wishes to retain the government's defense), the difficulty of a small party finding competent legal counsel is the

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[3]*See* CRS Report for Congress, "Awards of Attorneys' Fees by Federal Courts and Federal Agencies," #94-970 (Updated Jan. 24, 2006). This report enumerates more than 200 provisions.

[4]Because the courts have analogized most prevailing party fee statutes to 42 U.S.C. §1988, the precedents under §1988 have wide application in all fee-shifting cases. Whether such prevailing party statutes make fee awards discretionary ("may") or mandatory ("shall") makes little difference; under the discretionary statutes, the courts uniformly have ruled that the prevailing party ordinarily should recover fees. *Democratic Party v. Reed*, 388 F.3d 1281, 1285 (9th Cir. 2004) ("Under our construction of 42 U.S.C. §1988, a prevailing party in a §1983 action should ordinarily recover an attorney's fee..."); *Andretti v. Borla Performance Industries*, 426 F.3d 824, 834 n.6 (6th Cir. 2005) (under the "Civil Rights Act of 1964 ... we held that ... the prevailing party should ordinarily recover attorney fees").

same. The lawyer considering taking on such a case must make the very same calculation whether the prospective client must defend itself from illegal federal action (small party as defendant and government as plaintiff) or must pursue a change in illegal federal action (small party as plaintiff and government as defendant).

The federal agency, whether acting as plaintiff or defendant, is a powerful opponent with enormous resources, good attorneys, and the ability to fight for years. The attorney considering representing the small party needs every incentive provided by prevailing party fee shifting statutes – and then some – to take on the case. In short, the attorney needs the incentives of fee statutes such as §1988, which contains no substantial justification defense.

EAJA already is far weaker than §1988 and nearly all of the other 200 federal fee statutes. Retaining the government's substantial justification defense in half the cases, as AFL suggests, means that EAJA will remain weak in those half of the cases. While a small party's prospects would improve in those cases where the defense has been removed, they would remain dismal in all those cases where it has been retained.

Objection 1C: As noted above, DOJ and, to a lesser extent, AFL, believe that the *prevailing small party should pay its own attorneys' fees* when the government's losing case is nonetheless found to be substantially justified. The rationale for requiring the prevailing small party to pay is that to require the losing government agency to pay might chill that agency's proper role of taking close cases to clarify and fully enforce the law.

Response 1C: First, setting aside DOJ's assertion that the Executive Branch has a key role in making or "building the law" (DOJ Statement 3),[5] I agree that the role of government includes putting citizens on clear notice of what the law requires and what the penalties are for noncompliance. This is an essential *function of government* at all levels. Which is precisely why *the government* should pay for it – especially when it pursues a small party and loses. Removing this federal government defense won't stop or even chill the federal government from performing this essential government function. But it will require the federal government to pay for its mistakes, when it loses, while performing this essential government function. And it will not hoist such societal costs onto the backs of small parties – at least not when they prevail.

Second, it does not serve to refine public policy and clarify the law properly when the federal government is racking up precedents against small parties who cannot fight back. It is presumed in our legal system that an adversarial process – where both parties have competent legal counsel with adverse interests – is essential to bring out the truth and refine public policy. It does not create good public policy when federal agencies pursue small parties who can't resist. It only encourages the agencies and their attorneys to take the path of least resistance, which often leads down the middle of the backs of small parties.

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[5]Our Framers believed this was the core legislative function, belonging to the Congress.

Thus, even crediting this objection, it requests the wrong remedy. To ensure a proper refining of federal public policy, both sides need to be adequately represented. The only way to do this is to remove EAJA's barriers to fee recovery, so that small parties can entice decent attorneys to represent them against the federal government. The federal government's substantial justification defense must be eliminated.

Objection 2: Raising the small business net worth threshold from $7 million to $10 million will qualify 98% of all businesses for fee recovery under EAJA.

Other than its partial objection to removing the substantial justification defense (above), AFL's only other objection is to increasing the small business net worth threshold. According to AFL, increasing the net worth threshold from $7 million to $10 million will allow 98% of all businesses to qualify for recovery under EAJA.

Response 2: Raising the net worth threshold, which hasn't been raised since 1985, from $7 million to $10 million, is long overdue, still would not come close to adjusting for inflation over those 21 years, and still would remain a barrier to fee recovery that does not exist in §1988 and similar fee statutes.

First, perhaps EAJA should have no size standards at all. Perhaps when the federal government is proven to have violated the rights of a private citizen or business – however large or small – it should pay the prevailing party's attorneys' fees. Many federal fee recovery statutes, such as §1988, have no size standards. No matter how big the prevailing party is, it may recover its fees from the losing government agency. EAJA is different. EAJA adds many special protections for the federal government that do not exist in §1988 and other statutes. This is another such protection for the federal government: EAJA only applies to small parties. But EAJA's size standards have not been increased for 21 years. A modest increase is about 15 years overdue.

Second, even assuming AFL's objection is factually correct, and that increasing the threshold to $10 million will cover 98% of all businesses, what does that mean? As the Small Business Administration (SBA) and the White House have reported for many years, the nation's 22 million small businesses constitute about 97% of all our businesses. But they employ only half of all private sector workers. The other half of all workers are employed by the 3% of businesses that are *not small*. Thus, the 97% or 98% figures mean very little in the abstract. EAJA was designed principally for small businesses and it incorporated as its eligibility standard what essentially was the basic size standard employed by SBA at the time. The net worth component was $5 million when EAJA began in 1980. It was increased to $7 million a few years later when EAJA was made permanent in 1985. It has not been increased since. An increase to $10 million is the absolute minimum that must be done.

Objection 3: Lifting EAJA's rate cap on fees will cause many of the same harms to law enforcement goals as lifting the government's substantial justification defense.

Response 3: Lifting EAJA's rate cap would put the federal government in exactly the same shoes as every state and local government in the country, none of which has suffered ruin by fee awards at market rates.

My first response here is the same as Response 1A, above. All state and local governments throughout the United States have been subject to federal fee recovery statutes, primarily §1988, for decades. Section 1988 contains no rate cap. It employs a "reasonable" or "market" rate standard. Most other fee recovery statutes contain no rate cap and similarly employ a "reasonable" or "market" rate standard. The judge always has discretion in determining what rate is reasonable in any given case. None of these state and local agencies has suffered the kinds of harms proffered by DOJ. And none of the federal agencies subject to specific federal fee statutes that apply reasonable/market rates has suffered any such harms. Once again, EAJA offers special protections to the federal government, and special disincentives to small parties facing the federal government. This rate cap should be removed.

Interestingly, EAJA itself applies a market rate standard, but goes on to cap those rates via an exception. H.R. 435 would simply remove the exception in EAJA, allowing EAJA's market rate standard to apply.

My second response applies to the claims of DOJ that the rate cap actually provides much flexibility and discretion to judges to ignore the rate cap. DOJ's testimony in this regard appeared half-hearted, as well it should. EAJA's current $125 rate was set in 1996, but EAJA allows for cost-of-living increases. Thus, courts today routinely allow fees of up to $150, effectively raising the statutory cap from $125 to $150. This very small increase means little. A cap of $150 in 2006 is very nearly as counterproductive to EAJA's goals as a cap of $125. This rate is less than half the going rate for competent attorneys in the major legal markets where nearly all federal litigation occurs. As for "special factors" that would allow a significant increase over the capped rate, courts have *rarely* found such factors, as explained in my original statement. I challenge DOJ to catalogue the cases in which courts have allowed significant upward departures from the capped rate ($125-$150). The results would be embarrassing to DOJ's position.

Conclusion.

DOJ raised a few other objections to H.R. 435 in its oral and written testimony, but I believe my original statement, plus the other testimony and statements, adequately rebut those. I wanted to focus here on those objections that sought to retain special protections in EAJA that are not available to state and local governments under §1988 (and even to many federal agencies under specific fee statutes other than EAJA). These same objections were based on all sorts of speculation and predictions about the effects of H.R. 435, as if EAJA, §1988, and other prevailing party fee statutes were brand new ideas – as if such statutes did not provide thirty years of relevant experience that blatantly contradict the objections to H.R. 435.

I wish to comment further on just one additional objection of DOJ – the objection to codifying the catalyst rule for fee recovery under EAJA. My position is set forth in my original statement, at 18-20. I wish to re-emphasize one aspect, however.

The courts have become sloppy in analogizing all prevailing party fee statutes to one another, as if they all had common legislative history. It may be, as the Supreme Court found in *Buckhannon v. West Virginia*,[6] that Congress really did intend the two fee statutes at issue in that case to restrict fee recovery solely to those parties that prevailed through court-ordered victory *and not* through out-of-court settlements or through the government's unilateral change in position that provides the relief sought. I doubt it, but need not argue that point here, because *Buckhannon* did not involve EAJA. Yet, through judicial sloppiness, courts uniformly have applied *Buckhannon* to EAJA. See my original statement at 19, including footnote 28. The brand new case of *Goldstein v. Moatz* sums it up: "Because the EAJA shares the 'prevailing party' language with the statute at issue in *Buckhannon*, the *Buckhannon* principles are applicable here."[7]

Since the 2001 *Buckhannon* decision, courts uniformly have held that EAJA no longer provides fee recovery to prevailing parties who win their case in out-of-court settlements or other ways short of final court-ordered judgment on the merits. What I want to emphasize here is that Congress explicitly said otherwise in enacting EAJA. It's not a close call. It's not open to debate.

The House-Senate Conference Committee that reported EAJA stated specifically that "the phrase 'prevailing party' is not to be limited to a victor only after entry of a final judgment following a full trial on the merits," but should include cases where the prevailing "party obtains a favorable settlement of his case," obtains "a voluntary dismissal of a groundless complaint," prevails on fewer than "all issues," or prevails "on an interim order which was central to the case."[8] The courts clearly got it dead wrong. Explicit congressional intent controls. End of story. H.R. 435 provides this fix for EAJA. For all other discussion of this issue, I rely on my original statement.

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DONALD A. MANZULLO[9]

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[6]532 U.S. 598 (2001). This 5-4 ruling, which rejected the position of all federal Circuits but one, denies *prevailing party* status to parties who prevail prior to court-ordered victory, such as through an out-of-court settlement or through the government's unilateral change in position that moots the lawsuit.

[7]*Goldstein v. Moatz*, ___ F.3d ___, 2006 WL 1029115, at *3 (4th Cir. April 20, 2006).

[8]H. Conf. Rept. 96-1434 (Sep. 30, 1980) at §14 ("Agency Actions–Award of Fees and Other Expenses in Certain Agency Actions").

[9]Questions regarding this statement may be directed to Small Business Committee Chief of Staff Matthew Szymanski at matthew.szymanski@mail.house.gov or 202-225-5821. Questions regarding this hearing may be directed to Judiciary Counsel David Whitney at 202-225-3951.

LETTER FROM COLBY M. MAY, DIRECTOR, AMERICAN CENTER FOR LAW & JUSTICE TO THE HONORABLE DONALD A. MANZULLO, CHAIRMAN, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

ACLJ
American Center
for Law & Justice

February 21, 2005

The Honorable Donald Manzullo
Chairman, Committee on Small Business
United States House of Representatives
2228 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Manzullo:

With the reintroduction of your "*Equal Access to Justice Reform Act of 2005*" (H.R. 435), the American Center for Law & Justice ("ACLJ") again wishes to express its support of the bill. Providing for the recovery of attorney fees and costs when small businesses and individuals of modest means prevail in cases brought against the federal government is an important component in helping protect against illegal actions by the government.

If enacted, the "*Equal Access to Justice Reform Act of 2005*" would help to level the playing field between small businesses and individuals and federal agencies. The federal government has enormous taxpayer-funded resources which easily overpower the resources of small businesses and individuals. This imbalance creates enormous and unfair pressure to settle cases, regardless of the merits, simply to end financially crushing litigation. Your commonsense and long overdue changes to the laws regarding attorney fee recovery will provide some relief in this area, so that if a small business or individual successfully defends themself, they can at least recoup their expenses.

Thank you again for your leadership in advancing this important piece of legislation.

Sincerely,

Colby M. May
Director, Washington Office

CMM:fd

201 Maryland Avenue, N.E.
Washington, DC 20002
202-546-8890
202-546-9309 (Facsimile)

LETTER FROM LAURA W. MURPHY, DIRECTOR LASHAWN WARREN, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERITIES UNION

WASHINGTON LEGISLATIVE OFFICE
Laura W. Murphy
Director

915 15th Street, NW Washington, D.C. 20005

(202) 544-1681 Fax (202) 546-0738

February 14, 2005

Dear Representative:

The American Civil Liberties Union strongly urges you to cosponsor H.R. 435, the Equal Access to Justice Reform Act. It would provide important protections to persons seeking redress of civil rights or civil liberties violations caused by the federal government.

Congress enacted the Equal Access to Justice Act in 1980 as a means of ensuring both individuals and organizations the right to effective counsel in vindicating important civil rights and civil liberties protections. The protections enumerated in the U.S. Constitution and provided in federal civil rights statutes are the most important sources of legal rights for liberty and equality. And those protections extend to include a prohibition against the federal government itself violating the civil rights and civil liberties of individuals or organizations. The purpose of the Equal Access to Justice Act is to provide the resources for aggrieved persons to afford legal counsel to compel the federal government to abide by the Constitution and the civil rights laws.

Although the Equal Access to Justice Act has been an important step in providing such counsel, the statue has several significant limitations and has been curtailed further by court decisions narrowly interpreting the rights provided by the statute. H.R. 435 corrects these problems, and thereby helps ensure that individuals and organizations can secure their rights. Specifically, H.R. 435 would eliminate the "substantial justification" defense that often allows the federal government to avoid paying legal fees to successful litigants; eliminates hourly rate caps on legal fees, which are far below market rates, and expands the definition of "prevailing party" to include litigants who successfully obtain out-of-court settlements against the federal government or who otherwise trigger the federal government's compliance with the law.

The ACLU believes that the Equal Access to Justice Reform Act will help bring further accountability to the federal government. Particularly as the federal government accrues greater power over more aspects of the lives and liberties of the people in this country, it is imperative that persons who believe that their civil rights or civil liberties have been violated can have meaningful access to the courts. H.R. 435 would be critical to obtaining access to legal remedies, and we thus urge you to cosponsor this legislation.

Thank you for your attention to this issue, and please do not hesitate to call us at 202-675-2317 if you have any questions.

Sincerely,

Laura W. Murphy
Director

LaShawn Warren
Legislative Counsel

LETTER FROM RICHARD LESSNER, PH.D., EXECUTIVE DIRECTOR, THE AMERICAN CONSERVATIVE UNION TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

March 29, 2005

The Honorable Donald Manzullo
Chairman
Committee on Small Business
U.S. House of Representatives
2228 Rayburn House Office
Washington, DC 20515

Dear Chairman Manzullo:

The American Conservative Union is pleased to support *H.R. 435 the Equal Access to Justice Reform Act of 2005*. ACU believes it is important to provide small businesses the opportunity to recover attorney fees and costs, as well as individual Americans of modest means, in actions brought against them by the federal government in cases where such recovery in warranted. This is an important protection against illegal or baseless actions taken against law abiding Americans by their government.

H.R. 435 would draw a bright line against governmental abuses of power. It would level the playing field between small businesses and individual Americans and the power of federal agencies. The federal government has enormous taxpayer resources at its disposal that easily can overwhelm the limited financial resources of small businesses. Such imbalance creates enormous pressures to settle cases, regardless of the merits, simply to avoid financially crushing litigation.

Your legislation will bring needed relief to those targeted for frivolous, abusive or baseless litigation. It is only commonsense that those who defend themselves successfully can expect to recover the costs of the litigation. This prospect also will act as a deterrent to the government proceeding with legally dubious actions.

Sincerely,

Richard Lessner, PhD
Executive Director

LETTER FROM RICHARD HAUGHT, D.D.S., PRESIDENT AND JAMES B. BRAMSON, D.D.S., EXECUTIVE DIRECTOR, AMERICAN DENTAL ASSOCIATION TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

American
Dental
Association

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April 26, 2005

The Honorable Donald Manzullo
Chairman, Committee on Small Business
United States House of Representatives
2228 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Manzullo:

The American Dental Association (ADA) strongly supports your efforts to assist small businesses through the introduction of H.R. 435, the "Equal Access to Justice Reform Act of 2005." The ADA represents over 152,000 dentists in the United States. If enacted, H.R. 435 would allow small businesses, including dental offices, to recover attorney fees and costs when they succeed in challenging in a court of law improper cases brought forward by the federal government.

The Equal Access to Justice Act (EAJA) was enacted in 1980 as a means of equalizing the playing field between the federal government and small business litigants, as well as certain other parties. Various ambiguities within the text of EAJA have raised interpretive issues that have been a constant source of litigation within the courts. Moreover, EAJA incorporates some substantive limitations on the ability to recover attorneys' fees.

The costs of litigation often serve as a deterrent to small businesses from pursuing legal relief. Your common sense changes to the EAJA will remove many of the barriers that small businesses currently face and will also clarify ambiguities in the law, including:

- Elimination of the "substantial justification defense" provision, whereby the government can deny attorneys' fees recovery to prevailing parties if the adjudicative officer of the agency finds that the agency's position was substantially justified;
- Elimination of the rate cap of $125 per hour on attorney's fees;.
- Establishing provisions regarding settlement offers, declaration of intent to seek a fee award, payment from agency appropriations, and taxpayer eligibility for fee awards; and
- Defining "prevailing party" to include a party whose pursuit of a non-frivolous claim or defense was a catalyst for a voluntary or unilateral change in position by the opposing party that provides any significant part of the relief sought.

Thank you for your effort to address these matters. Please have your staff get in touch with Michael Graham in our Washington office at (202) 789-5167 should you have any questions or need any assistance.

Sincerely,

Richard Haught, D.D.S.
President

James B. Bramson, D.D.S.
Executive Director

RH:JB:mag

LETTER FROM MICHAEL D. MAVES, MD, MBA, AMERICAN MEDICAL ASSOCIATION TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

American Medical Association
Physicians dedicated to the health of America

Michael D. Maves, MD, MBA
Executive Vice President, CEO

515 North State Street
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312 464-5000
312 464-4184 Fax

May 13, 2005

The Honorable Donald A. Manzullo
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Manzullo:

The American Medical Association (AMA) is writing to express our support for H.R. 435, the "Equal Access to Justice Reform Act 2005."

We applaud you for your efforts to improve and strengthen the Equal Access to Justice Act (EAJA) by seeking to remove barriers and inefficiencies for small business owners, such as physicians, involved in disputes with the Federal government. The AMA has long advocated for relief from overzealous enforcement by government agencies directed at physicians and for fair resolution of alleged violations of the multitude of laws and regulations governing the practice of medicine.

Thank you for your leadership and dedication to reduce burdens on small businesses.

Sincerely,

Michael D. Maves, MD, MBA

LETTER TO SUSAN STEINMAN, LINDA LIPSEN, DANIEL COHEN, ASSOCIATION OF TRIAL LAWYERS OF AMERICA FROM THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

DONALD A. MANZULLO, ILLINOIS
CHAIRMAN

NYDIA M. VELÁZQUEZ, NEW YORK

Congress of the United States
House of Representatives
109th Congress
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515–6315

March 28, 2005

Susan Steinman
Linda Lipsen
Daniel Cohen
Association of Trial Lawyers of America
1050 31st Street, NW
Washington, DC 20007
Via Facsimile (202-342-5484) and Email

Re: ATLA's Support for H.R. 435

Dear Counsel:

Thank you for communicating the firm support of the Association of Trial Lawyers of America (ATLA) for the Equal Access to Justice Reform Act of 2005 (H.R. 435), reintroduced recently by me and Representative Earl Blumenauer (D-OR). Thank you also for your support of this bill in prior Congresses.

As you know, H.R. 435 will provide attorney fee recovery for small parties – small businesses, small nonprofits, and individuals with net worths up to $2 million – when they prevail in legal disputes with the federal government. It thus will help provide real access to the justice system for small parties who ordinarily cannot afford to make their case against the federal government or defend themselves against its illegal enforcement actions.

We look forward to working with you and others in our diverse coalition of supporters toward enactment of this bill.

Sincerely,

Donald A. Manzullo

Donald A. Manzullo
Chairman

LETTER FROM R. BRUCE JOSTEN, EXECUTIVE VICE PRESIDENT, GOVERNMENT AFFAIRS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICAN TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESETATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
Government Affairs

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

February 17, 2005

Honorable Donald Manzullo
Chairman, Committee on Small Business
United States House of Representatives
2228 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Manzullo:

The U.S. Chamber of Commerce applauds your leadership on introducing H.R. 435, the "Equal Access to Justice Reform Act of 2005." The Chamber strongly supports your efforts to provide for the recovery of attorney fees and costs when small businesses prevail in cases brought against the federal government.

If enacted, the "Equal Access to Justice Reform Act of 2005" would help to level the playing field between small employers and federal agencies. Simply stated, the federal government has enormous taxpayer-funded resources with which to prosecute employers. The practical result of these real-world realities is that small entities, far "outgunned" by the agencies, are under unfair and intense pressure to settle cases, regardless of the merits, simply to end financially crushing litigation. Your common sense and long overdue changes to the laws regarding attorney fee recovery will provide some relief to small business owners, so that if they successfully defend themselves, they can at least recoup their expenses.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees. On behalf of these small employers, I thank you again for introducing this important piece of legislation and we look forward to working with you in its passage.

Sincerely,

R. Bruce Josten

R. Bruce Josten

LETTER FROM THE HONORABLE EDWIN MEESE III, RONALD REAGAN DISTINGUISHED FELLOW IN PUBLIC POLICY AND CHAIRMAN, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

214 Massachusetts Avenue, NE • Washington, DC 20002-4999 • (202) 546-4400

EDWIN MEESE III
Chairman, Center for Legal & Judicial Studies

11 March 2005

The Honorable Donald Manzullo
Chairman
House Committee on Small Business
U.S. House of Representatives
2228 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Manzullo:

We want to thank you for your careful review of the Equal Access to Justice Act as well as your efforts to further the purposes of the Act through appropriate amendments to it. In particular, we believe the key provisions of the Equal Access to Justice Reform Act of 2003, H.R. 435, would improve the statute and further balance the legitimate needs of government litigators and the rights and legitimate interests of individuals and small businesses.

As Attorney General, I developed a great respect for the litigators in the Department of Justice, whose overall professionalism is exemplary. Nevertheless, I also shared former Attorney General (and later Supreme Court Justice) Robert Jackson's understanding of a federal litigator's role (whether a prosecutor or civil litigator) which is to do justice rather than exploit every advantage the government has to win every case brought. The Equal Access to Justice Act helps the federal government follow the just course, and the provisions of H.R. 435 move us further in that direction. I hope the Department of Justice also supports your efforts and works constructively with you on such legislation.

The changes contained in H.R. 435 would improve the opportunity for small entities to recoup their attorneys' fees and other expenses if they prevail in cases been brought against them by the federal government. The provisions likely would also lead to increased early assessment and settlement of claims. More importantly, the provisions in question will provide small entities a better chance of obtaining legal representation when they believe the federal litigation is unwarranted. All of these ends serve the public interest, and may even result in a reduction of overall federal outlays for litigation.

We look forward to working with you to see this legislation enacted into law.

Sincerely,

Edwin Meese III

Edwin Meese III

LETTER FROM J. MICHAEL SMITH, ESQ., PRESIDENT, NATIONAL CENTER FOR HOME EDUCATION TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

NATIONAL CENTER
★ ★ ★ *for* ★ ★ ★
HOME EDUCATION
a division of Home School Legal Defense Association

J. MICHAEL SMITH, ESQ.
PRESIDENT

CALEB A. KERSHNER
FEDERAL POLICY & RESEARCH

SARAH E. MEHRENS, CLA
ADMINISTRATOR

MICHAEL P. FARRIS, ESQ.
GENERAL COUNSEL

IAN M. SLATTER
MEDIA RELATIONS

March 30, 2005

The Honorable Don Manzullo
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Representative Manzullo,

On behalf of the 80,000 plus member families of the Home School Legal Defense Association (HSLDA), I am writing to express our support for H.R. 435, the *Equal Access to Justice Reform Act of 2005*.

As you know, though the years, homeschoolers have often found themselves at odds with government policies – many of which are simply errant interpretations of existing law. In our experience at HSLDA, it has occasionally been necessary to file legal suits to effectuate changes in these settings. Often times, this filing of a suit will quickly result in a reinterpretation. In other cases, however, changes do not take place until after substantial resources have been expended on the case.

We are therefore particularly pleased with the provisions of H.R. 435 pertaining to modifications to the definition of prevailing party to include a party whose pursuit of a non-frivolous claim or defense was a catalyst for a voluntary or unilateral change in position. This is a good modification to the existing equal access to justice law and speaks much more clearly to the realities of litigation.

Your reforms to the *Equal Access to Justice Act* are helpful to ensuring that freedom from unjust government actions will not go unchallenged. Thank you for standing firm in your support of liberty.

Sincerely,

J. Michael Smith

JMS/cak

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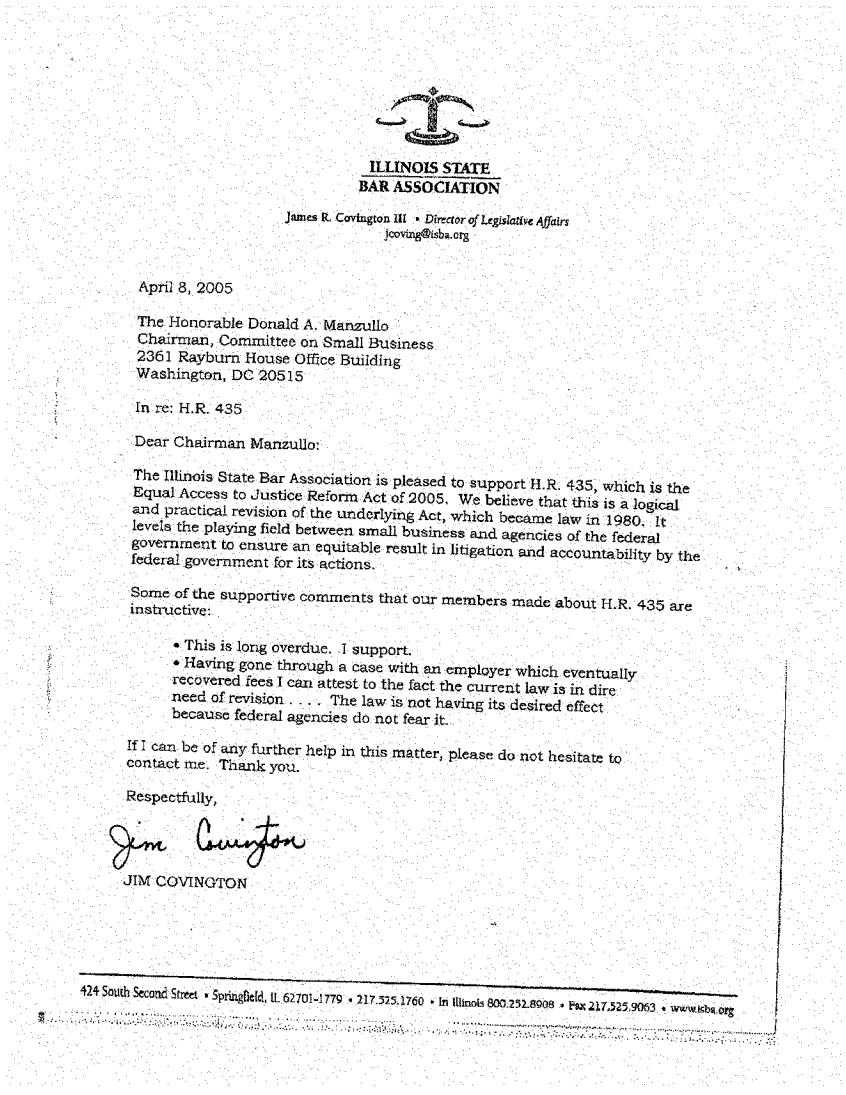
LETTER FROM JIM COVINGTON III, DIRECTOR OF LEGISLATIVE AFFAIRS, ILLINOIS STATE BAR ASSOCIATION TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS



ILLINOIS STATE
BAR ASSOCIATION

James R. Covington III • *Director of Legislative Affairs*
jcoving@isba.org

April 8, 2005

The Honorable Donald A. Manzullo
Chairman, Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515

In re: H.R. 435

Dear Chairman Manzullo:

The Illinois State Bar Association is pleased to support H.R. 435, which is the Equal Access to Justice Reform Act of 2005. We believe that this is a logical and practical revision of the underlying Act, which became law in 1980. It levels the playing field between small business and agencies of the federal government to ensure an equitable result in litigation and accountability by the federal government for its actions.

Some of the supportive comments that our members made about H.R. 435 are instructive:

- This is long overdue. I support.
- Having gone through a case with an employer which eventually recovered fees I can attest to the fact the current law is in dire need of revision . . . . The law is not having its desired effect because federal agencies do not fear it.

If I can be of any further help in this matter, please do not hesitate to contact me. Thank you.

Respectfully,

Jim Covington

JIM COVINGTON

424 South Second Street • Springfield, IL 62701-1779 • 217.525.1760 • In Illinois 800.252.8908 • Fax 217.525.9063 • www.isba.org

LETTER FROM WADE HENDERSON, EXECUTIVE DIRECTOR AND NANCY ZIRKIN, DEPUTY DIRECTOR OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS AND THE HONORABLE EARL BLUMENAUER, MEMBER OF CONGRESS, U.S. HOUSE OF REPRESENTATIVES

LCCR

Leadership Conference on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006
Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

WADE J. HENDERSON
Executive Director

February 15, 2005

The Honorable Donald A. Manzullo
Chairman, Small Business Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Earl Blumenauer
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Manzullo and Representative Blumenauer:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest and most diverse civil and human rights coalition, we are our writing to express our strong support for H.R. 435, the Equal Access to Justice Reform Act of 2003. LCCR greatly appreciates your efforts to strengthen and expand the Equal Access to Justice Act.

Civil rights laws – like all laws – are of little value unless individuals and organizations are able to access the courts to ensure their enforcement. But in too many instances, people find themselves unable to access the courts in any meaningful fashion simply because of the often-prohibitive costs of securing adequate legal representation. Yet as Supreme Court Justice George Sutherland wrote in *Powell v. Alabama* (1958), "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."

It was with this understanding of the importance of the right to counsel in vindicating legal rights that Congress in 1980 enacted the Equal Access to Justice Act (EAJA). EAJA provides groups and individuals who prevail in many legal actions against the federal government with reasonable attorney's fees. Since its enactment, however, EAJA has in many instances not lived up to its admirable goal of putting Americans on a more equal footing with the federal government in the courtrooms.

H.R. 435, the Equal Access to Justice Reform Act of 2003, takes a number of important steps to further the goals of EAJA. Among its key improvements, H.R. 435 will:

- Eliminate the "substantial justification" defense that often allows the federal government to avoid paying legal fees to successful litigants;
- Eliminate hourly rate caps on legal fees, which are currently well below the market rate for many legal services; and
- Expand the definition of "prevailing party" to include litigants who successfully obtain out-of-court settlements against the federal government.

We also believe the bill's provision that requires losing agencies to pay the fees from their own budgets is fiscally responsible and adds accountability. We are concerned, however, about the possible chilling effect this provision could have on the principal agencies that protect workers' rights (i.e., NLRB, OSHA, and EEOC). These agencies stand in a unique position vis-à-vis workers, who must depend on those agencies for enforcement of their rights. We trust this concern can be addressed before final bill passage.

We greatly appreciate your leadership on the important issue of EAJA reform, and we look forward to working with you towards the passage of H.R. 435. If we can be of any assistance, please feel free to contact Rob Randhava, LCCR Policy Analyst, at (202) 466-6058.

Sincerely,

Wade Henderson
Executive Director

Nancy Zirkin
Deputy Director

LETTER FROM HILARY O. SHELTON, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOSICATION FOR THE ADVANCEMENT OF COLORED PEOPLE TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS AND THE HONORABLE EARL BLUMENAUER, MEMBER OF CONGRESS, U.S. HOUSE FO REPRESENTATIVES

WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
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Fax (202) 463-2953 • E-Mail: washingtonbureau@naacpnet.org • Web Address: www.naacp.org

March 9, 2005

The Honorable Donald A. Manzullo
Chairman, Small Business
Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Earl Blumenauer
U.S. House of Representatives
Washington, DC 20515

RE: H.R. 435, THE *EQUAL ACCESS TO JUSTICE REFORM ACT OF 2005.*

Dear Chairman Manzullo and Congressman Blumenauer;

On behalf of the National Association for the Advancement of Colored People (NAACP), our nation's oldest, largest and most widely recognized grassroots civil rights organization, I would like to express our strong support for H.R. 435, the *Equal Access to Justice Reform Act of 2005.*

The 1980 enactment of the *Equal Access to Justice Act* provided Americans with the means to hire competent attorneys when they have legitimate complaints against the federal government. And, while the NAACP still strongly supports *the Equal Access to Justice Law*, we recognize that in the past 24 years we have seen several problems that the original law intended to address but did not.

The fact that there are problems which continue to plague our nation's judicial system in cases in which groups of people or individuals win suits against the United States government is why we are so pleased to support your legislation. Specifically, the provisions in your bill, H.R. 435, the *Equal Access to Justice Reform Act of 2005*, that the NAACP is particularly supportive of include those that:

- Eliminate the "substantial justification: defense that often allows the federal government to avoid paying legal fees to successful litigants;
- Require losing agencies to pay the fees from their own budgets, thus improving individual agency accountability;
- Eliminate hourly rate caps on legal fees, which are currently well below the market rate for many legal services; and

- Expand the definition of "prevailing party" to include litigants who successfully obtain out-of-court settlements against the federal government.

The NAACP greatly appreciates your efforts to correct these inequities and to improve upon the existing *Equal Access to Justice Act*. While we have expressed to you, though conversations and through other correspondence in conjunction with other coalition partners, our concerns surrounding the unique position the NLRB, OSHA and the EEOC are in and would not want to see those agencies' missions compromised due to your bill, we look forward to working with you to see that H.R. 435 is improved in this one area and enacted as soon as possible.

Thank you again for your efforts in this area. I look forward to working with you to address the flaws in the existing system and to ensuring that more Americans are able to justice in their struggles to hold the federal government accountable. Please feel free to contact me at (202) 463-2940 should you have any questions about the NAACP position on this matter.

Sincerely,

Hilary O. Shelton
Director

LETTER FROM JOHN ENGLER, PRESIDENT AND CEO, THE NATIONAL ASSOSCIATION OF MANUFACTURERS TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

John Engler
President and CEO

National Association of Manufacturers

February 28, 2005

The Honorable Don Manzullo
The U.S. House of Representative
Washington DC 20515

Dear Representative Manzullo:

On behalf of its thousands of small and medium manufacturers, the National Association of Manufacturers (NAM) salutes your initiative in introducing the Equal Access to Justice Reform Act of 2005, H.R. 435. At a time when burdensome regulations domestically are creating an unlevel playing field in the global economy, this bill offers some much needed relief.

If enacted, H.R. 435 will remove existing barriers and inefficiencies within existing law and equalize the level of accountability to federal law among governments in the US, discourage marginal or abusive Federal enforcement actions directed at small businesses, stop the practice of paying liabilities from the General Treasury, which has insulated agencies from the financial consequences of their misconduct and burdened the Federal budget unnecessarily, and provide a fairer opportunity for full participation by small businesses in the free enterprise system, further increasing the economic vitality of the Nation.

As you may have heard, last Congress, NAM member, Jim Knott of Riverdale Mills testified before the House Subcommittee on Workforce Protections (Chaired by Rep. Norwood) regarding a similar bill that dealt with compensating small manufacturers when prevailing in contesting OSHA violations. We support this bill along with your legislation in trying to move forward a fairer process for small business to defend themselves from frivolous government litigation.

Again, thanks for this common sense approach to allow small businesses to recover attorney's fees when the federal government fails to make its case. The NAM looks forward to working with you on passage of this legislation.

Hope to see you soon.

Sincerely,

John Engler

JE/jn

LETTER FROM DAN DANNER, SENIOR VICE PRESIDENT, FEDERAL PUBLIC POLICY, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS (NFIB) TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

May 22, 2006

The Honorable Don Manzullo
Chairman
Committee on Small Business
U.S. House of Representatives
Washington, DC 20515

Dear Representative:

On behalf of the 600,000 members of the National Federation of Independent Business (NFIB), I am writing to express our support for H.R. 435, the Equal Access to Justice Reform Act of 2005. H.R. 435 will hold agencies accountable for their actions and help protect innocent small businesses.

The Equal Access to Justice Act (EAJA) was designed to give small businesses protection from onerous government regulations and lawsuits. Despite the intentions of the act, it has not been followed by government agencies, and small businesses continue to be burdened by unnecessary government actions. Unfortunately, agencies have repeatedly avoided paying for attorneys' fees to prevailing parties by overuse of the "substantial justification defense." This defense allows the government to deny paying attorneys' fees if an agency finds that their own position was substantially justified. Agencies have used this loophole repeatedly to escape their requirements under EAJA.

NFIB is very supportive of eliminating the use of the "substantial justification defense," and we are pleased that H.R. 435 would end its use. In addition, eliminating the rate cap on attorneys' fees of $125 per hour will ensure that small-business owners are fairly reimbursed for legal services.

Small-business owners do not possess the resources to defend themselves against onerous government action, and H.R. 435 will rectify the problems by eliminating loopholes in the Equal Access to Justice Act. Your legislation places the private citizen and the government on a more equal footing by making sure government agencies follow the intent of EAJA.

Reform of the Equal Access to Justice Act is crucial to provide a strong incentive for government agencies to leave small businesses alone unless there is strong evidence of guilt. NFIB strongly endorses H.R. 435, and appreciates your efforts to protect America's small businesses.

Sincerely,

Dan Danner
Executive Vice President
Federal Public Policy and Political

LETTER FROM DREW CAPUTO, SENIOR ATTORNEY, THE NATURAL RESOURCES DEFENSE COUNSEL TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS AND THE EARL BLUMENAUER, MEMBER OF CONGRESS, U.S. HOUSE OF REPRESENTATIVES

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

February 17, 2005

The Honorable Donald A. Manzullo
Chairman, Small Business Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Earl Blumenauer
U.S. House of Representatives
Washington, D.C. 20515

RE: H.R. 435 – SUPPORT

Dear Chairman Manzullo and Congressman Blumenauer:

The Natural Resources Defense Council strongly supports H.R. 435, the Equal Access to Justice Reform Act. The Equal Access to Justice Act (EAJA) was intended to remove the financial disincentives that make it difficult to challenge unfair or illegal actions by the federal government. Several aspects of the current law, however, undermine EAJA's purpose of leveling the legal playing field between citizens and their government. First, EAJA currently contains a "substantial justification" defense that enables the government to avoid paying attorney fees to successful litigants in certain circumstances. Second, EAJA has an hourly rate cap that is far below the market rate for legal services in many communities. Third, the law currently lacks a "catalyst test" that enables a litigant to recover attorney fees where an agency refuses to change its illegal behavior until a litigant has been forced to incur the time and expense of actually filing a lawsuit.

H.R. 435 would address each of these problems with the current law and, in doing so, would help ensure that all Americans are treated with fairness and justice under the legal system. We strongly support this bill, and we thank you for your leadership in pursuing this important legislation.

Sincerely,

Andrew Caputo

Drew Caputo
Senior Attorney

www.nrdc.org

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San Francisco, CA 94104
TEL 415 845-6100 FAX 415 875-6161

NEW YORK · WASHINGTON, DC · LOS ANGELES

LETTER FROM PATRICK GALLAGHER, DIRECTOR OF ENVIRONMENTAL LAW, SIERRA CLUB TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS AND THE HONORABLE EARL BLUMENAUER, MEMBER OF CONGRESS, U.S. HOUSE OF REPRESENATIVES

SIERRA CLUB
FOUNDED 1892

February 22, 2005

The Honorable Donald A. Manzullo
Chairman, Small Business Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Earl Blumenauer
U.S. House of Representatives
Washington, D.C. 20515

Re: Support of H.R. 435 Equal Access to Justice Reform Act of 2005

Dear Chairman Manzullo and Congressman Blumenauer:

The Sierra Club supports the Equal Access to Justice Reform Act of 2005, H.R. 435. The Equal Access to Justice Act ("EAJA") plays a critical role in vindicating the rights of small businesses and non-profits in the face of wrongful actions by federal agencies and officials. Congress originally enacted EAJA to "reduce[] the disparity of resources between individuals, small businesses, and other organizations with limited resources and the federal government." H.R. Rep. No. 120, 99th Cong., 1st Sess. 4 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 133. EAJA's attorney fee provisions were specifically intended to further that purpose by allowing plaintiffs to recover attorney fees in successful actions against the federal government.

Unfortunately, several barriers in the current law have served to undermine the original purpose of EAJA. These include: a "substantial justification" defense to the award of attorney fees, which has served to promote extra litigation more than advance the goals of the law; and the lack of a mechanism for the resolution of legal actions that, prior to judgment, truly "catalyze" a change of course by the government and the reform of misconduct. Finally, the $125 hourly cap on fees in the current law is antiquated and eliminates the potential for small businesses and non-profits to obtain assistance from a large segment of the legal profession.

H.R. 435 will help repair these problems and improve the law. The Sierra Club strongly supports the bill and lauds your efforts to modernize EAJA and enhance its utility to the small business and non-profit community. Thank you for your consideration of this letter.

Sincerely,

Patrick Gallagher
Director of Environmental Law

85 Second Street, Second Floor San Francisco, CA 94105-3441 TEL: (415) 977-5500 FAX: (415) 977-5792 www.sierraclub.org

LETTER FROM THE SMALL BUSINESS EQUAL ACCESS TO JUSTICE COALITION TO THE HONORABLE F. JAMES SENSENBRENNER, JR., CHAIRMAN, HOUSE JUDICIARY COMMITTEE

Small Business Equal Access to Justice Coalition

March 10, 2005

The Honorable F. James Sensenbrenner, Jr.
Chairman, House Judiciary Committee
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner:

On behalf of the millions of businesses represented by the undersigned organizations, the Small Business Equal Access to Justice Coalition strongly urges you to expeditiously move H.R. 435, the "Equal Access to Justice Reform Act of 2005". This bipartisan bill introduced by House Small Business Committee Chairman Donald Manzullo (R-IL) and Representative Earl Blumenauer (D-OR) would remove current barriers against the recovery of attorney fees and costs when small businesses prevail in cases brought against the federal government.

If enacted, the "Equal Access to Justice Reform Act of 2005" would help to level the playing field between small employers and federal agencies. Simply stated, the federal government has enormous taxpayer-funded resources with which to prosecute employers. The practical result of these real-world realities is that small entities, far "outgunned" by the agencies, are under unfair and intense pressure to settle cases, regardless of the merits, simply to end financially crushing litigation. These common sense and long overdue changes to the laws regarding attorney fee recovery will provide some relief to small business owners, so that if they successfully defend themselves, they can at least recoup their expenses.

For these reasons, the Small Business Equal Access to Justice Coalition strongly urges you to expeditiously move H.R. 435, the "Equal Access to Justice Reform Act of 2005." On behalf of the many small employers we represent, we thank you in advance for considering this important piece of legislation and we look forward to working with you in its passage.

cc: The Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee

Air Conditioning Contractors of America
American Bakers Association
American Farm Bureau Federation
American Hotel and Lodging Association
American Trucking Association
Associated Builders and Contractors, Inc.
Associated General Contractors of America
Finishing Contractors Association
International Franchise Association
Mason Contractors Association of America
Mechanical Contractors Association of America
National Association of Home Builders
National Association of Manufacturers
National Council of Agricultural Employers
National Council of Chain Restaurants
National Electrical Contractors Association
National Federation of Independent Business
National Funeral Directors Association
National Mining Association
National Newspaper Association
National Ready Mixed Concrete Association
National Restaurant Association
National Roofing Contractors Association
National Small Business Association
Society for Human Resource Management
Society of American Florists
U.S. Chamber of Commerce

LETTER FROM J. WILLIAM LAUDERBACK, EXECUTIVE VICE PRESIDENT, THE AMERICAN CONSERVATIVE UNION TO THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

ACU
THE AMERICAN CONSERVATIVE UNION

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(703) 836-8606

www.conservative.org

May 23, 2006

The Honorable Don Manzullo
Chairman
U.S. House Small Business Committee
2361 Rayburn House Office Building (ROHB)
Washington DC 20515

Dear Chairman Manzullo:

The American Conservative Union reiterates our support for H.R. 435, the Equal Access to Justice Reform Act of 2005 that we originally stated in our letter of March 25, 2005. ACU believes it is important to provide small businesses, as well as individual Americans of modest means, the opportunity to recover attorney fees and costs in actions brought against them by the federal government in cases where recovery is warranted. This legislation modernizes this important protection against baseless actions taken against law abiding Americans by their own government.

Some within the federal government will attempt to say this legislation will cost too much. This is simply not the case. When EAJA was originally enacted, estimations placed the cost to the federal government at $500 million annually. The actual cost for the first 13 years (FY82 - FY94) was reported by the GAO to be a TOTAL of $34.1 million.

EAJA in fact forces the federal government to cost the taxpayer LESS money. A reduction in frivolous federal actions will be caused when the general counsel of an initiating agency is forced to weigh the likelihood of success against the loss of the defendants' costs from their own operating budget – the same consideration that anyone else filing suit must face.

Chairman Manzullo, your legislation will bring needed relief to those targeted for frivolous, abusive or baseless lawsuits. It is only commonsense that those who defend themselves successfully can

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expect to recover the costs of litigation. This prospect will act as a deterrent to the government proceeding with legally dubious actions.

Sincerely,

J. William Lauderback
Executive Vice President

LETTER FROM CAROLINE FREDRICKSON, DIRECTOR, LASHAWN WARREN, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERITIES UNION, TO THE HONORABLE F. JAMES SENSENBRENNER, JR., CHAIRMAN, U.S. HOUSE OF REPRESENTATIVES, HOUSE JUDICIARY COMMITTEE AND THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, RANKING MEMBER, HOUSE JUDICIARY COMMITTEE

WASHINGTON
LEGISLATIVE OFFICE

ACLU
AMERICAN CIVIL LIBERTIES UNION

May 22, 2006

The Honorable F. James Sensenbrenner, Jr., Chairman
House Judiciary Committee
Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr., Ranking Member
House Judiciary Committee
Rayburn House Office Building
Washington, DC 20515

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Caroline Fredrickson
DIRECTOR

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PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

KENNETH B. CLARK
CHAIR, NATIONAL
ADVISORY COUNCIL

RICHARD ZACKS
TREASURER

Dear Representatives:

On behalf of the American Civil Liberties Union and its hundreds of thousands of members, activists, and fifty-three affiliates nationwide, we write to encourage you to cosponsor H.R. 435, the Equal Access to Justice Reform Act. It would provide important protections to persons seeking redress of civil rights or civil liberties violations caused by the federal government.

Congress enacted the Equal Access to Justice Act in 1980 as a means of ensuring both individuals and organizations the right to effective counsel in vindicating important civil rights and civil liberties protections. The protections enumerated in the U.S. Constitution and provided in federal civil rights statutes are the most important sources of legal rights for liberty and equality. And those protections extend to include a prohibition against the federal government itself violating the civil rights and civil liberties of individuals or organizations. The purpose of the Equal Access to Justice Act is to provide the resources for aggrieved persons to afford legal counsel to compel the federal government to abide by the Constitution and the civil rights laws.

Although the Equal Access to Justice Act has been an important step in providing such counsel, the statue has several significant limitations and has been curtailed further by court decisions narrowly interpreting the rights provided by the statute. H.R. 435 corrects these problems, and thereby helps ensure that individuals and organizations can secure their rights. Specifically, H.R. 435 would eliminate the "substantial justification" defense that often allows the federal government to avoid paying legal fees to successful litigants; eliminates hourly rate caps on legal fees, which are far below market rates, and expands the definition of "prevailing party" to include litigants who successfully obtain out-of-court settlements against the federal

government or who otherwise trigger the federal government's compliance with the law.

The ACLU believes that the Equal Access to Justice Reform Act will help bring further accountability to the federal government. Particularly as the federal government accrues greater power over more aspects of the lives and liberties of the people in this country, it is imperative that persons who believe that their civil rights or civil liberties have been violated can have meaningful access to the courts. H.R. 435 would be critical to obtaining access to legal remedies, and we thus urge you to cosponsor this legislation.

Thank you for your attention to this issue, and please do not hesitate to contact LaShawn Warren at 202-675-2317 if you have any questions.

Sincerely,

Caroline Fredrickson
Director

LaShawn Warren
Legislative Counsel

Cc. Representative Manzullo

LETTER FROM THE HONORABLE DONALD A. MANZULLO, U.S. HOUSE OF REPRESENTATIVES AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS AND THE HONORABLE EARL BLUMENAUER, MEMBER OF CONGRESS, U.S. HOUSE OF REPRESENTATIVES, THE HONORABLE OLYMPIA SNOWE, CHAIR, COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP, UNITED STATES SENATE, AND THE HONORABLE RUSSELL FEINGOLD, UNITED STATES SENATE TO THE HONORABLE ARLEN SPECTER, SENATE JUDICIARY AND THE HONORABLE F. JAMES SENSENBRENNER, JR., CHAIRMAN, HOUSE JUDICIARY COMMITTEE

Congress of the United States
Washington, DC 20515

December 16, 2005

The Honorable Arlen Specter
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building

The Honorable James Sensenbrenner, Jr.
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building

Dear Chairmen Specter and Sensenbrenner:

We have introduced companion bills in the House and Senate to amend the Equal Access to Justice Act (EAJA), H.R. 435 (Manzullo-Blumenauer) and S. 2017 (Feingold-Snowe). We request that your committees schedule action on these bills, as promptly possible, including a hearing and markup.

Our proposal will improve the existing EAJA statute and help small businesses and individual plaintiffs that win lawsuits against the government. First, the bill eliminates the restrictive standard for attorneys' fees recovery that requires the government's claims to be "not substantially justified" before a court may award fees. The bill will encourage settlement, create a more accountable government, and will provide Congress, through annual reporting, with an excellent oversight tool to track fee awards. Finally, this proposal should have a minimal fiscal impact because it requires most federal agencies to pay attorneys' fees out of their preexisting appropriations.

As shown in the attached summary, this proposal is supported by groups representing the entire political spectrum, from the American Civil Liberties Union and the Sierra Club to the business community, the Heritage Foundation, and the American Conservative Union. There is good reason for this broad support; a well-intentioned statute, EAJA essentially has become a dead letter.

Enacted in 1980, EAJA provides for the recovery of reasonable attorneys' fees by small businesses, individuals of modest means, and small nonprofit organizations when they prevail in litigation with the federal government. Its purpose was to ensure that those with modest means would be able to defend themselves against federal actions. EAJA has failed to meet this goal. The companion bills we have sponsored are designed to strengthen EAJA enabling it to accomplish its intended goal without unduly crimping federal enforcement.

EAJA authorizes the award of attorneys' fees against the federal government when a party prevails against the federal government. Yet, in practice, that simple notion is so riddled with exceptions that it generally provides false hope to small businesses and individuals that want to challenge federal agency action.

The most significant hurdle to recovery under EAJA is the federal government's ability to avoid the payment of attorneys' fees when its has lost its case by convincing a court or agency that its litigation position was "substantially justified." Such a claim initiates additional, time-consuming, risk-laden, and often expensive litigation over the fee recovery itself, all of which provides a significant disincentive for individuals and small businesses to pursue the statutory remedy now available to them.

Even assuming this barrier is overcome, EAJA also caps hourly fees at well below the market rate. This is an additional hurdle for small businesses and individuals especially for complex litigation against the federal government. The fee cap also provides a significant disincentive to qualified attorneys to take cases representing those of modest means against the government.

These problems with EAJA were exacerbated by the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia*, 532 U.S. 598 (2001). In that case, the Court held that the term "prevailing party" for all federal fee-shifting statutes, including EAJA, only applies if the litigant obtains a judgment in the litigant's favor rather than when the litigant achieves its objective through an out-of-court settlement or unilateral concession by the government. This creates an incentive for litigants to refuse to accept settlements and concessions by the government, further clogging the federal courts.

There are at least 100 federal-fee shifting statutes in the United States Code, and only EAJA includes the "substantial justification" defense and caps on attorneys fees. It has become increasingly important to make the proposed changes to EAJA for small businesses and individuals alike. EAJA is frequently the only way for small businesses and individuals to afford counsel who will defend them against the government.

These amendments to EAJA are needed so that federal agencies will more carefully consider the implications of their actions against small businesses and individuals in the same way that they might when considering action against large businesses with substantial financial and legal resources.

Our proposal removes flaws and strengthens EAJA. Furthermore, the changes will increase efficiency in EAJA litigation and help reduce delays in the federal courts by reducing the amount of EAJA-related litigation. Finally, by requiring most federal agencies to pay EAJA fees out of their appropriated funds rather than a general account in the Treasury, decision makers will be forced to critically assess their enforcement and litigation. Ultimately, the changes to EAJA will create a less burdensome and more efficient federal government for all.

For more information about these companion bills, please contact one of us, or Matthew Szymanski (Manzullo) at 202-225-5821 or Alex Hecht (Snowe) at 202-224-4291. Thank you for your consideration.

Respectfully,

Donald A. Manzullo
Chairman
Committee on Small Business
U.S. House of Representatives

Olympia Snowe
Chair
Committee on Small Business and Entrepreneurship
U.S. Senate

Earl Blumenauer
U.S. House of Representatives

Russell Feingold
U.S. Senate

cc: The Honorable Patrick Leahy, Ranking Member, Senate Judiciary Committee
The Honorable John Conyers, Jr., Ranking Member, House Judiciary Committee

Enclosure

The Equal Access to Justice Reform Act of 2005 (H.R. 435 / S. 2017): Fair Treatment for Small Businesses

(Updated January 25, 2006)

Enacted in 1980, the Equal Access to Justice Act (EAJA) intended to make the justice system accessible to small businesses, by allowing small businesses that prevail in litigation against the Federal government to recover their attorney's fees and legal costs. However, EAJA's applicability has been severely undermined by a number of legal barriers. The primary barrier is EAJA's "substantial justification" defense, which permits the Federal government to claim, in a costly separate proceeding, that its actions were "substantially justified," thereby denying EAJA recovery to a small business that has prevailed in an underlying dispute.

In order to effectuate EAJA's original intent, the **Equal Access to Justice Reform Act of 2005 (H.R. 435 / S. 2017) would eliminate the "substantially justified" obstacle so that qualifying parties can recover their fees when they win their cases against the government.** In addition, H.R. 435 / S. 2017 would:

- **Raise the threshold for a qualifying small business** from $7 million net worth **to $10 million net worth**;
- **Remove EAJA's $125 per hour cap on legal fees**;
- **Allow qualifying parties who settle out of court to recover legal fees**; and
- **Require most agencies who lose lawsuits to pay the legal fees out of their own budgets**, and not out of the General Treasury fund, which will make the agencies more accountable for their decisions. S. 2017 differs from H.R. 435 by exempting three agencies that have special responsibility for enforcing the labor laws from paying fees from their own appropriations. These changes will protect small businesses and individuals throughout the United States.

In short, the **Equal Access to Justice Reform Act will guarantee that small businesses receive an equal opportunity for justice. A diverse, bipartisan coalition of organizations supporting this reform is listed on the next page.** These companion bills have numerous predecessors, including the Equal Access to Justice Reform Act of 2003 (H.R. 2282, Manzullo-Blumenauer); Equal Access to Justice Reform Amendments of 2001 (S. 106, Feingold-Hutchinson); and Equal Access to Justice for Taxpayers Act of 1998 (S. 1612, Leahy-Feingold).

Contact Matthew.Szymanski@mail.house.gov (Manzullo) for a section-by-section analysis of H.R. 435 or support letters from the groups listed on the back. Contact alexh@small-bus.senate.gov (Snowe) for a section-by-section analysis of S. 2017.

STATEMENT OF THE HONORABLE EARL BLUMENAUER, MEMBER OF CONGRESS, U.S. HOUSE OF REPRESENTATIVES

Statement of Congressman Earl Blumenauer
Subcommittee on Courts, the Internet, and Intellectual Property

Legislative Hearing on H.R. 435, the "Equal Access to Justice Reform Act of 2005"

May 23, 2006

Ensuring that individuals, organizations and small businesses can seek remedy in the courtroom on equal footing with the federal government is the worthy principle behind the Equal Access to Justice Act (EAJA), which was enacted in 1980. Implementation of H.R. 435, the Equal Access to Justice Reform Act of 2005, will put this principle into practice.

Current EAJA law does not live up to the ideal it intended to establish. Caps on attorney fees and the definition of what constitutes a prevailing party have had a deterrent effect for those seeking to enforce their rights against the government. I have heard from attorneys in Oregon who have outlined the negative impact on Indian tribes under current law and regulations. Non-profit environmental groups have also pointed out the weaknesses of the current system. I support the EAJA Reform Act because it addresses these concerns and creates a level playing field for these organizations and individuals in dealing with the federal government.

Specifically, H.R. 435 establishes EAJA's original intent by:

- Eliminating the "substantially justified" provision so that qualifying parties can recover their fees when they win cases against the government;
- Raising the threshold for a qualifying small business from $7 million of net worth to $10 million of net worth;
- Removing EAJA's $125 per hour cap of legal fees;
- Allowing qualifying parties who settle out of court to recover legal fees; and,

- Requiring most agencies that lose lawsuits to pay the legal fees out of their own budgets, which will make agencies more accountable for their actions.

I would hope that my friends in labor would support EAJA reform, given that: (1) the reform applies equally to all federal agencies and targets none; (2) the reform provides every union member with the ability to obtain a competent attorney in any illegal or abusive federal action confronting that union member; and (3) far from targeting NLRB, OSHA, EEOC, and MSHA for special penalties, the reform would secure for them special financial relief to minimize any chill on enforcement of workers' rights.

Much of my work in Congress has centered on the idea that the federal government must lead by example. When the federal government operates under a different set of rules than others, it is difficult to set that example. H.R. 435 reforms EAJA to put federal agencies and officials on the same legal footing as state and local agencies and officials. The legislation will equalize accountability to federal law.

The diverse and bipartisan coalition of organizations that support H.R. 435 is testimony to the need for and balance of this important legislation. I'm proud to have sponsored this bill led by Chairman Manzullo and appreciate the Subcommittee's interest in considering this proposal to bring justice to individuals and small businesses.