ORAL ARGUMENT TO BE SCHEDULED

No. 05-5139

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARRITA MURPHY, *et al.*,

*Plaintiffs/Appellants,*

v.

INTERNAL REVENUE SERVICE, *et al.*,

*Defendants/Appellees,*

On appeal from the United States District Court
for the District of Columbia

# BRIEF OF AMICUS CURIAE NO FEAR COALITION IN SUPPORT OF APPELLANTS

Respectfully submitted by:
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Date: December 1, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 05-5139

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MARRITA MURPHY, *et al.*,

*Plaintiffs/Appellants,*

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**CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS AND RELATED CASES UNDER LOCAL RULE 28(a)(1) (INCLUDING F.R.A.P. 26.1 STATEMENT)**

Pursuant to Rule 28(a)(1) of this Court (and Federal Rule of Appellate Procedure 26.1), counsel for amicus curiae No FEAR Coalition, certify as follows:

**A. Parties.**

Except for amicus curiae No FEAR Coalition, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants Marrita Murphy and Daniel J. Leveille.

Pursuant to Fed. R. App. P. 26.1, counsel state that amicus curiae No FEAR Coalition is a non-profit unincorporated association, comprised of more than 20 organizations and institutions, and it is engaged in advocacy efforts on a range of

issues, including the promotion of civil rights in the twenty first century and civil rights tax fairness. No FEAR Coalition has no corporate parents or subsidiaries, and no publicly held company has an ownership interest in it of any kind or degree.

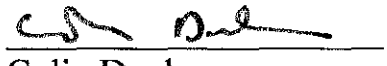
**B. Ruling Under Review.**

References to the ruling at issue appear in the Brief for Appellants Marrita Murphy and Daniel J. Leveille.

**C. Related Cases.**

References to related cases appear in the Brief for Appellants Marrita Murphy and Daniel J. Leveille.

Respectfully submitted,



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## INTEREST OF AMICUS CURIAE AND INTRODUCTION

The No FEAR Coalition is comprised of more than 20 organizations or groups dedicated to eliminating discrimination and worker abuse in Federal agencies. It was founded by Dr. Marsha Coleman-Adebayo, whose successful civil rights law suit against the U.S. Environmental Protection Agency (*Coleman-Adebayo v.Browner*) galvanized Congress and led to the passage of the Notification of Federal Employees Anti-Discrimination and Retaliation ("NO FEAR") Act of 2002. The No FEAR Coalition Members include the following groups and organizations: African American Environmentalist Association; EPA Victims Against Racial Discrimination; The National Whistleblower Center; Southern Christian Leadership Conference; Congress Against Racism & Corruption in Law Enforcement; Customs Employees Against Discrimination; Government Accountability Project; NAN; National Employment Lawyers Association; AARP; US Chamber of Commerce; EPA-NTEU Chapter #280; EPA Chapter AFGE; Society for Human Resource Management; Religious Action Committee on Reform Judaism; National Council of Churches in Christ, USA; Seventh Day Adventist Church; and the No Fear Institute.

The Notification of Federal Employees Anti-Discrimination and Retaliation ("NO FEAR") Act of 2002 was the first civil rights act of the 21st century. *See,* P.L. 107-174 (H.R. 169), 116 Stat 566 (May 15, 2002). The No FEAR law was

signed by President George W. Bush on May 15, 2002, and it requires that federal agencies found liable for illegal retaliation under federal discrimination and whistleblower laws pay the full cost of their liability from their own budget.

The No FEAR Coalition sponsors the No Fear Institute which monitors compliance with the NO FEAR Act. It is committed to blowing the whistle and educating the public about federal Agencies that violate the civil and human rights of federal employees and the general public. Additionally, the No FEAR Coalition strongly believes that violation of Title VII of the 1964 Civil Rights Act undermines our credibility as a democracy and that we can not continue to allow federal agencies to violate the civil and human rights of federal employees and the public and remain silent.

The No FEAR Coalition, and its members, has a strong interest in assuring that victims of unlawful retaliation receive the full measure of compensation due to them. The No FEAR Coalition submits this Amicus Curiae brief to urge the use of the strongest enforcement of the constitutional limitation on Congressional action to tax only income, and not "make whole" compensatory damages. Taxation of compensatory damages would undercut the effectiveness of the NO FEAR Act which was intended to restore accountability to government agencies through full and direct compensation of victims.

## SUMMARY OF ARGUMENT

Through the 16th Amendment, Congress has the power to tax income. Compensatory damages compensate a party for a loss, and, therefore, are not income. In determining if a damage award is within or outside this limit, legislation is helpful when it is correct, and is meaningless when it is not.

The decision of the district court below seriously undercuts the effectiveness of our civil rights and environmental laws. Particularly when the district court seeks to "decrease" enforcement litigation, it is contrary to public policy.

## ARGUMENT

### A. IRC Section 104(a)(2) has no effect on the 16th Amendment's limitation on Congress' power to tax.

Amicus Curiae, No FEAR Coalition, writes separately to state directly that IRC Section 104(a)(2) is meaningless. Congress cannot tax that which is not income. Whether compensation is paid for physical or other injuries matters not. Whether Congress enacts an exemption or not makes no difference. Compensatory damages payments are not income[1] and cannot be taxed, no matter what Congress says or does not say.

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[1] *Blackburn v. Martin,* 982 F.2d 125,132 (4th Cir. 1992) (Award of compensatory damages is "*in addition to* remedies designed to restore any financial losses that the victim of discrimination suffered.") (Emphasis in original). *Accord., DeFord v. Secretary of Labor,* 700 F.2d 281, 288 (6th Cir. 1983).

It is certainly convenient when Congress undertakes the task of establishing by law that which the Constitution requires. However, when Congress misstates the constitutional limits, it is solely the Court's responsibility to reassert those limits. In *City of Boerne* v. *Flores,* 521 U.S. 507, 536, 117 S.Ct. 2157, 2172 (1997), for example, the Supreme Court preserved for itself the responsibility of establishing the limits of religious freedom. The Religious Freedom Restoration Act was passed by Congress in response to a Supreme Court decision (*Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595 (1990)) affirming the denial of unemployment benefits to Native American Church members who lost their jobs after using peyote. The Religious Freedom Restoration Act reinstated the Court's *Sherbert*[2] test by prohibiting the substantial burdening of a person's religious practice absent a compelling government interest and proof that the statute is using the "least restrictive means" available. The Act was meant to apply to state and local law and was passed pursuant to Congress' right to "enforce . . . by appropriate legislation" the protections of the 14th Amendment (the 1st Amendment right to free exercise of religion is enforced, in part, through the 14th Amendment).

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[2] *Sherbert v. Verner*, 374 U.S. 398, 405, 83 S.Ct. 1790, 1794 (1963).

Justice Kennedy begins his *Boerne* majority opinion by emphasizing that our government is one of limited and enumerated powers. The 14th Amendment's Enforcement Clause has, Kennedy insists, never been understood to grant Congress anything approaching unrestrained legislative authority. Instead, congressional laws passed pursuant to the Enforcement Clause, though always given some measure of deference by the Court, are limited by the requirement that they be only "remedial" in nature. *South Carolina v. Katzenbach*, 383 U.S. 301, 326, 86 S.Ct. 803, 818 (1966). Remedial congressional acts may be "preventive," but Congress may not act to *substantively* create or change the 14th Amendment's restrictions on the States. *Boerne*, 521 U.S. at 524, 117 S.Ct. 2166.

Similarly, as argued by the appellant, Congress cannot change the 16th Amendment.

**B. Taxation of compensatory damages will undercut the effectiveness of civil rights laws.**

Simply stated, the taxation of "make whole" compensatory damages awards is directly at odds with, and undermines the purpose of, Title VII and the 1991 amendments to the Civil Rights Act, "to make persons whole for injuries suffered on account of unlawful discrimination." *Faragher v. City of Boca Raton,* 524 U.S. 775, 805-806, 118 S.Ct. 2275, 2292 (1998), citing *Albermarle Paper Co. v. Moody,*

422 U.S. 405, 418, 95 S.Ct. 2362, 2372 (1975).[3] This is true whether or not such awards are received on account of physical injuries or physical sickness.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

The Civil Rights Act of 1991 amended Title VII of the Civil Rights Act of 1964 to expressly authorize the recovery of compensatory damages. 42 U.S.C. § 1981a(b)(2) and (3). Under the Civil Rights Act of 1991, victims of intentional discrimination are entitled to a jury trial, at which they may recover compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3). In addition, the Civil Rights Act of 1991 limits the amount of compensatory damages that are recoverable in cases of intentional discrimination in Title VII cases by capping the amount of damages based on the size of the employer. *Id.* Significantly, the Civil Rights Act of 1991 expressly

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[3] Likewise, it is at odds with the purpose of the six federal environmental whistleblower laws under which Plaintiffs-Appellants in this case sued and were awarded non-wage compensatory damages. *See, e.g., Passaic Valley Sewerage*

excludes "back pay" or "interest on back pay" from the definition of recoverable compensatory damages. 42 U.S.C. § 1981a(b)(2). Any award of such damages, therefore, is not income.

Unquestionably, the purpose of the 1991 amendments to Title VII was to expand civil rights protections and remedies for federal and private sector employees to provide for compensatory damages. Such awards were to make whole the victims of discrimination on the basis of race, sex and national origin. *See, e.g.,* H.R.Rep. No. 102-40, pt. 1, pp. 64-65 (1991), U.S.Code Cong. & Admin.News 1991, pp. 549, 602, 603 (Report of Committee on Education and Labor) ("Monetary damages also are necessary to *make discrimination victims whole* for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity.")(Emphasis added.).

Notably, prior to 1991, the Civil Rights Act of 1964 only provided Title VII plaintiffs with the right to seek limited forms of equitable relief, which included back pay. *Id.,* pt. 2, p. 25 (Report of Committee on the Judiciary) ("The limitation of relief under Title VII to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination."). Solely as a result of the lack of a "make whole" compensatory

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*Commissioners v. Dept. of Labor,* 922 F.2d 474, 479 (3rd Cir. 1993); *Blackburn, supra.,* 982 F.2d at 129-132; *DeFord, supra.,* 700 F.2d at 288.

damages provision in the original Title VII of the Civil Rights Act of 1964, the Supreme Court held that the pre-1991 version of Title VII did not provide for recovery of damages for "personal injuries" for the violation of "tort or tort type rights," and, therefore, that such monetary recoveries for back pay under the original Civil Rights Act of 1964 were not excludable from gross income under IRC Section 104(a)(2). *U.S. v. Burke,* 504 U.S. 229, 238-242, 112 S.Ct. 1867, 1872-1874 (1992).

It is clear under the reasoning of *Burke,* that recoveries under the compensatory damages provision in the Civil Rights Act of 1991 for Title VII claimants who prove intentional discrimination by their employers are damages for "personal injuries" for the violation of "tort or tort type rights." *Id.* Notably, at the time Congress passed the 1991 Civil Rights Act to provide for compensatory damages it was assumed that such damages for non-physical personal injuries fell within the exclusion from gross income under Section 104(a)(2). *Cf., Burke, supra.* Consequently, if the 1996 amendment to I.R.C. Section 104(a)(2) applied to narrow the exclusion to damages for "personal physical injuries and physical sickness," the effect would be that successful Title VII claimants were made less than "whole."

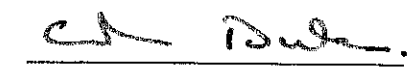
Not only will the taxation of such compensatory damages undermine the legislative purpose of discrimination and whistleblower laws, in general, it will

have a "chilling effect" on the filing of such claims which will also defeat the legislative purpose behind these remedial laws. In this case, the district court held that one of the primary purposes behind the 1996 amendment to IRC Section 104(a)(2) limiting the exclusion to physical injuries or physical sickness was to "*decrease* litigation." *Murphy v. IRS,* 362 F.Supp.2d 206, 218 (D.D.C. 2005) (emphasis added). That purpose, however, directly conflicts with the underlying purpose of Title VII. Our civil rights laws depend for their enforcement on private actions to vindicate individual rights. If victims of discrimination are to be made "whole" it is completely inappropriate to discourage legitimate claims by taxing compensatory damages to "decrease" litigation.

## CONCLUSION

The No FEAR Coalition asks this Court to reverse the district court's order granting defendants' motion for summary judgment. Instead, it is the plaintiff's motion for partial summary judgment must be granted.

Respectfully submitted,



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## RULE 32(a)(7)(C) CERTIFICATE

I HEREBY CERTIFY that the foregoing Brief for Amicus Curiae complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief is composed in a 14-point proportional typeface, Times New Roman, and the contents of the Brief (exclusive of those parts permitted to be excluded under FRAP and the local rules of this court) contain 1,976 words.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 1, 2005, I caused two copies of the foregoing Brief of Amicus Curiae No FEAR Coalition, in support of Appellants, to be served by first class mail, postage prepaid, upon:

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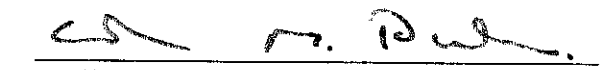
By: 
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