No. 98-262

In the
Supreme Court of the United States

October Term, 1998

Perry Johnson, *et al.*, *Petitioners*,

v.

Everett Hadix, *et al.*, *Respondents*.

On Writ of *Certiorari* to
the United States Court of Appeals
for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The American Civil Liberties Union Fund

of Michigan is one of the ACLU's state affiliates. The ACLU established the National Prison Project (NPP) in 1972 to protect and promote the civil rights of prisoners. The ACLU through the NPP and many of its affiliates has filed suit pursuant to 42 U.S.C. §1983 to protect these rights. As a result of such litigation, the NPP and ACLU affiliates have been the recipients of attorney's fees awarded to prevailing plaintiffs pursuant to 42 U.S.C. §1988. The amount of fees that the ACLU Foundation and its affiliates will receive as a result of such litigation will be affected by the outcome of this case. This Court granted a writ of certiorari to the Sixth Circuit Court of Appeals to review the decision in *Hadix v. Johnson*, 143 F.3d 246 (6th Cir.), *cert. granted in part*, 119 S.Ct. 508 (1998), involving the consolidated cases of *Everett Hadix et al. v. Perry Johnson et al.*, No. 80-73581 (E.D. Mich.) and *Mary Glover et al. v. Perry Johnson et al.*, No. 77-71229 (E.D. Mich.). The NPP is not and has never been counsel in either of these Eastern District of Michigan cases, and will not recover any attorney's fees in those cases. The NPP does however serve as counsel for plaintiffs in *Everett Hadix et al. v. Perry Johnson et al.*, No. 4:92-CV-110 (W.D. Mich.). This case is pending in the Western District of Michigan as a result of the Sixth Circuit's decision to consolidate certain issues from *Hadix* with a case in the Western District of Michigan. *See Knop v. Johnson*, 977 F.2d 996, 999, 1014 (6th Cir. 1992) (remanding *Hadix* claim to Western District of Michigan). Subsequently, the parties agreed that certain additional issues in *Hadix* should be transferred to the Western District case. [1]

The parties have consented to the filing of this brief as indicated by their letters of consent filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Contrary to Petitioners' argument, there is nothing in the text of 42 U.S.C. §1997e(d), the attorney's fees provision of the Prison Litigation Reform Act (PLRA or Act), that mandates its application to pending cases. At the time Congress enacted the PLRA, it knew how to draft legislation that specified its application to pending cases, and it knew from this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), that the fees provision would require an express direction that the provision apply to pending cases for it to do so.

Despite these facts, the evolution and structure of the fees provision as it progressed toward enactment show that Congress deliberately moved the provision from a section of the PLRA that contained an express mandate for the provision's application to pending cases to a section that lacked such an express direction. In this respect, the PLRA's historical evolution, like that of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C.A. §2254(d) (West Supp. 1998), at issue in *Lindh v. Murphy*, 117 S.Ct. 2059 (1997), supports a strong inference that Congress did not intend that the fees provision apply to pending cases.

Part of the PLRA fees provision reduces a plaintiff's damages award by providing that attorney's fees must be paid out of any monetary judgment. Congress would have known, in light of well-settled principles discussed in *Landgraf*, that this part of the fees provision has a retroactive effect. Therefore, the inference is particularly strong that Congress transferred the entire fees provision out of a section of the PLRA that mandated application of its provisions to pending cases in order to avoid the unfair retroactive effect of applying the fees provision in pending cases.

Moreover, the balance of the fees provision also has a retroactive effect in cases filed before the PLRA's enactment. By reducing the amount of fees that can be recouped from defendants, the provision increases the potential liability of a plaintiff to his or her retained lawyer after the plaintiff has decided to retain counsel and file suit. The fact that this provision involves attorney's fees does not preclude an analysis of whether the provision has a retroactive effect. Indeed, this Court has made clear that the "functional conceptio[n] of legislative 'retroactivity'" is a flexible one responsive to the actual effects of the legislation in question. *See Hughes Aircraft v. United States ex rel. Schumer,* 117 S.Ct. 1871, 1876 (1997) (alteration in original) (quoting *Landgraf*, 511 U.S. at 269).

For similar reasons, the decision in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), counsels against the application of this fees provision to pending cases because such application would cause "manifest injustice." This manifest injustice would affect not only the plaintiffs in pending cases but also their lawyers who have an ethical obligation to continue to provide services despite a substantial reduction in compensation.

ARGUMENT

I. UNDER GENERAL RULES OF STATUTORY INTERPRETATION, THE LANGUAGE, STRUCTURE, AND HISTORICAL EVOLUTION OF THE ACT DEMONSTRATE THAT CONGRESS INTENDED THE PLRA ATTORNEY'S FEES PROVISION TO APPLY PROSPECTIVELY

A. The Language of the PLRA

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Court enunciated general principles governing the application of new statutes to pending cases. Among these principles is the following: "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. Petitioners and their Amici argue that, under *Landgraf*, the "plain language" of the PLRA fees provision commands its application to cases that were pending on the date of the PLRA's enactment. *See* Petitioners' Br. at 14; Amici's Br. at 7.[2]

The introductory paragraph of the PLRA fees provision reads as follows:

> (d) Attorney's Fees -- (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent [provided below].

42 U.S.C.A. §1997e(d) (West Supp. 1998).

Petitioners and their Amici rely on the use of words such as "any" and "brought" to support their plain language argument. *See* Petitioners' Br. at 14; Amici's Br. at 7. They place a weight on these isolated words that the words cannot bear. For this language to convey the intent that they ascribe to it, the language would need to say, in some clear manner, that the provision applies to pending cases. For example, in *Lindh*, this Court noted that the following language "might possibly have qualified" as a clear statement: "[This Act] shall apply to *all* proceedings pending on or commenced after the date of enactment of this Act." 117 S.Ct. at 2064 n.4. The clarity of this statutory language arises from its reference to application to pending cases. In contrast, the argument from Petitioners and their Amici is entirely circular; only if the provision is first assumed to apply to pending cases does the language appear to address its temporal applicability.[3]

Each of the arguments from Petitioners and their Amici regarding the language of the section has been rejected by this Court. Amici argue that the use of the word "any" in the fees provision means that Congress meant that the provision was to apply to "any" action, including pending cases. *See* Amici's Br. at 7-8. Indeed, Amici argue that "*Lindh* strongly suggests that such a phrase [as any civil action] would qualify as a clear statement of retroactive intent." *Id.* at 8 (quoting *Lindh*, 117 S.Ct. at 2064 n.4). At the point in the *Lindh* footnote cited by Amici, the Court was discussing language relevant to the *scope* of a waiver of sovereign immunity, where there was no question but that sovereign immunity had been waived as to some class of suits.[4] In another context, this Court specifically rejected the argument that the use of the term "any" in a statute that authorized suit against "any recipient of Federal assistance" was sufficient to waive the sovereign immunity of a state because the statute lacked the "kind of unequivocal statutory language" necessary to abrogate Eleventh Amendment immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985).

Second, they claim that it is significant that the fees provision employs a verb in the past tense in the phrase "action brought by a prisoner." *See* Petitioners' Br. at 15; Amici's Br. at 8. "Brought" is self-evidently not a verb in the phrase "in any action brought by a prisoner"; it is a participle used in an adjectival phrase modifying the noun "action." Because "brought" is functioning as an adjective rather than a verb, the Court's decision in *United States v. Wilson*, 503 U.S. 329, 333 (1992), which attaches significance to the tense of a verb in a statute, has little relevance.

Moreover, this Court in *Landgraf* considered whether 42 U.S.C. §1981a(a), which refers to "an action brought by a complaining party," includes a clear expression of retroactive intent. This Court rejected the argument that Congress had expressly prescribed the section's temporal applicability. *See Landgraf*, 511 U.S. at 251-63.

If general language of this sort were dispositive of the temporal application of a statute, then this Court would have held in *Lindh* that the provision there at issue similarly contained a clear statement of congressional intent that it be applied to pending cases. That provision provides that "[a]n application for a writ of habeas corpus . . . shall not be granted" except as provided. 28 U.S.C.A. §2254(d). Theoretically, one could argue that Congress'

use of the mandatory "shall" constituted a clear statement of intent that a federal court was to apply the statute to every application for a writ of habeas corpus after the effective date of the provision. However, the entire Court in *Lindh* rejected the argument that this provision contained a clear statement of temporal applicability. *See Lindh*, 117 S.Ct. at 2063-64; *id.* at 2068 (Rehnquist, C.J., dissenting).

In drafting the PLRA attorney's fees provision, after *Landgraf*, Congress could have used many formulations that would have unmistakably conveyed its intent that the fees provision apply to pending cases. Congress could have used language parallel to the language quoted in *Landgraf* from an earlier, unsuccessful amendment to the statute at issue there: "(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989[.]" 511 U.S. at 255 n.8. Alternatively, Congress could have used the language that *Lindh* quotes from *Landgraf* regarding application to "*all* proceedings pending[.]" 117 S.Ct. at 2064 n.4. Indeed, Congress used very similar language in the AEDPA, a statute passed contemporaneously with the PLRA, to convey an intent that one chapter of the AEDPA was generally to apply to pending cases. *See Lindh*, 117 S.Ct. at 2063 ("shall apply to cases pending on or after the date of enactment"). Finally, Congress could have expressed its intent through the PLRA language that initially accompanied the fees provision, which specified that the provision "shall apply with respect to all relief . . . whether such relief was originally granted or approved before, on, or after the date of the enactment of this Act." H.R. 667, 104th Cong. §301(b) (1995). Congress did none of these things; in fact it removed the fees provision from the reach of this retroactivity language. The remaining language simply does not rise to a clear statement of congressional intent for retroactive application.

B. The Structure and Historical Evolution of the PLRA

In *Lindh*, this Court addressed the question of whether chapter 153 of the AEDPA, 28 U.S.C.A. §2254(d), which governs habeas corpus proceedings in non-capital cases, applies to petitions pending when the Act was passed. *See* 117 S.Ct. at 2061. The Court found decisive the distinction between chapter 154 of the AEDPA, which governs habeas proceedings in capital cases and explicitly provides that it "shall apply to cases pending on or after the date of enactment," *id.* at 2063, and chapter 153, which does not contain comparable language. *See id.* at 2063-65. The Court concluded that this contrasting treatment regarding retroactivity in the two chapters necessarily meant that Congress "had the different intent that the latter chapter [153] not be applied to the general run of pending cases," noting that "[n]othing, indeed, but a different intent explains the different treatment." *Id.* at 2064.

The PLRA is substantially similar in this regard to the AEDPA provision considered in *Lindh*, and this Court's reasoning in that case is equally applicable here. The attorney's fees provision of the PLRA, which is found in §803 of the Act, is silent as to whether it should be applied to pending cases or only prospectively to cases filed after the Act's passage. *See* 42 U.S.C.A. §1997e(d). In contrast, §802 of the Act, which governs "appropriate remedies" in prison conditions litigation, states that the section is to be applied to pending cases, as follows:

> Section 3626 of title 18, United States Code [this section], as amended by this section, shall apply with respect to all prospective relief *whether such relief was originally granted or approved before, on, or after the date of the enactment of this title* [Apr. 26, 1996].

Pub. L. No. 104-134, 110 Stat. 1321-66, renumbered Pub. L. No. 104-140, 110 Stat. 1327 (codified as amended at 18 U.S.C. §3626) (emphasis added). This Court's analysis in *Lindh* compels the conclusion that Congress, by including an explicit statement that §802 apply to pending cases and not including similar language in §803, intended that the attorney's fees provision apply only to cases filed after the effective date of the Act.

This conclusion from the language and structure of the PLRA is consistent with the well-established principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). This maxim of statutory interpretation, *expressio unius est exclusio alterius*, must be applied unless there is clear evidence of a contrary legislative intent. *See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S.Ct. 1160, 1163 (1993). There is no evidence from the Act itself that points to a contrary legislative intent to apply the fees provision retroactively.

Rather, as in *Lindh*, the legislative evolution of the Act bolsters the conclusion that Congress intended to apply the fees provision only to cases filed after the Act's passage. This Court recognized that the negative implication

created by the disparate treatment of temporal reach in chapters 153 and 154 of the AEDPA was particularly strong because "the [two chapters] had already been joined together [in a single bill] and were being considered simultaneously when the language raising the implication was inserted," although they began life independently and in different houses of Congress. *Lindh*, 117 S.Ct. at 2065. The Court distinguished this history from one in which "two chapters had evolved separately in the congressional process, only to be passed together at the last minute . . . ." *Id.* at 2064. In these circumstances, the Court reasoned that "there might have been a real possibility that Congress would have intended the same rule of application for each chapter, but in the rough-and-tumble no one had thought of being careful about chapter 153, whereas someone else happened to think of inserting a provision in chapter 154." *Id.* at 2064-65. In noting the familiar rule that a negative inference is strongest where disparate provisions have been joined in a single bill, the Court relied on its earlier ruling in *Field v. Mans*, 116 S.Ct. 437 (1995), in which it had recognized that "[t]he more apparently deliberate the contrast, the stronger the inference, as applied, for example, to *contrasting statutory sections originally enacted simultaneously in relevant respects*." *Lindh*, 117 S.Ct. at 2065 (emphasis added) (quoting *Field*, 116 S.Ct. at 446).[5]

The legislative evolution of §§802 and 803 of the PLRA is similar to that of the AEDPA sections at issue in *Lindh*. The precursor to the PLRA was introduced as part of the Violent Criminal Incarceration Act of 1995. H.R. 667, 104th Cong. (1995); S. 400, 104th Cong. (1995). Title II of the bill, entitled "Stopping Abusive Prisoner Lawsuits," was aimed at reducing frivolous prisoner litigation by amending provisions of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§1997 to 1997j, and the federal *in forma pauperis* proceedings statute, 28 U.S.C. §1915. *See* H.R. Rep. No. 104-21, at 5-6 (1995). Title II had neither an effective date nor an attorney's fees provision. *See id.* Title III of the bill, entitled "Stop Turning Out Prisoners" (STOP), was introduced to limit ongoing federal court involvement and available remedies in prison litigation. *See id*. at 5-7. The injunctive relief provisions and the attorney's fees provisions both appeared in Title III, which contained an explicit statement of its retroactive application. The House version of the bill at the time was slightly different from the enacted version and provides as follows: "Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all relief (as defined in such section) whether such relief was originally granted or approved before, on, or after the date of the enactment of this Act." H.R. 667, 104th Cong. §301(b) (1995).[6]

Thereafter, during the Senate floor debate on S. 400, a substitute bill entitled the "Prison Litigation Reform Act" was introduced. S. 1275, 104th Cong. (1995). The vast majority of S. 400's provisions, including the retroactivity provision, appeared in §2 of the substitute bill. However, the attorney's fees provisions had been extracted from §2 and transferred to a new section of the bill, §3, which did not contain retroactivity language. The statute retained this structure until its final passage.[7]

Therefore, as in *Lindh*, the negative implication regarding retroactivity created by the disparity between §§802 and 803 is particularly pronounced given that the two sections had been joined together and were being considered simultaneously when the attorney's fees provision was moved from a section that was expressly retroactive to one that was not. Though the legislative evolution of the PLRA is not identical to that of the AEDPA (with the AEDPA an explicit retroactivity provision was added to one chapter and not the other after the two chapters had been joined), the difference does not vitiate the negative inference in the PLRA. Indeed, the inference from history is more compelling in this case. In *Lindh*, the Court drew an inference from silence in the section at issue. In contrast, in this case, Congress took the affirmative step of removing the attorney's fees provision from an explicitly retroactive section.

It is reasonable to infer that Congress was aware of this Court's strong reaffirmation of the presumption against retroactivity in *Landgraf*, and understood that moving the fees provision from §802 to §803 meant that it would not be applied to pending cases. As recognized by the court of appeals, what is now §802 was first introduced to curb "perceived excesses of the federal judiciary in *pending* litigation . . . and was logically made expressly applicable to pending cases." *Hadix*, 143 F.3d at 255. In contrast, §803 "is forward looking as [it is] aimed at curtailing the *filing* of frivolous lawsuits." *Id*. Even when it was first introduced as part of the expressly retroactive STOP Act, the attorney's fees provision likewise was aimed, in part, at "eliminat[ing] the financial incentive for prisoners to include numerous non-meritorious claims in sweeping institutional litigation . . . ." H.R. Rep. No. 104-21, at 28. After the fees provision was moved to §803 in S. 1275, Senator Abraham, the sponsor of the new bill, also stated that the fees limitations were among several measures aimed at "reduc[ing] frivolous inmate litigation." 141 Cong. Rec. S14316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham).[8] Congress' decision to move the fees provision from §802 to §803 makes sense given that the fees provision, like

the other provisions in §803, was forward looking and aimed at deterring prisoners from filing frivolous lawsuits.[9]

Moreover, Congress added a new subsection to the fees provision in S. 1275 that reduced a prevailing plaintiff's damage award by requiring that a portion of the judgment be applied to the fees awarded against the defendant and capping the defendant's liability for attorney's fees at 125% of the judgment. *See* S. 1275, 104th Cong. §3(f)(2) (1995). This subsection remains in substantially similar form in §803 of the enacted statute, at §803(d)(2),[10] and is part of the fees provision at issue in this case.[11]42 U.S.C.A. §1997e(d)(2). Congress must have known that application of §803(d)(2) to pending cases would reduce a plaintiff's potential award of damages and thus create an impermissible retroactive effect under *Landgraf*, as it is presumed to have legislated with this Court's rules of statutory interpretation and retroactivity precedents in mind. *See Lindh*, 117 S.Ct. at 2064; *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction . . . ."). The addition of §803(d)(2) at the same time that the attorney's fees provision was removed from the STOP section of the bill, with its express command for application to pending cases, indicates that Congress recognized the unfairness of a retroactive application of the fees provision, and therefore intended that it not be applied to pending cases.

Congress' decision to move the entire fees provision, including the newly added subsection addressing monetary judgments, §803(d)(2), creates an inference that also applies to the subsection addressing hourly rates, §803(d)(3). *See* 42 U.S.C.A. §1997e(d)(2)-(3). In particular, Petitioners' argument that words such as "any action" or "brought" expressly prescribe the temporal reach of the fees provision, *see* Petitioners' Br. at 14-18, does not take account of the fact that these words appear in the introduction to the fees provision, §803(d)(1). *See* 42 U.S.C.A. §1997e(d)(1). If, as demonstrated above, Congress did not use these words to mandate retroactive application of the subsection reducing a plaintiff's damages, then it could not have used these same words to mandate retroactive application of the subsection capping a plaintiff's attorney's fees.

Had Congress been concerned to ensure that the fees provision remained applicable to pending cases after it was moved to §803, it certainly could have added language to the provision making it expressly applicable to pending cases, as it had done with §802.[12] That Congress chose not to do so is especially telling given that the PLRA was drafted and enacted shortly after the *Landgraf* decision, in which this Court strongly reaffirmed the presumption against retroactive application of new statutes to pending cases, and provided a clear message to Congress that it needed to be explicit if it intended new statutes to have retroactive effect. *See Landgraf*, 511 U.S. at 280.

In *Lindh,* this Court likewise was faced with interpreting a statute that was enacted in the shadow of *Landgraf*.[13] The Court observed that while *Landgraf* generally exempted purely procedural statutes from the presumption against retroactivity, *Lindh*, 117 S.Ct. at 2063-64, it "did not speak to the rules for determining the temporal reach" of statutory provisions like chapters 153 and 154 of the AEDPA which "will have substantive *as well as* purely procedural effects." *Id.* at 2063 (emphasis added).[14] Significantly, the Court therefore concluded as follows:

> Since *Landgraf* was the Court's latest word on the subject when the Act was passed, Congress could have taken the opinion's cautious statement about procedural statutes and its silence about the kind of provision exemplified by the new §2254(d) as counselling the wisdom of being explicit if it wanted such a provision to be applied to cases already pending.
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> If, then, Congress was reasonably concerned to ensure that chapter 154 be applied to pending cases, it should have been just as concerned about chapter 153, unless it had the different intent that the latter chapter not be applied to the general run of pending cases.

Id. at 2064.

Petitioners and Amici both suggest that *Lindh* is inapposite because the fees provision at issue here applies to conduct that is collateral or secondary to the merits of the underlying litigation. *See* Petitioners' Br. at 21;

Amici's Br. at 10. That attorney's fees proceedings subject to §803 may be characterized as addressing collateral or secondary conduct to the main cause of action, however, does not remove the section from a *Lindh* analysis. This Court in *Lindh* did not consider the nature of the conduct being regulated by the AEDPA in order to determine Chapter 153's applicability to pending cases; rather, this Court concluded under general rules of statutory construction that Congress intended chapter 153 to apply only prospectively, thereby "remov[ing] even the possibility of retroactivity." 117 S.Ct. at 2063. Indeed, the AEDPA section at issue in *Lindh*, which regulates federal habeas corpus proceedings in non-capital cases, could also be described as regulating collateral or secondary conduct, or even tertiary conduct. *See id.* at 2070 (Rehnquist, C.J., dissenting).

Lindh governs this case. Given the inclusion of an explicit statement that §802 applies to pending cases; the absence of a similar provision in §803; and the structure and legislative history of the Act, the reasoning in *Lindh* dictates the conclusion that Congress intended that the attorney's fees provision in §803 apply only to cases filed after the PLRA's enactment.

II. UNDER *LANDGRAF*, THE PLRA ATTORNEY'S FEES PROVISION HAS AN IMPERMISSIBLE RETROACTIVE EFFECT AND MUST NOT BE APPLIED TO CASES FILED BEFORE THE ACT'S EFFECTIVE DATE

As in *Lindh*, this Court can decide based on general principles of statutory construction alone that the PLRA attorney's fees provision does not apply to pending cases. A retroactivity analysis under *Landgraf* becomes necessary only if the Court determines under general principles that the fees provision in §803 may apply to pending cases. Even then, however, a *Landgraf* analysis reveals that the fees provision has an impermissible retroactive effect on prisoner plaintiffs and cannot be applied to cases filed before the PLRA's enactment.

In the absence of clear congressional intent, the rule developed in *Landgraf* applies:

> [T]he court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

511 U.S. at 280.[15] In *Landgraf*, the Court held that applying statutory provisions permitting a Title VII plaintiff to recover compensatory and punitive damages and to have a jury trial in cases arising before the enactment of these provisions would have an impermissible retroactive effect. *See id.* at 280-93. With respect to the compensatory damages provision, the Court reasoned that it "affects the liabilities of defendants . . . by requiring particular employers to pay for harms they caused," *id.* at 282, and "impose[s] on employers found liable a 'new disability' in respect to past events." *Id.* at 283. Conversely, the provision "confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged." *Id.*

The provision at issue here also has a retroactive effect. Section 803(d)(2) provides in part that: "Whenever a monetary judgment is awarded in an action described in paragraph (1) [prisoner's civil rights action], a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C.A. §1997e(d)(2). Thus, a prisoner who filed suit before the PLRA was enacted had the right, if successful, to have his or her attorney's fees paid for by the defendants pursuant to 42 U.S.C. §1988. The PLRA diminishes that right, creating a mechanism that takes up to 25% of a monetary judgment award away from a successful prisoner plaintiff.[16] Just as the defendant's liability exposure for past events would have been altered retroactively in *Landgraf*, the plaintiff's potential damages would be altered retroactively here. The existence of a retroactive effect does not depend on the identity of the party who is disadvantaged through application of a newly enacted statute. As noted in *Landgraf*, a restriction on a plaintiff's rights, like the statute restricting a subcontractor's rights to recover damages in *United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314-15 (1908), is a form of "monetary liability" that operates retroactively. *See* 511 U.S. at 284-85; *see also id.* at 270 (citing *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) (refusing to apply statute reducing commissions available to customs collectors in actions commenced before its enactment)). Nor does the circumstance that the change decreases rather than

entirely eliminates the possibility of a damages remedy remove the retroactive effect. The Court noted that " [t]he *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." *Landgraf*, 511 U.S. at 283-84.

Plaintiffs' rights are additionally impaired by the PLRA's limitations on the amount of attorney's fees that can be recovered under 42 U.S.C. §1988.[17] In their complaints, prisoner plaintiffs routinely seek reasonable attorney's fees as one of their requests for relief. Prior to the PLRA's enactment, these plaintiffs anticipated that, if they succeeded, the liability they would otherwise incur to retain and pay for legal representation could be shifted to defendants pursuant to §1988. Accordingly, a prisoner plaintiff could contract with an attorney to be represented at the attorney's market rate based on the understanding that if successful, plaintiff's counsel would in fact be paid by defendants. Application of §803(d) to pending cases operates retroactively on the completed transaction of retaining an attorney.[18] If §803(d) were applied to pending cases, then a successful plaintiff would become responsible for the shortfall created by the PLRA's caps on the amount of fees that defendants must pay under §1988.[19] Congress can prospectively raise or lower the rates of compensation available in civil rights cases pursuant to §1988, but imposing this change in cases in which an attorney-client relationship has already been formed would have a retroactive effect. That this effect occurs in connection with an attorney's fees provision and that the Court has not previously held that this kind of provision has a retroactive effect presents no barrier to doing so here. *See Hughes Aircraft Co.*, 117 S.Ct. at 1876 (noting that *Landgraf* "does not purport to define the outer limit of impermissible retroactivity," but to describe what "constituted a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity").

Petitioners and their Amici argue that because §803(d) involves attorney's fees, this case is an exception to the general *Landgraf* rule. *See* Petitioners' Br. at 24-29; Amici's Br. at 11-14. It is true that, in *Landgraf*, the Court asserted that the nature of attorney's fees determinations lent support to the decision in *Bradley* to apply a new fees statute in a pending case, and implied that statutes affecting attorney's fees are procedural. *See* 511 U.S. at 276-79; *see also id.* at 292 (Scalia, J., concurring) (asserting that majority "classifies attorney's fees provisions as procedural" and disagreeing with that classification). Categorizing the PLRA fees provision as procedural, however, does not automatically result in a determination that it can be applied in pending cases. While noting "the diminished reliance interests in matters of procedure," *id.* at 275 (citing *Ex parte Collett*, 337 U.S. 55, 71 (1949)), the Court also admonished that "the mere fact that a new rule is procedural does not mean that it applies to every pending case." *Id.* at 275 n.29; *see also Glover*, 138 F.3d at 251 ("laws regulating litigation conduct often impact the substantive rights of the parties as well").

Amici's argument that §803(d) should apply to pending cases because it does not regulate primary conduct similarly overstates its premise. *See* Amici's Br. at 12-14. The Court has explained that the actions of the parties giving rise to the legal proceeding constitute primary conduct, and that the actions of the parties in the course of the litigation constitute secondary conduct. *See Hughes*, 117 S.Ct. at 1878; *see also Lindh*, 117 S.Ct. at 2070 (Rehnquist, C.J., dissenting) (same in criminal context). From a defendant's perspective, the actions that preceded service of a summons and complaint would be primary conduct. From a plaintiff's perspective, however, the decision to file a lawsuit is arguably primary conduct. The decision to file, as opposed to subsequent conduct in the litigation, is an inextricable part of the plaintiff's response to the offending behavior by the defendant.[20] In the same way that a defendant weighs the risks and benefits of certain behavior in light of current law, a plaintiff weighs the risks and benefits of filing a lawsuit.[21] At a minimum, the distinction between primary and secondary conduct is less helpful in assessing a plaintiff's reliance interests than those of a defendant. Accordingly, labeling §803(d) as a "procedural" statute or one directed towards "secondary" conduct does not change the fact that it has an impermissible retroactive effect when applied to pending cases.

Application of the fees provision to work that a plaintiff authorized and the plaintiff's lawyer actually performed prior to the PLRA's enactment has an especially pronounced retroactive effect. In this circumstance, a plaintiff would have no notice that work done by his or her counsel would reduce a potential monetary judgment by up to 25%. Likewise, a plaintiff would have no notice that this work would create an additional obligation to compensate counsel for the reduced fees that would be awarded from defendants under §1988. After the PLRA's enactment, once a plaintiff became aware of the changed legal import of authorizing those services, it would be too late to rescind that authorization. Applying §803(d) to services performed prior to the effective date of the Act would present a paradigmatic case of imposing "new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270.

Moreover, there is no support in the text of §803(d) for distinguishing between services performed before and after enactment. To the contrary, a comparison of the statutory text of §803(d)(2) and §803(d)(3) indicates that determining the precise moment that an attorney performed services for a prisoner plaintiff is not significant. *See* 42 U.S.C.A. §§1997e(d)(2), 1997e(d)(3). For the reasons given above, Congress must have known that §803(d)(2), based on its retroactive effect on a plaintiff's monetary judgment, would apply only prospectively absent an express mandate to apply it to pending cases. Knowing that, Congress' failure to differentiate between the applicability of §803(d)(2) (monetary judgment) and of §803(d)(3) (hourly rate), and its use of the same "shall be applied" and "shall be based" language indicates that Congress intended both subsections to apply only to cases filed after the PLRA's enactment. *See id.*

III. APPLICATION OF THE PLRA ATTORNEY'S FEES PROVISION TO CASES FILED BEFORE THE ACT'S EFFECTIVE DATE WOULD BE MANIFESTLY UNJUST

In contrast to retroactive application of the fees provision in *Bradley* which the Court held did "not impose an additional or unforeseeable obligation" on the defendant, 416 U.S. at 721, or cause "manifest injustice," 416 U.S. at 716-17, the application of §803(d) in pending cases would be manifestly unjust to a prisoner plaintiff for all of the same reasons that it would have a retroactive effect. *See* Part II, *infra*. Such application would additionally be manifestly unjust to the attorneys who represent prisoner plaintiffs. In such cases, counsel reasonably relied on the availability of attorney's fees under 42 U.S.C. §1988 when deciding to pursue litigation for a prisoner plaintiff. They had a settled expectation that if they prevailed, they would be compensated under §1988 at the prevailing rate for attorneys with similar experience and skill.[22] Although counsel have no guarantee of winning when they first file a prisoner's civil rights complaint, the decision to file involves an assessment of the likelihood of success and the potential benefit to be gained for the plaintiff, as well as the plaintiff's attorney. As a practical matter, lawyers weigh the risks of losing against the potential benefits that will be realized if they win. Before the PLRA's enactment, one of those potential benefits was compensation for their services at market rates. Regardless of whether a plaintiff's lawyer has decided to litigate a case based on the potential to make money or to effect social change, the decision to file invariably entails an economic component. Section 803(d) represents a significant change to this component, and applying §803(d) to pending cases would be manifestly unjust to attorneys who decided to represent a prisoner plaintiff based on their assessment of the case under the governing legal rules at the time of their decision.[23]

The decisive moments for purposes of a "manifest injustice" analysis are the formation of an attorney-client relationship and the filing of a complaint. It is at these moments when an attorney assumes the legal responsibility to represent the plaintiff and becomes counsel of record for the plaintiff in the court in which the complaint is filed. Although application of the PLRA's attorney's fees provision may have serious financial implications for plaintiff's counsel, they cannot simply walk away from a case. Counsel who wish to withdraw from a case must get permission to do so from a court:

> An attorney who has entered an appearance in a case may not withdraw without leave of court because the court's interest in making sure that a litigant is adequately represented and that the orderly prosecution of the lawsuit is not disrupted is paramount to a lawyer's personal interest in terminating a relationship with a client.

Mallard v. United States Dist. Court for the S. Dist. of Iowa, 490 U.S. 296, 316 (1989) (Stevens, J., dissenting) (citing *Ohntrup v. Firearms Ctr., Inc.*, 802 F.2d 676 (3d Cir. 1986), and *Mekdeci ex rel. Mekdeci v. Merrell Nat'l Labs., Inc.*, 711 F.2d 1510, 1521-22 (11th Cir. 1983)); *see also Inmates of D.C. Jail*, 158 F.3d at 1363 (Wald, J., dissenting) (citing D.C. Rule of Prof. Conduct 1.16(b), "preclud[ing] lawyers from withdrawing from a case in midstream except under extraordinary circumstances").[24] As a practical matter, a court is unlikely to grant leave to withdraw unless substitute counsel is available,[25] and this will rarely be the case where a plaintiff's counsel is seeking to withdraw because the application of §803(d) is causing a financial hardship. It is similarly unlikely that substitute counsel could be found to take on a prisoner class action lawsuit after the case has already been filed and is partially litigated. Thus, the exact stage at which a case is pending is less relevant than whether the case was filed before or after enactment. Simply knowing the PLRA's effective date does not permit counsel for a prisoner plaintiff in a pending case to stop representing their client after that date.[26] Accordingly, "conduct occurring temporally after the law is in effect but which is an inextricable part of a course of conduct initiated prior to the law," *Inmates of D.C. Jail*, 158 F.3d at 1362 (Wald, J., dissenting), should be treated the same as pre-enactment conduct.

Application of the fees provision would be particularly unfair to plaintiff's counsel with respect to fees earned prior to the PLRA's enactment. In such cases, counsel has performed services at a time and under a legal regime in which they were eligible for payment at market rates under 42 U.S.C. §1988. In some cases, that work was completed years before even the predecessor of the PLRA was introduced in Congress. To reach back to change compensation rules after the work has been done is contrary to the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place . . . ." *Landgraf*, 511 U.S. at 265 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Retroactive application to pre-enactment services would also raise serious concerns that plaintiff's counsel lacked fair notice of the PLRA's fee restrictions. Although some counsel may have been aware of the PLRA as it was pending in Congress, as part of an appropriations bill, the absence of clear congressional intent defeats the notion that somehow counsel should have known that their pre-enactment work was subject to §803(d). Such application would additionally overturn counsel's reasonable reliance and settled expectations that, if the plaintiff prevailed, their reasonable attorney's fees could be shifted to the defendants for payment at market rates under §1988.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

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NOTES:

1 Pursuant to Sup. Ct. R. 37.6, undersigned counsel avers that no counsel for a party authored this brief, in whole or in part, and no person or entity other than the amici listed as submitting this brief made a monetary contribution to the preparation or submission of the brief.

This Court granted a writ of certionari to the Sixth Circuit Court of Appeals to review the decesion in *Hadix v. Johnson*, 143 F.3d 246 (6th Cir.), *cert. granted in part,* 119 S. Ct. 508 (1998), involving the consalidated cases of *Everett Hadix et al. v. Perry Johnson et al*., No.8073581 (E.D. Mich.) and *Mary Glover et al. v. Perry Johnson et al*., No. 7771229 (E.D. Mich.). The NPP is not and has never been counsel in eitrher of thse Eastern District of Michigan cases, and will not recover any attorney's fees in those cases. The NPP does however serve as counsil forplaintiffs in *Everett Hadix et al. v. Perry Johnson et al.,* No. 4:92-cv-110 (W.D. Mich.). This case is pending in the Western District of Michigan as a result of the Sixth Circuit's decision to consolidate certain issues from *Hadix* with a case in the Western District of Michigan. *See Knop v. Johnson*, 977 F.2d 996, 999, 1o14 (6th Cir.1992) (remanding *Hadix* claim to Western District of Michigan). Subsequently, the parties agreed that certain additional issues in Hadix should be transferred to the Western District case. Following that transfer, the NPP appeared as counsel for plaintiffs in the Western District case only.

2Petitioners make this argument despite their concession that "neither the text nor the legislative history of the PLRA expressly address the precise question of whether the attorney's fee provision applies to cases pending on the Act's effective date . . . ." Petitioners' Br. at 14.

3*Cf. Landgraf*, 511 U.S. at 257 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.").

4Petitioners note that this Court quoted the "in any action" language in considering the attorney's fees statute at issue in *Hutto v. Finney*, 437 U.S. 678(1978). *See* Petitioners' Br. at 15. Significantly, however, the court relied on that language in rejecting an Eleventh Amendment challenge to the statute; it did not use the language to determine the temporal reach of the statute. *See Hutto*, 437 U.S. at 694.

5The Court in *Field* declined to apply the negative implication rule of construction to infer that Congress, by adding a reasonable reliance element to the false financial statement exception in the bankruptcy code, thereby intended not to require reasonable reliance in the fraud discharge exception in the code. *See* 116 S.Ct. at 441-43. The Court reasoned that application of a negative implication in this instance would lead to unreasonable results, was at odds with other textual pointers in the code, displaced settled common law, and was not supported by the legislative history of the statute. *See id.* at 442-47.

6It would be possible to argue that even this language did not expressly prescribe application to the attorney's fees provision. However, the term "relief" was broadly defined in the bill as "all relief in any form which may be granted or approved by the court . . . ." H.R. 667, 104th Cong. §301(a)(g)(2) (1995). Additionally, the term "relief" is frequently used to include attorney's fees. For example, plaintiffs routinely request an award of attorney's fees under fee-shifting statutes as part of the relief they seek in their complaints. Thus, there is nothing odd about referring to a statutory entitlement to fees as part of the relief, or remedy, that a plaintiff seeks by filing suit:

> [C]ongress enacted the fee-shifting provision as "an integral part of the remedies necessary to obtain" compliance with civil rights laws, . . . to further the same general purpose -- promotion of respect for civil rights -- that led it to provide damages and injunctive relief. The statute and its legislative history nowhere suggest that Congress intended to forbid *all* waivers of attorney's fees -- even those insisted upon by a civil rights plaintiff in exchange for *some other relief* to which he is indisputably not entitled -- anymore than it intended to bar a concession on damages to secure broader injunctive relief.

Evans v. Jeff D., 475 U.S. 717, 731 (1986) (second emphasis added) (quoting S. Rep. No. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5912). In any event, Congress removed any question of the applicability of the retroactivity mandate in §802 to the PLRA attorney's fees provision by moving this provision to §803.

7 In fact, the attorney's fees provision in §803 was twice amended before final passage of the bill. First, the numerical cap on the hourly rate that could be awarded as attorney's fees was increased from 100% of CJA rates to 150%. *See* 141 Cong. Rec. H13874-01, *H13892 (daily ed. Dec. 4, 1995). Second, a provision authorizing an award of attorney's fees for enforcement work was added to the bill. *See id*.

8 Since attorney's fees are awarded only to a plaintiff who succeeds, at least in part, on the merits, it is apparent that the sponsors of the PLRA were employing a broad definition of a "frivolous" lawsuit. In fact, however, the PLRA fees provision is more likely to deter meritorious cases than it is to deter frivolous ones. In any event, while cutting the entitlement to fees undoubtedly does deter plaintiffs from filing new cases, cutting fees in cases already filed will not serve that purpose.

9 Amici argue that the "more important" harm from litigation to vindicate the constitutional rights of prisoners is its adverse effect on the operation of correctional facilities. *See* Amici's Br. at 1-3. Amici's argument suggests that Congress intended to reduce the incentives to file suit created by the potential award of attorney's fees. Amici do not attempt to demonstrate, however, why Congress would have believed that reducing the availability of fees in existing cases would end existing litigation, particularly in light of plaintiff's counsel's ethical obligation, *see* Part III, *infra*, once counsel had entered an appearance in a case.

10 *See* Pub. L. No. 104-134, 110 Stat. 1321-71, renumbered Pub. L. No. 104-140, 110 Stat. 1327 (codified as amended at 42 U.S.C. §1997e(d)(2)). We will refer to this subsection of the PLRA attorney's fees provision as §803(d)(2) for ease of reference, although technically it is §803(d)(d)(2) of the enacted statute. *See* 42 U.S.C.A. §1997e(d)(2) (West Supp. 1998). We will similarly refer to the following subsection of the fees provision as §803(d)(3). *See id.* §1997e(d)(3).

11Section 803(d)(2) provides that:

> Whenever a monetary judgment is awarded in an action described in paragraph (1) a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

12Congress' decision to move the fees provision to §803 eliminated the possibility that §802's retroactivity language would be applied to this provision. *See* footnote 6, *supra*.

13The AEDPA was signed into law on April 24, 1996, two days before the PLRA. *See* Pub. L. No. 104-132, 110 Stat. 1218 (codified as amended at 28 U.S.C. §2254(d)); *see also* footnote 10, *supra*.

14 Similarly here, the PLRA fees provision has substantive effects on a plaintiff's entitlement to damages and liability to his or her counsel. *See* Part II, *infra*.

15The discussion in Part I, *supra*, addressed the issues of clear statement and congressional intent. Therefore, this Part will focus solely on retroactive effect.

16*See Blissett v. Casey*, 147 F.3d 218, 221 (2d Cir. 1998) (application of §803(d) "would retroactively impair the plaintiff's right to full compensation for the violation of his constitutional rights by taking up to 25 percent

of his damage award to cover the defendants' liability for plaintiff's legal fee under §1988"), *petition for cert. filed*, 67 U.S.L.W. 3259 (U.S. Sept. 23, 1998) (No. 98-527).

17In addition to diminishing a successful prisoner plaintiff's right to monetary damages, §803(d)(2) provides that in such cases, "[i]f the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." 42 U.S.C.A. §1997e(d)(2). Using virtually identical mandatory language, §803(d)(3) provides that: "No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel." *Id.* §1997e(d)(3).

18*See Glover v. Johnson*, 138 F.3d 229, 250 (6th Cir. 1998) ("parameters of the attorney-fee statute in effect at the time legal services are requested clearly affects the relationship between the prisoners and their attorneys, including whether an attorney chooses to provide legal assistance in the first place").

19 Although prisoners are often represented by *pro bono* counsel, such as the ACLU, §803(d) presents a retroactivity problem because in other cases prisoners retain paid counsel.

20*Cf. Landgraf*, 511 U.S. at 275 n.29 ("new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime").

21One example of the way in which the PLRA's reduction in a prisoner plaintiff's damages award could change this conduct is that a plaintiff may choose to file a lawsuit *pro se* rather than give up 25% of a potential damages award. Another example is that the attorney's fees restrictions could make it harder for a putative plaintiff to hire a lawyer, resulting in a decision not to file a lawsuit. *Cf. Bradley*, 416 U.S. at 721 ("no indication that the obligation under [the attorney's fees provision at issue], if known . . . would have caused the [defendant] to order its conduct so as to render this litigation unnecessary").

22The very purpose of §1988 was to create this expectation. The House report that accompanied the passage of §1988 stated that the purpose of the legislation was to ensure "effective access to the judicial process" for victims of civil rights abuse. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). Similarly, the Senate report recognized that "fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation," S. Rep. No. 1011, 94th Cong., 2d Sess. 3-4 (1976), and stated that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 4 (citation and internal quotation marks omitted).

23 *See Blissett*, 147 F.3d at 221 (applying §803 "to representation begun before its passage could have a seriously detrimental retroactive effect on [attorneys'] previously established rights and reasonable prior expectations"); *Hadix*, 143 F.3d at 252 (applying §803 to work performed in pending cases "both prior to and after" the PLRA's enactment results in impermissible retroactive effect on attorneys); *Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996) (retroactive application of §803 would impose new legal consequences to "services rendered by the plaintiffs' counsel in advance of the passage of the new Act"); *Jensen v. Clarke*, 94 F.3d 1191, 1202-03 (8th Cir. 1996) (applying §803 would disappoint plaintiffs' attorneys' "reasonable reliance on prior law" and be "manifestly unjust"); *see also Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357, 1363-64 (D.C.Cir. 1998) (Wald, J., dissenting) (applying §803 to post-enactment legal services in case filed pre-enactment has impermissible retroactive effect on parties and lawyers), *petition for cert. filed*, 67 U.S.L.W. 3394 (U.S. Dec. 3, 1998) (No. 98-917); *Alexander S. v. Boyd*, 113 F.3d 1373, 1395 (4th Cir. 1997) (Murnaghan, J., dissenting) (applying §803 retroactively would result in "manifest injustice" to plaintiffs' attorneys), *cert. denied*, 118 S.Ct. 880 (1998).

24*See also* American Bar Association Model Rules of Professional Conduct Rule 1.16(b) (describing circumstances that must be met for withdrawal); *accord* Ala. Rules of Professional Conduct Rule 1.16(b); Ark. Rules of Court Model Rules of Professional Conduct Rule 1.16(b); Cal. Attorneys and State Bar Code, Rules of Professional Conduct of the State Bar of California Rule 3-700(c); Colo. Court Rules, Colo. Rules of Professional Conduct (appendix to chapters 18-20) Rule 1.16(b); Ind. Code Ann. (appendix to Court Rules (Civil)) Rules of Professional Conduct Rule 1.16(b); New Hamp. Rev. Stat. Ann., Rules of Professional Conduct Rule 1.16(b); S.C. Code Ann., Appellate Court Rule 407, Rules of Professional Conduct Rule 1.16(b).

25 *See Jolly v. Coughlin*, No. 92 CIV. 9026, 1999 WL 20895, at *10 (S.D.N.Y. Jan. 19, 1999) (rejecting defendants' argument that law firm could have withdrawn from representation because of PLRA fees provision

and therefore refusing to apply PLRA retroactively to limit fees).

26Consider, for example, a case in which counsel filed suit on behalf of a class of mentally ill prisoners, knowing that it would be necessary to hire an expert psychiatrist to testify about the defendants' lack of an adequate mental health care system in order to prevail. *Cf. Boring v. Kozakiewicz*, 833 F.2d 468, 473-74 (3d Cir. 1987) (holding that expert testimony was necessary to show seriousness of medical need where it would not otherwise be "apparent to the lay person"). Counsel know that the plaintiff class has no money to pay for an expert and that fees for expert services in civil rights cases cannot be shifted from prevailing plaintiffs to defendants pursuant to §1988. *See West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 102 (1991). Nevertheless, counsel decide that they will pay for an expert based on their expectation that, assuming they prevail on behalf of plaintiffs, they will be compensated for their services pursuant to §1988 and that they can absorb this cost. Retroactive application of the PLRA fees provision would change the financial aspect of this calculus. Counsel would find themselves in a situation in which continued representation of the plaintiff class at an unanticipated below-market attorney's fees rate would cause a significant financial burden. However, counsel could not ethically change their earlier merits-based decision that hiring an expert was necessary, and for the reasons stated above, are unlikely to be able to withdraw from the case.