

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: RICHARD B. KAY, Petitioner  
v. BREMER EHRLER AND KENTUCKY BOARD  
OF ELECTIONS  
CASE NO: 90-79  
PLACE: Washington, D.C.  
DATE: February 25, 1991  
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1 P R O C E E D I N G S

2 (1:51 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 90-79, Richard B. Kay v. Bremer Ehrler and  
5 Kentucky Board of Elections.

6 Spectators are reminded that the Court remains  
7 in session. There is to be no talking inside the  
8 courtroom.

9 Mr. Dyk, you may proceed whenever you are ready.

10 ORAL ARGUMENT OF TIMOTHY B. DYK

11 ON BEHALF OF THE PETITIONER

12 MR. DYK: Mr. Chief Justice, and may it please  
13 the Court:

14 This case presents an important question under  
15 Section 1988 of the civil rights laws which allows a  
16 reasonable attorney's fee to prevailing parties.  
17 Petitioner in this case is an attorney who, proceeding pro  
18 se in the United States district court for the Eastern  
19 District of Kentucky, succeeded in having two state  
20 statutes restricting access to the ballot declared  
21 unconstitutional. And one of those had been declared  
22 unconstitutional 4 years earlier and it had been reenacted  
23 by the State in its identical form despite the court's  
24 ruling.

25 QUESTION: What was the standing in this case?

1 MR. DYK: In this case?

2 QUESTION: In this case, yeah.

3 MR. DYK: He was a --

4 QUESTION: Was he a candidate or something?

5 MR. DYK: Yes. He was a candidate for President  
6 of the United States. He has run for various offices on  
7 the Democratic ticket a number of times, and has received  
8 access to the ballot in a number of States and a fair  
9 amount of media coverage for a minor party candidate, and  
10 for a minor candidate for the Democratic nomination.

11 He, in doing this, fulfilled the purposes of the  
12 civil rights laws, and that is he acted as a private  
13 attorney general vindicating not only his own rights,  
14 representing not only his own rights, but those of other  
15 people in the United States.

16 QUESTION: Was it ever established, Mr. Dyk,  
17 that he was admitted to the bar in the Eastern District of  
18 Kentucky, or Western District, wherever it was?

19 MR. DYK: He didn't need to be admitted to the  
20 bar pro hac vice. He was not a regular member of the bar,  
21 but he did not need to seek a pro hac vice admission  
22 because under the rules of the Eastern District he was  
23 allowed to proceed without doing that since he was pro se.  
24 He is a member of the bar of the States of Florida and  
25 Ohio.

1 QUESTION: So he was enabled to proceed in  
2 Kentucky not because he was admitted to the bar, but  
3 because he was pro se?

4 MR. DYK: Well, he could have -- he could have  
5 proceeded either to seek admission pro hac vice or to  
6 proceed under this rule. It wasn't necessary for him to  
7 do the pro hac vice because the rule allowed it anyway.

8 QUESTION: So at any rate he was not admitted to  
9 practice as an attorney, either for this case or  
10 generally, in the Federal court in Kentucky?

11 MR. DYK: That is correct, he was not.

12 QUESTION: Now, Mr. Dyk, you don't take the  
13 position that all pro se litigants are eligible for  
14 attorneys' fees, just those who are attorneys?

15 MR. DYK: That is correct, Justice O'Connor. We  
16 take the position that while some of the purposes of the  
17 statute would be served by allowing attorneys' fees to pro  
18 se litigants who are not attorneys, that the language of  
19 the statute in referring to an attorney assumes a licensed  
20 member of the bar --

21 QUESTION: Well, the statute also refers to  
22 prevailing parties, which might more easily be read to  
23 cover all than just attorneys. I thought it was curious  
24 that you limited your argument.

25 MR. DYK: I -- Justice O'Connor, I would agree

1 that there are many of the policies of this statute which  
2 would be fulfilled by allowing attorneys' fees to non-  
3 attorney pro se litigants. But there is the reference in  
4 the statute to attorney, and there is the reference in the  
5 legislative history wishing to involve attorneys in these  
6 cases.

7 QUESTION: Well, if you -- if you look to the  
8 language the phrase "attorneys' fee," isn't the more  
9 natural meaning of that to presuppose that there is an  
10 attorney-client relationship?

11 MR. DYK: I think not, Justice O'Connor. I  
12 think the reference is to the fee that the court allows to  
13 the attorney in the case, and of course this statute comes  
14 to the Court today with the gloss placed on it by both the  
15 Blum and the Blanchard cases, which have specifically held  
16 that this statute does not contemplate cost-based  
17 recovery. In other words, it does not make any difference  
18 under this statute whether there is a paying relationship  
19 between attorney and client.

20 Indeed, if one looks at the legislative history,  
21 it seems that one of the clear purposes of the statute was  
22 to award fees to individuals who were not charging their  
23 clients for their services. So despite the reference in  
24 the statute to the word fee, it is now clear under this  
25 Court's earlier decision that the payment of -- an actual

1 payment of the fee is not what the statute means.

2 QUESTION: True, but it may still contemplate an  
3 attorney-client relationship.

4 MR. DYK: I think -- I think not, Justice  
5 O'Connor, because not only does the statutory language not  
6 draft it in a way that requires representation, and I  
7 think it would have been relatively easy for Congress to  
8 do that if it intended to do it, but the policies of the  
9 statute are fully served in the case of an individual  
10 attorney who is proceeding pro se. First of all, the  
11 statute is designed --

12 QUESTION: What about that old saw that he who  
13 represents himself has a fool for a client?

14 MR. DYK: Well, I realize --

15 QUESTION: Maybe Congress had in mind that  
16 people should get attorneys in order to vindicate civil  
17 rights causes of action.

18 MR. DYK: I think there is no question but that  
19 Congress wanted attorneys to be involved. There is no  
20 question that Congress to some extent, to a significant  
21 extent, was motivated by the desire to provide attorneys  
22 to people who could not afford them. But it did not draft  
23 the statute in that way. For example, it could have said,  
24 and it had the Fair Housing Act before it as an example at  
25 the time that it passed this statute, it could have



1 awarded fees only to people who are, quote, "unable to  
2 assume the payment of the fees themselves." It didn't do  
3 that. It acted more broadly, and it acted more broadly  
4 because it had broad purposes in enacting this statute.

5 It was concerned that without private  
6 enforcement of the civil rights laws, that the civil  
7 rights laws might become a dead letter. It was actively  
8 seeking to encourage civil rights litigation by awarding  
9 these fees, not to discourage it. And again and again  
10 this Court has said and the legislative history has said  
11 that this was the central purpose, to encourage these  
12 suits to be brought to vindicate the civil rights not only  
13 of the plaintiffs in the cases, but of other people whom  
14 the plaintiffs represented.

15 At the same time there was a lesser purpose to  
16 some extent deter the defendants in these cases from  
17 raising defenses to meritorious claims. And for these --  
18 these purposes are fully served by cases in which an  
19 attorney is proceeding pro se. It is also quite clear, we  
20 think, and conceded by the other side, by both the  
21 respondent and by the United States, that pro se  
22 organizations proceeding under the statute are entitled to  
23 recover an attorney's fee. And I think the same purposes  
24 of the statute which lead to that result should lead to  
25 the result of a pro se individual being covered by the

1 statute as well.

2 And if this Court were to rule otherwise I think  
3 there would be extremely difficult line-drawing problems.  
4 I mean, you could have one case in which an individual  
5 represented a corporation or a nonprofit corporation. You  
6 could have a case in which an individual was a member of a  
7 voluntary association which was bringing the suit, or, as  
8 in some of the cases, you could have an individual who was  
9 representing a partnership, or in this case --

10 QUESTION: In all of those cases the entity is  
11 larger than the attorney who is appearing before the court  
12 on its behalf.

13 MR. DYK: I think there are, there are in the  
14 examples that I have given so far, that is true, Mr. Chief  
15 Justice, but Mr. Kay could also have sued in the name of  
16 the Kay for President Committee, which may consist of one  
17 or two people.

18 The fact is that there may be -- by introducing  
19 a distinction between organizations and individuals, I  
20 think we're suggesting that some very difficult line-  
21 drawing problems could be introduced, line-drawing which  
22 isn't justified by the purposes of the statute and that we  
23 would end up, as this Court said in Hensley should not be  
24 the case, we could end up with other litigations to try to  
25 determine whether it's an organizational situation or an

1 individual situation.

2 QUESTION: Mr. Dyk, what is your answer to the  
3 situation where house counsel represents a nonprofit  
4 organization?

5 MR. DYK: That does happen with some frequency.  
6 It was something that they were apparently aware of in  
7 passing the statute. There are references to it in the  
8 hearings, and there is a specific reference to it in the  
9 House report, and, that clearly says that under those  
10 circumstances that the organization is entitled to recover  
11 the attorney's fee. And the amicus brief of Public  
12 Citizen has pointed out how often that occurs and how  
13 important it is.

14 And I understand that point to be conceded by  
15 the other side, that if it's a nonprofit corporation, if  
16 it has a corporate form, that it is within the statute and  
17 that an attorney's fee can be recovered, even though it is  
18 another pro se situation.

19 QUESTION: Well, I suppose organizations,  
20 corporations and other organizations have to be  
21 represented by counsel. I mean, they can't come in as a  
22 corporation and represent themselves. They have to have  
23 an attorney there, house counsel or otherwise, don't they?

24 MR. DYK: Well, I think, Justice O'Connor, that  
25 is true in the case of a corporation. But in the case of

1 a voluntary association or a partnership, which also  
2 qualify for this organizational status, they don't have to  
3 proceed by an attorney. They can proceed by a member of  
4 the organization. And if it so happens that they proceed  
5 being represented by an attorney who is a member of the  
6 organization, it seems difficult -- very difficult to  
7 distinguish between that situation and the corporate  
8 situation, and very difficult to believe that Congress  
9 could have intended to do that.

10 QUESTION: Is that, is that for certain, Mr.  
11 Dyk? I'm not sure. Do you know of any cases where a  
12 partnership appears pro se?

13 MR. DYK: Yes. There is one of the leading  
14 District of Columbia cases, the D.C. Circuit cases here,  
15 the Cuneo case, involved a case in which the partnership  
16 appeared pro se and Mr. Cuneo represented them, and the  
17 D.C. Circuit held that he was entitled to fees. So these  
18 things do happen.

19 And if, if the Court tries to draw a line  
20 between individuals and organizations I fear it will be a  
21 very difficult line for the courts to administer in  
22 practice, not only because these situations do exist, but  
23 it would create an incentive for people to create an  
24 organization for the purpose of getting the attorneys'  
25 fees.

1           Now the Solicitor General tells us don't worry,  
2 we'll pierce the corporate veil, we'll go behind that, but  
3 there again I think one is just getting into all sorts of  
4 difficult litigation over the question of attorneys' fees.

5           We are told -- we are told by the other side  
6 that there are purposes of the statute which would be  
7 defeated if attorneys' fees were allowed here. It is  
8 said, for example, by the brief of the State of Hawaii and  
9 others as amicus that if attorneys' fees are allowed here  
10 it will devastate the State treasuries, and that for that  
11 reason the Court should not construe 1988 as allowing  
12 attorneys' fees in this situation.

13           The difficulty with that argument, of course, is  
14 it will devastate the State treasuries only, only if the  
15 petitioner as the plaintiffs in these cases prevail. And  
16 if they prevail they are serving the very purpose of the  
17 Civil Rights Act that led Congress to award of an  
18 attorney's fee.

19           They also argue that the reason that Congress  
20 wanted to get attorneys involved in these civil rights  
21 cases was to perform a sifting function, that they would  
22 sit there and decide which cases were meritorious and  
23 ought to be brought, and which cases were not meritorious  
24 and should not be brought. And they somehow suggest that  
25 a pro se attorney isn't going to perform the same sifting

1 function.

2 The difficulty here again is that there simply  
3 isn't a single statement in the legislative history  
4 suggesting that Congress enacted 1988 or brought attorneys  
5 into the process in order to perform this sifting  
6 function.

7 QUESTION: Well, the whole idea of our  
8 profession is that that degree of insulation,  
9 independence, and professionalism prevails because there  
10 is a distance between you and the client. And you would  
11 concede on the one hand that a pro se who is not an  
12 attorney cannot get the fees, and yet you would create for  
13 the legal profession this little option where they could  
14 represent themselves. And it seems to me that it somewhat  
15 detracts from the purpose of the Congress in asking for  
16 professional representation.

17 MR. DYK: The problem, Justice Kennedy, that the  
18 Congress faced in 1976 after this Court's decision in  
19 Alyeska was that they thought these cases would not be  
20 brought because they could not be brought based on the  
21 traditional attorney-client relationship in which the  
22 client retained the attorney and agreed to pay the  
23 attorney. Congress felt, in fact, so strongly about this  
24 that they concluded that if they did not provide for an  
25 award of attorneys' fees, that the civil rights laws would

1 not be enforced. And it is clear, I think, that pro se  
2 attorneys, individuals proceeding pro se as attorneys,  
3 have made valuable contributions in this area. This  
4 petitioner did in this particular case. The briefs that  
5 we have filed --

6 QUESTION: Well, I suppose you could say the  
7 same about some pro se's who are not attorneys.

8 MR. DYK: I agree with you, Justice Kennedy,  
9 that is quite true that there are purposes of this statute  
10 which would be served by awarding fees to individuals who  
11 are not attorneys. And if I were to approach this as a  
12 legislative matter I would completely agree that there was  
13 a great deal to be said for that.

14 But there is the word "attorney" in the statute,  
15 there is the reference in the legislative history to the  
16 desire to bring expert individuals into this, and for that  
17 reason we think that the language and the history of the  
18 statute suggests that it falls short of awarding it to  
19 non-attorney pro se's, a result which has been reached by  
20 many of the circuits which have nonetheless agreed that  
21 pro se attorneys should recover.

22 QUESTION: Mr. Dyk, I don't understand how you  
23 make that distinction. As Justice O'Connor points out,  
24 the person who gets the award is simply described in the  
25 statute as the prevailing party, which would include

1 anybody, attorneys or not. The award is described as  
2 attorney's fees, a reasonable attorney's fee, but you're  
3 ignoring the word fee. There isn't any fee, nobody has  
4 paid any money to anybody, so why not ignore the word  
5 attorney's too? I mean, it's just a description of what  
6 the money is for, not a description of what, what the  
7 function actually is.

8 MR. DYK: I think I'm not, Justice Scalia,  
9 ignoring the word fee. I think that based on this Court's  
10 decisions in Blum and Blanchard that I read the word fee  
11 as referring to the payment that is made to the prevailing  
12 party. And I approach the statute with the understanding  
13 from this Court's decisions that it is -- does not provide  
14 for cost-based recovery. But I also approach the statute  
15 not only looking at the word attorney, but looking at the  
16 legislative history which suggests this desire to have  
17 attorneys involved. There was an apparent conclusion that  
18 attorneys were invaluable contributions to these cases.

19 Now, a number of members of the Court have  
20 suggested that non-attorneys may bring valuable  
21 contributions. I don't dispute that. I say again that I  
22 agree that non-attorneys may make very valuable  
23 contributions to these cases, and that there are many  
24 reasons for arguing that they should also be covered. And  
25 I agree that if you look at the words "prevailing party"



1 instead of attorney's fee, that maybe it is possible to  
2 reach the conclusion under this statute that it covers  
3 non-attorneys. That issue of course is not before the  
4 Court today.

5 But we, I -- I'm giving you my best  
6 understanding of what I think Congress intended, and I  
7 think that Congress probably did not intend to include pro  
8 se non-attorneys within the statute, even though there are  
9 strong reasons for doing it.

10 Mr. Chief Justice, unless there are further  
11 questions I'd like to reserve the remainder of my time.

12 QUESTION: Very well, Mr. Dyk.

13 Ms. Sheadel, we'll hear from you.

14 ORAL ARGUMENT OF ANN M. SHEADEL

15 ON BEHALF OF THE RESPONDENTS

16 MS. SHEADEL: Mr. Chief Justice, and may it  
17 please the Court:

18 The question presented in this case is whether a  
19 pro se litigant who is an attorney is eligible for  
20 attorneys' fees under 42 U.S.C. Section 1988. The  
21 language of 42 U.S.C. Section 1988 indicates that pro se  
22 litigants, whether attorneys or not, are not eligible for  
23 attorneys' fees. The language of that statute provides  
24 that the court, in its discretion, may allow the  
25 prevailing party, other than the United States, a

1 reasonable attorney's fee as part of the costs. The issue  
2 before the Court is to determine the meaning of the phrase  
3 "attorney's fee as part of the costs."

4 In examining the definition of attorney's fee,  
5 we believe that it becomes clear that pro se litigants,  
6 whether or not attorneys, are not eligible for fees. The  
7 phrase "attorney's fee" is defined as meaning charged to  
8 client for services rendered, and examples given, hourly  
9 fee, flat fee, contingency fee. Looking at that  
10 definition, "charge to client for services rendered,"  
11 indicates that there is a presupposition that there are  
12 two parties, that there is an attorney on one hand and the  
13 attorney -- client on the other.

14 QUESTION: But it also assumes that there is a  
15 charge, and we have ignored that assumption because we  
16 allow pro bono attorneys to, we allow the recovery of fees  
17 for pro bono attorneys.

18 MS. SHEADEL: Yes, Your Honor, but here --

19 QUESTION: So if we ignore the one, why can't we  
20 ignore the other?

21 MS. SHEADEL: We believe that if you look at the  
22 words in the entire context, attorney's fee as part of  
23 costs, that it would indicate that there is an attorney-  
24 client relationship from which a fee arrangement springs.  
25 Now the fee arrangement may ultimately be that there might

1 not be an actual paying relationship other than some kind  
2 of contingency fee arrangement, such as contingency fee if  
3 we lose the case there are no attorneys' fees paid, if we  
4 win the case attorneys' fees will be paid if attorneys'  
5 fees are recovered. We do believe that the language,  
6 looked at in its entire context, indicates that there is  
7 the requirement of an attorney-client relationship from  
8 which springs a fee arrangement. We believe that that is  
9 --

10 QUESTION: Well, what about the house counsel's  
11 situation or the pro bono organization's situation?

12 MS. SHEADEL: We believe that there is still a  
13 fee arrangement. In-house counsel is in fact acting as  
14 retained counsel by the organization that has hired it.  
15 In-house counsel is paid the retainer of the yearly salary  
16 and benefits to be there for the organization and to  
17 represent the organization in any matters that the  
18 organization requires, much as an outside counsel might be  
19 put on retainer for the same purpose. We believe that  
20 that is the kind of -- is a kind of fee arrangement that  
21 would qualify as part of this attorney-client  
22 relationship.

23 We believe that that also is true in the  
24 situation of a pro bono attorney representing a client.  
25 That relationship also has a fee arrangement much like a

1 contingency fee arrangement. If the case is lost there  
2 are no fees that are paid. If the case is won, fees are  
3 paid based on whatever attorneys' fees are recovered.  
4 That is a fee arrangement that stems from the attorney-  
5 client relationship, the attorney representing his client  
6 as anticipated by the language in the statute itself.

7 QUESTION: May I ask this question? Supposing  
8 in this case the presidential candidate had also put on  
9 the complaint that he had also represented a voter in  
10 Kentucky to get not only the candidate's point of view but  
11 the voter's point of view for standing. Fees in that  
12 case?

13 MS. SHEADEL: If the petitioner were  
14 representing someone other than himself, then we believe  
15 he would have qualified for fees for that particular  
16 representation. But for matters in which he was  
17 representing himself, we would believe that he would not  
18 qualify.

19 QUESTION: How do you differentiate if there, if  
20 a common interest -- say the vice presidential candidate  
21 was plaintiff also. He represents X and Y, presidential  
22 and vice presidential candidate respectively, and he is  
23 one of the two. Does he get a fee?

24 MS. SHEADEL: It may be in that situation that  
25 when the court is asked to examine the facts connected

1 with it that it might not be possible to make a  
2 distinction. If the common interests were such that  
3 everything the attorney did was on behalf of the clients  
4 together, you might not be able to make a differentiation.

5 QUESTION: Which means he would or would not get  
6 a fee?

7 MS. SHEADEL: It means he would, if he were  
8 representing a party other than himself.

9 QUESTION: I see.

10 MS. SHEADEL: Because there would in fact be an  
11 attorney-client relationship and a fee arrangement that  
12 would stem from that.

13 QUESTION: You say, Ms. Sheadel, that the  
14 statute contemplates an attorney-client relationship which  
15 will ultimately give rise to some sort of fee arrangement.  
16 How does the existence of that sort of a relationship  
17 advance the purpose of the statute? I mean, more so than  
18 just an arrangement just where the -- if the attorney is  
19 pro se he can get a fee.

20 MS. SHEADEL: The language used by Congress in  
21 the legislative history indicates that Congress was  
22 concerned with enabling individuals who might not be able  
23 to afford to hire attorneys and get into court the means  
24 by which they would be able to hire an attorney to  
25 represent him or her in the court in order to vindicate

1 his or her civil rights. Congress' intent seems to us to  
2 be that encouragement -- that giving individuals the  
3 ability to hire attorneys to represent them, and was in  
4 fact contemplating the existence of the attorney-client  
5 relationship that we are describing.

6 QUESTION: Are you arguing that -- that because  
7 a man was a lawyer he didn't need to go out and find a  
8 good lawyer? Is that it? And therefore Congress didn't  
9 intend to have him compensated because he didn't need to  
10 go out and hunt a lawyer? Is that it?

11 MS. SHEADEL: We would not say it that way. We  
12 believe that Congress meant to treat all pro se litigants  
13 the same in that they were encouraging everyone who  
14 believes that he or she should file a civil rights action  
15 to go and find an attorney to represent him or her in that  
16 lawsuit. And that would include attorneys. If attorneys  
17 decide to proceed pro se, they are making the decision in  
18 the same way that any other litigant might make that  
19 decision. But the congressional intent was to give  
20 individuals the means by which they could hire attorneys  
21 to represent them.

22 QUESTION: Well, unless a pro se lawyer gets  
23 paid, I suppose he would be less likely to bring a civil  
24 rights suit, because while he's pursuing it he can't take  
25 any other clients.

1 MS. SHEADEL: We don't believe he would be any  
2 less likely to bring the suit than any other individual  
3 who is contemplating it. Certainly the attorney always  
4 has the opportunity to hire --

5 QUESTION: Well, I don't know about that. The  
6 nonlawyer pro se fellow hasn't got that problem, or may  
7 not have that problem of paying the rent and not having  
8 any clients, not being able to serve any other clients.

9 MS. SHEADEL: It might apply to some pro se  
10 litigants and might not apply to others. For example, if  
11 there are pro se litigants who have professions and who do  
12 work, any time --

13 QUESTION: Well, it's certainly likely if the  
14 lawyer, if the fellow is making his living as a lawyer it  
15 is likely that, that -- well, he normally doesn't take  
16 cases that interfere with his practice.

17 MS. SHEADEL: Yes, that's true, Your Honor, but  
18 we do not believe --

19 QUESTION: So he won't be likely to be going out  
20 pursuing civil rights cases if he's not going to get paid.

21 MS. SHEADEL: That's right. He might not pursue  
22 them himself, but he has the same option that every other  
23 citizen in the country has, as encouraged by Congress, and  
24 that is to hire an attorney to represent him if he decides  
25 that he should file a civil rights claim. Congress has

1 put every citizen in the country on the same plane, the  
2 same starting point with its concern about hiring an  
3 attorney to represent him if he's filing a civil rights  
4 action.

5 Attorneys certainly have the capability of  
6 finding attorneys to represent them if they wish to bring  
7 these actions and do not wish to spend the time on it  
8 themselves as far as litigating the action. And we  
9 believe --

10 QUESTION: There's always the risk, naturally  
11 there's always the risk of losing. You always -- if you  
12 go out and hire an attorney and you have to pay him,  
13 maybe, win, lose, or draw. And if you lose you're going  
14 to have to pay him anyway.

15 MS. SHEADEL: That certainly is the possibility.  
16 A Congress intent in enacting the statute obviously was  
17 not to, to award fees to anyone whether or not prevailing.  
18 Fees are available to prevailing parties only, and that is  
19 true for anyone that hires an attorney to represent him or  
20 her in these actions.

21 We believe if you compare the wording  
22 "attorney's fee as part of costs" with the meaning of the  
23 phrase "pro se," it becomes even clearer that Congress was  
24 contemplating the attorney-client relationship. Pro se  
25 means appearing for oneself, as in the case of one who



1 does not retain a lawyer and appears for himself in court.  
2 Someone who is appearing pro se is doing it for himself on  
3 his own behalf. Someone who is -- who is qualified for  
4 attorneys' fees is an attorney who is acting on behalf of  
5 someone else, his client.

6 The legislative history supports this  
7 conclusion. Congress' main concern was with citizens who  
8 might be unable to assert their civil rights because they  
9 could not afford to hire attorneys to represent them in  
10 court. Congress expressed this concern in several places  
11 in the legislative history, and in one place stating that  
12 it was very concerned about citizens who must sue to  
13 enforce the law but who had little or no money in which to  
14 hire an attorney. That was the concern that Congress was  
15 addressing in enacting 42 U.S.C. Section 1988. It very  
16 much wanted to enable citizens to hire attorneys to  
17 represent them in these actions.

18 Nowhere in the legislative history does Congress  
19 talk about any intent in allowing pro se litigants,  
20 whether or not attorneys, to be awarded attorneys' fees in  
21 this kind of action.

22 QUESTION: May I ask you a question? Would it  
23 make any difference if it were a class action and the  
24 litigant was proceeding on behalf of a class and was the  
25 named plaintiff and also the lawyer?

1 MS. SHEADEL: We don't believe that it would  
2 make a difference, if you mean if the attorney should get  
3 attorney's fees for representing clients, we believe that  
4 in that situation the attorney would be eligible for fees.

5 QUESTION: Because of the class members, yes.

6 MS. SHEADEL: He does in fact represent parties  
7 other than himself and has the attorney-client  
8 relationship that the statute contemplates.

9 QUESTION: Another example occurs to me. I  
10 remember there's the Shakman case in Chicago. Shakman was  
11 a lawyer, but he was a member of a law firm, and I think  
12 probably everybody in the law firm worked on the case.  
13 Would his partners be -- under your view his partners  
14 would be entitled to a fee but he would not?

15 MS. SHEADEL: Assuming from your question that  
16 the partners were representing him and there was the  
17 attorney-client relationship, we believe that the partners  
18 would be eligible.

19 QUESTION: But he couldn't -- he probably  
20 couldn't count his own hours working on the case as part  
21 of the fee?

22 MS. SHEADEL: We would agree that he should not  
23 be able to be compensated for his own representation of  
24 himself.

25 Petitioner has argued that pro se litigants

1 should be awarded fees because organizations are mentioned  
2 in the legislative history, and that organizations that  
3 proceed pro se are allowed fees and so pro se individuals  
4 should receive fees.

5 We do not think that that argument is persuasive  
6 because organizations do not in fact proceed pro se, and  
7 indeed the organizations that Congress specifically  
8 mentions in the legislative history were all represented  
9 by counsel. They were all part of an attorney-client  
10 relationship, and the intent of the Congress would seem by  
11 the language that it used in the legislative history to  
12 indicate that it was still looking at the attorney-client  
13 relationship.

14 Organizations indeed are represented by other  
15 parties as a general rule, whether the attorney is an in-  
16 house counsel or outside counsel, and certainly that was  
17 true in all of the specific situations that Congress was  
18 examining in determining the wording of 42 U.S.C. Section  
19 1988.

20 QUESTION: You would apply that to all  
21 organizations, including partnerships? You disagree with  
22 Mr. Dyk as to whether a partnership can appear pro se?

23 MS. SHEADEL: I don't know if courts allow  
24 partnerships to proceed pro se without a licensed attorney  
25 there in the courtroom for them. My experience has been

1 that there has always been a licensed attorney  
2 representing these organizations and these partnerships.  
3 But if there is someone who is not a licensed attorney  
4 representing a partnership, then we would say that there  
5 cannot be an attorney-client relationship because there is  
6 not even an attorney. We would -- we would say that -- we  
7 would agree with petitioner that at the least the  
8 statutory language would require there to be an attorney  
9 involved in the representation.

10 QUESTION: Well, would you -- a law partnership  
11 where a lawyer represents the partnership, would you treat  
12 the partnership and that lawyer like a -- like a  
13 corporation?

14 MS. SHEADEL: Yes, we would, if the lawyer is  
15 representing the partnership and there is the attorney-  
16 client relationship.

17 QUESTION: Well, he's representing himself, too.  
18 He's a partner in the firm.

19 MS. SHEADEL: Yes. We believe that if the  
20 partnership or organization is greater than the individual  
21 that is representing the partnership or organization, then  
22 that there is an attorney-client relationship, and that  
23 that is what the language and the intent for 42 U.S.C.  
24 would require, and fees would be applicable and the  
25 individual would be eligible for attorney's fees for that

1 reason.

2 QUESTION: What, what courts have been against  
3 you?

4 MS. SHEADEL: The Ninth Circuit and the Eleventh  
5 Circuit have held --

6 QUESTION: Are those, are there only three  
7 circuits ruled on that?

8 MS. SHEADEL: There are only three circuits that  
9 have ruled on this specific question, although the Duncan  
10 case involved a defendant obtaining attorney's fees, and  
11 so the question is enough different that it's difficult to  
12 know if that court would also make the same ruling for a  
13 plaintiff that was proceeding pro se.

14 We do not believe that Congress' intent to  
15 foster private enforcement actions is in any way undercut  
16 by the decision that we are asking this Court to make in  
17 this case. It's clear that Congress did not intend to  
18 foster all enforcement actions. If it had that intent it  
19 would have in fact awarded fees to all parties that  
20 brought suits, whether or not the parties prevailed.  
21 Clearly Congress' intent to encourage enforcement actions  
22 was limited by the means that it adopted for this statute,  
23 and those means being that attorneys' fees -- that  
24 prevailing parties would be eligible for attorneys' fees  
25 if in fact there were an attorney-client relationship --

1 an attorney representing another person, that attorney's  
2 client.

3 We believe that the language of the statute and  
4 the legislative intent are clear that pro se litigants,  
5 whether or not they are attorneys, are ineligible for  
6 attorneys' fees under 42 U.S.C. Section 1988, and we ask  
7 this Court to affirm the decision of the Sixth Circuit.  
8 Thank you.

9 QUESTION: Thank you, Ms. Sheadel.

10 Mr. Long, we'll hear now from you.

11 ORAL ARGUMENT OF ROBERT A. LONG, JR.

12 ON BEHALF OF THE UNITED STATES,

13 AS AMICUS CURIAE, IN SUPPORT

14 OF THE RESPONDENTS

15 MR. LONG: Thank you, Mr. Chief Justice, and may  
16 it please the Court:

17 Let me begin with a point Mr. Dyk raised. He  
18 referred to pro se organizations, and there was also a  
19 question whether a partnership can litigate pro se. Our  
20 understanding is that the general rule is that  
21 organizations cannot litigate pro se. That is certainly  
22 true of corporations, and we think that is the majority  
23 rule as to partnerships and also as to unincorporated  
24 associations.

25 QUESTION: Corporations can't litigate pro se

1 because the corporation can't come into court?

2 MR. LONG: It could not appear through its  
3 president or through some officer of the corporation. It  
4 has to hire a member of the bar to represent it.

5 QUESTION: Well, what if its vice president is a  
6 lawyer?

7 MR. LONG: I think that then the courts have  
8 allowed the attorney --

9 QUESTION: They don't need to go out and hire  
10 anybody. It's just part of his job.

11 MR. LONG: Well, that would be the in-house  
12 counsel situation, and that is certainly okay. I might  
13 add --

14 QUESTION: But how about a voluntary  
15 organization, say an environmental organization or, you  
16 know, any one of the groups that litigate. If they're  
17 simply an association, are they allowed to appear in court  
18 by one of their members who is not a lawyer?

19 MR. LONG: We think the general rule is they are  
20 not, and the cases on this are collected under 28 U.S.  
21 Code 1654, which is a statute we did not cite in our  
22 brief, but that is a statute that generally gives all  
23 parties in Federal courts a right to conduct their own  
24 cases personally or by counsel.

25 QUESTION: So, under your view an organization

1 would have to be represented by an attorney, but it could  
2 be an attorney who was also a member of the organization?

3 MR. LONG: Yes, that's exactly right, Mr. Chief  
4 Justice.

5 We think the language of Section 1988 which  
6 provides that a prevailing party other than the United  
7 States may recover a reasonable attorney's fee as part of  
8 the costs answers the question presented in this case.  
9 The word "attorney" ordinarily denotes a person who is  
10 both licensed to practice law and who acts as the  
11 representative or agent of a client. Members of the bar  
12 generally do represent clients, but that does not mean  
13 that a lawyer who litigates a case pro se is functioning  
14 as an attorney. Standard dictionaries define attorney as  
15 the agent or representative of another. And  
16 representation is the essence of phrases such as attorney  
17 in fact and power of attorney. We also think other  
18 language in Section 1988 reinforces the conclusion that  
19 Congress used attorney in its usual sense.

20 QUESTION: Let me ask you a question there.  
21 Supposing you had an attorney who was a beneficiary of a  
22 trust with a lot of money in it, and he brought suit in  
23 his own name as a beneficiary to surcharge the trustees  
24 for wrongful action of some kind, and he collected a  
25 million dollars or so. Fee or no fee, do you suppose, as



1 a matter of normal common law approach to that?

2 MR. LONG: He is the beneficiary of the trust?

3 QUESTION: He is both the beneficiary -- he  
4 brought an action on behalf of all -- well, I suppose you  
5 could say, say he's the sole beneficiary. I have to make  
6 him the sole beneficiary.

7 MR. LONG: I think in that case it is simply a  
8 pro se example. If he were the trustee, he might be  
9 acting on behalf of the beneficiary or the cestui, then he  
10 might well be entitled --

11 QUESTION: No, I'm thinking of an action where  
12 he creates -- a common fund case, where he creates a fund  
13 for the trust and he is the individual beneficiary.

14 MR. LONG: If he is the sole beneficiary, I  
15 think our position would be that he is not entitled to a  
16 fee. I mean, I should add --

17 QUESTION: I suppose in most of those cases that  
18 there would be -- he in effect would be doing a service  
19 for the trust as a whole.

20 MR. LONG: Yes, and in that case he might well  
21 get a fee. And I should add in general that Mr. Dyk rests  
22 a great deal of his argument on the proposition that this  
23 distinction between organizations and pro se litigants  
24 would be very difficult to apply in practice. And first  
25 of all we think this statute requires the distinction, so

1 the difficulty of it is not really an issue, but we also  
2 think in the ordinary run of cases it's not going to be  
3 difficult to apply. It is the kind of determination  
4 courts make routinely, for example under this statute  
5 1654, also in determining whether there is an attorney-  
6 client relationship or who the attorney represents in a  
7 corporate setting. It is the kind of question that courts  
8 can answer quite easily in the borderline or difficult  
9 cases that may arise.

10 But in addition to a requirement of an attorney,  
11 there is a requirement of an attorney's fee as part of the  
12 costs, and a pro se litigant cannot pay himself a fee. A  
13 pro se lawyer also incurs no costs for legal services  
14 other than opportunity costs, and this Court has never  
15 held that opportunity costs are compensable as attorneys'  
16 fees.

17 Now, it is correct, as petitioner observes, that  
18 organizations represented by in-house counsel, as well as  
19 clients represented by attorneys on a pro bono basis, are  
20 eligible for fee awards under Section 1988. But this does  
21 not foreclose reliance on the statutory language  
22 authorizing an award of fees as a part of costs for two  
23 reasons.

24 First, organizations actually incur costs for  
25 representation by in-house attorneys, although the costs

1 may be in the form of a flat fee, that is a salary, and  
2 lawyers who represent clients pro bono have a fee  
3 arrangement with the client, even if it is to waive the  
4 fee, and more typically the arrangement is in the nature  
5 of a contingent fee, that is to recover any fee award  
6 under Section 1988.

7           Second, the cases awarding attorneys' fees to  
8 in-house counsel rest on -- I'm sorry, the second reason  
9 is that the awards of fees to organizations rest on the  
10 legislative history rather than the language of the  
11 statute, and we think the legislative history simply  
12 doesn't apply to pro se lawyers, because, as we have  
13 already argued, pro se lawyers are easily distinguished  
14 from organizations.

15           We think the language of Section 1988 answers  
16 the question presented in this case, but the legislative  
17 history reinforces our interpretation of the language.  
18 Statements in the legislative history such as "many  
19 citizens have little or no money with which to hire a  
20 lawyer" indicate that Congress had in mind encouraging  
21 plaintiffs to obtain legal representation rather than  
22 litigating cases on their own, and we think that applies  
23 to lawyer litigants as well as to all other litigants.

24           And finally, awarding attorneys' fees to pro se  
25 lawyers would not further the purpose of Section 1988,

1 which is to make sure that competent counsel are available  
2 to civil rights plaintiffs. At a minimum, it's certainly  
3 not necessary to adopt the result petitioner argues for to  
4 achieve the purpose of Section 1988, because under the  
5 court of appeals decision lawyers have precisely the same  
6 ability to vindicate their civil rights as all other  
7 litigants, and in fact they may have a greater ability  
8 because if they choose to litigate pro se they can apply  
9 whatever additional skills they have.

10 And we also think, frankly, that encouraging pro  
11 se litigation by lawyers would not ensure that competent  
12 counsel would be available in civil rights cases. Pro se  
13 lawyers often lack the detachment and objectivity that is  
14 necessary for effective professional representation. A  
15 pro se lawyer may be inclined to focus on the recovery of  
16 a fee to the exclusion of vindication of the merits. And  
17 pro se litigation also --

18 QUESTION: Why would a pro se lawyer be any more  
19 apt to do that than any other lawyer?

20 MR. LONG: Well, if a lawyer --

21 QUESTION: They both have the same --

22 MR. LONG: -- has a client, the lawyer has to  
23 consult with the client about various important parts of  
24 the litigation, including settlement offers, and  
25 presumably the client is going to be particularly

1 interested in achieving the result on the merits. I think  
2 this Court's decision in Evans against Jeff D. suggests  
3 some of that concern.

4 Section 1988 ensures effective access to the  
5 courts for all citizens, including members of the bar. A  
6 rule that provides lawyers with additional rights and  
7 privileges not available to other citizens, with the right  
8 to litigate pro se and to recover an attorney's fee, is  
9 not justified.

10 QUESTION: Thank you, Mr. Long.

11 Mr. Dyk, do you have rebuttal? You have 12  
12 minutes remaining.

13 REBUTTAL ARGUMENT OF TIMOTHY B. DYK

14 ON BEHALF OF THE PETITIONER

15 MR. DYK: As I listen to the United States and  
16 the respondent, I begin to hear that almost everybody  
17 other than an individual can litigate on a pro se basis  
18 and recover under the statute. I hear concessions that a  
19 voluntary association could do that. I hear the  
20 concession, I think, that a partnership could do that. I  
21 even hear a concession that an individual could proceed to  
22 bring a class action and recover.

23 And I find great difficulty in finding any  
24 distinction between those people, if they're allowed to  
25 recover under Section 1988, and the petitioner in this

1 case, who was a prevailing party. He prevailed mightily  
2 in having these two statutes declared unconstitutional,  
3 having to attack one of them for the second time, and  
4 allowing him the fee that the statute contemplates fully  
5 serves the statutory purpose. One of the things that  
6 Congress was fully conscious of in enacting this  
7 legislation was that it was not easy to get people to take  
8 civil rights cases. It was not easy to get people to take  
9 civil rights case even if you provided for a statutory  
10 attorney's fee.

11 QUESTION: Wouldn't the statutory purpose been  
12 have served just as well in this case if your client had  
13 retained an attorney to represent him, and then there  
14 would be no question that attorney could get an attorney's  
15 fee?

16 MR. DYK: Mr. Chief Justice, that is surely true  
17 that the statutory purpose would be served if he had  
18 gotten an attorney to represent him. The difficulty is,  
19 and I think it's reflected in the history of this statute  
20 that I am talking about, is that he may not have been able  
21 to get an attorney to represent him, and as a result of  
22 that --

23 QUESTION: But that, that's true of any  
24 potential civil rights plaintiff.

25 MR. DYK: That is true. But if, if the effect

1 of denying the fee here is to cause this individual  
2 petitioner not to bring this suit, the purpose of the  
3 statute is defeated. In order to bring this suit he has  
4 to suffer significant opportunity costs. He may also have  
5 paralegal costs, which under this Court's decision in  
6 Missouri and Jenkins can only be recovered as part of the  
7 attorney's fee. They are not recoverable as part of the  
8 costs. So he has the opportunity costs, he has the  
9 potential paralegal costs and related costs, and if he  
10 can't recover those he may not bring the suit at all.

11 I think it is not possible to assume that every  
12 pro se attorney litigant has the capability to go out and  
13 hire an attorney, that that's an option available to him.  
14 I think in many cases it is not an option that is  
15 available to him.

16 QUESTION: So Congress intended pro se attorney  
17 potentially to be more favorably situated with respect to  
18 getting attorneys' fees than the typical nonlawyer civil  
19 rights plaintiff?

20 MR. DYK: As I said earlier, I think there are,  
21 that the nonlawyer civil rights plaintiff who proceeds pro  
22 se can make a significant claim that he is serving the  
23 purposes of the statute. And as Justice Scalia pointed  
24 out, if you focus on the terminology "prevailing party"  
25 rather than on the word "attorney," maybe one concludes

1 that the non-attorney pro se should also recover. But the  
2 fact is that the pro se attorney is directly serving every  
3 significant purpose that this statute was designed for.  
4 He is bringing a meritorious civil rights case. We have  
5 to assume that the case is meritorious, because there are  
6 no fees if he does not prevail.

7 And indeed there are disincentives written into  
8 the statute, not only the denial of the fee, but the  
9 possibility that the defendant would recover a fee against  
10 the plaintiff if the action was unfounded. This pro se  
11 attorney brings to bear on the litigation his expertise as  
12 an attorney to litigate these civil rights cases. Mr. Kay  
13 in this particular case has argued 20 cases in the courts  
14 of appeals.

15 QUESTION: How many of them were pro se?

16 MR. DYK: How many? I do not know the answer,  
17 but I think a relatively small number of them.

18 And by seeking out these statutes, by  
19 successfully having them declared unconstitutional, by  
20 litigating these issues he is doing exactly what Congress  
21 wanted done, and that is that the civil rights of people  
22 in this country are vindicated. Not just Mr. Kay's  
23 rights, but those of the people in general. Congress  
24 wasn't just concerned about the individual litigants, it  
25 was concerned about the breadth of enforcement. And there



1 is no basis, we suggest, for distinguishing between a  
2 situation in which the individual is proceeding pro se and  
3 all these other situations where it is conceded that the  
4 organization or the class or the partnership is proceeding  
5 pro se and would recover fees.

6 Unless there are further questions, I have  
7 nothing more.

8 QUESTION: Thank you, Mr. Dyk.

9 MR. DYK: Thank you.

10 CHIEF JUSTICE REHNQUIST: The case is submitted.

11 (Whereupon, at 2:40 p.m., the case in the above-  
12 entitled matter was submitted.)

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*Alderson Reporting Company, Inc., hereby certifies that  
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