against the PVA suit. For this reason, plaintiffs are entitled to summary judgment on Counts One and Three of the Complaint.

An order will accompany this opinion.

William SANJOUR, Hugh B. Kaufman, and North Carolina Waste Awareness and Reduction Network, Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, William Reilly, the United States of America, Office of Government Ethics, and Stephen D. Potts, Defendants.

No. CIV. A. 91-2750 SSH.

United States District Court,
District of Columbia.

April 10, 1998.

Environmental coalition and employees of Environmental Protection Agency (EPA) brought action against EPA and several officials, challenging ethics regulation that prohibited EPA employees from receiving expense reimbursement for unofficial speaking or writing engagements concerning their official duties. The District Court, Stanley S. Harris, J., upheld regulation, 786 F.Supp. 1033, and plaintiffs appealed. On rehearing en banc, the Court of Appeals reversed, 56 F.3d 85. On remand, the District Court, Harris, J., held that: (1) government-wide injunction against enforcement of regulation could properly be issued, even though case was not litigated as a class action; (2) injunction against enforcement of entire regulation, as opposed to merely that portion relating to speeches on current government policies, was necessary; (3) injunction against another regulation permitting government to accept third-party reimbursement for official employee travel was not required; and (4) plaintiffs were not entitled to attorney fees under Equal Access to Justice Act even though they prevailed on First Amendment claim.

Judgment accordingly.

1. Injunction ⇐189

Government-wide injunction was proper against enforcement of regulation barring executive branch employees from receiving expense reimbursement for unofficial speaking or writing engagement relating to their official duties, even though case was not litigated as a class action; regulation affected the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression. U.S.C.A. Const.Amend. 1; 5 C.F.R. §§ 2635.807(a), 2636.202(b).

2. Injunction ⇐189

Courts may issue injunctions that benefit nonparties where they are necessary to give the prevailing parties the relief to which they are entitled.

3. Injunction ⇐189

Authority of Office of Government Ethics to promulgate new regulations would not be usurped by government-wide injunction against enforcing regulation that prohibited executive branch employees from receiving reimbursement of expenses for unofficial speaking or writing activities relating to official duties. 5 C.F.R. §§ 2635.807(a), 2636.202(b).

4. Injunction ⇐189

Injunction against enforcement of entire regulation prohibiting executive branch employees from receiving expense reimbursement for unofficial speaking engagements relating to official duties was necessary to provide complete relief to environmental coalition and two employees of Environmental Protection Agency (EPA) who challenged regulation under First Amendment; appellate decision on which injunction was based did not limit its analysis to that portion of regulation dealing with speeches addressing current government policies, but evaluated the regulation as a whole. U.S.C.A. Const.

Amend. 1; 5 C.F.R. §§ 2635.807(a), 2636.202(b).

5. Injunction ⇐189

Issuance of injunction against regulation barring executive branch employees from receiving expense reimbursement for unofficial speaking or writing engagements relating to official duties did not require an injunction against another regulation authorizing government to accept third-party reimbursements for official employee travel; while second regulation was part of the regulatory scheme being challenged under First Amendment and entire scheme was held invalid, elimination of prohibition on travel reimbursements for unofficial travel cured the unconstitutionality. U.S.C.A. Const.Amend. 1; 5 C.F.R. §§ 2635.807(a), 2636.202(b); 41 C.F.R. § 304–1.3(a).

6. Injunction ⇐189

Injunctions issued by federal courts should be narrowly tailored to remedy the harm shown

7. United States ⇐147(10)

When the government contests an application for fees under Equal Access to Justice Act (EAJA), it must address two issues: first, whether the agency's underlying action that gave rise to the civil litigation is substantially justified; and second, whether its position in the civil litigation is substantially justified. 28 U.S.C.A. § 2412(d).

8. United States ⇐147(10)

In contesting an application for fees under Equal Access to Justice Act, government has the burden of proof to show that its position was justified to a degree that could satisfy a reasonable person. 28 U.S.C.A. § 2412(d).

9. United States ⇐147(14)

For purposes of recovering attorney fees under Equal Access to Justice Act, government employees who challenged regulation prohibiting expense reimbursement to government employees for unofficial travel could seek compensation only for the First Amendment claim on which relief was based, and not for the separate and unsuccessful "selective enforcement" cause of action based on equal protection principles. U.S.C.A. Const. Amends. 1, 14; 5 C.F.R. §§ 2635.807(a), 2636.202(b).

10. United States ⇐147(9)

As general rule, for purposes of recovering fees and expenses under Equal Access to Justice Act (EAJA), plaintiffs "prevail" in action against United States by receiving some or all of their requested relief, in which case the government must prove that its overall position in the litigation, even with regard to arguments on which the ultimate relief was not based, were substantially justified. 28 U.S.C.A. § 2412(d).

See publication Words and Phrases for other judicial constructions and definitions.

11. United States ⇐147(9)

For purposes of application for attorney fees under Equal Access to Justice Act (EAJA), if plaintiffs present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories, counsel should be compensated only for work on those distinct claims that prevailed. 28 U.S.C.A. § 2412(d).

12. United States ⇐147(14)

Environmental coalition and Employees of Environmental Protection Agency (EPA) were not entitled to attorney fees under Equal Access to Justice Act for successful First Amendment challenge to regulations that allowed government employees to receive expense reimbursement for official speaking or writing engagements relating to their government duties but not for unofficial engagements; government's promulgation of regulations was reasonable in light of governing law at time regulations were promulgated, and it conducted ensuing litigation in a manner well-grounded in law and fact, squarely addressing each issue presented by plaintiffs. U.S.C.A. Const.Amend. 1; 28 U.S.C.A. § 2412(d); 5 C.F.R. §§ 2635.807(a), 2636.202(b); 41 C.F.R. § 304–1.3(a).

Stephen M. Kohn, David K. Colapinto, Washington, DC, for Plaintiffs.

Kevin M. Simpson, DOJ, Civil Div., Washington, DC, for Defendants.

OPINION

STANLEY S. HARRIS, District Judge.

This matter is before the Court pursuant to the Court of Appeals' decision in *Sanjour v. Environmental Protection Agency*, 56 F.3d 85 (D.C.Cir.1995) ("*Sanjour*"). Currently pending are plaintiffs' motion for a final order, defendants' opposition thereto and motion for a final order, plaintiffs' reply, defendants' reply, and plaintiffs' surreply. Also pending are plaintiffs' motion for leave to file an application for attorney's fees and costs, defendants' opposition thereto, and plaintiffs' reply. Upon consideration of the entire record, the Court shall enter a separate Judgment in accordance with the reasoning set forth below.

BACKGROUND

The history of this litigation is discussed at length in this Court's prior Opinion and in the Court of Appeals' *en banc* opinion. *See Sanjour v. EPA*, 786 F.Supp. 1033 (D.D.C. 1992), *aff'd* 984 F.2d 434 (D.C.Cir.1993), *decision vacated and reh'g granted*, 997 F.2d 1584, *rev'd and remanded*, 56 F.3d 85 (D.C.Cir.1995) (*en banc*). In brief, this matter arises from a First Amendment challenge by William Sanjour and Hugh Kaufman—two employees of the Environmental Protection Agency ("EPA")—and the North Carolina Waste Awareness and Reduction Network ("NC WARN") to regulations prohibiting EPA employees from receiving travel expense reimbursement from private sources for unofficial speaking or writing engagements concerning the subject matter of the employees' work, while permitting such compensation for officially authorized speech on the same issues.

This Court granted summary judgment to defendants on all counts except a single claim of selective prosecution, and was affirmed by a panel of the Court of Appeals. A subsequent *en banc* decision, however, invalidated the "no-expenses" prohibition on First Amendment grounds and remanded the case "for proceedings consistent with this opinion." *Sanjour*, 56 F.3d at 88, 99.

DISCUSSION

I. Motions for Issuance of a Final Order

Plaintiffs move this Court to declare that the

> regulations, policies, memoranda and directives of defendants which prohibit plaintiffs from paying or receiving reasonable travel reimbursements for non-official speech which concerns the responsibilities, programs and policies of the EPA, OGC [sic] and United States government are invalid ... and ... unconstitutional under the First Amendment, as they relate to plaintiffs, federal government employees who work below the grade level of senior executive service, and outside organizations similarly situated to plaintiff [NC WARN].

Pls.' Proposed Order at 1–2. Plaintiffs further ask this Court to enjoin defendants from enforcing "against plaintiffs, and against all federal employees below the senior executive service level of employment, ... all restrictions placed on their reimbursement for reasonable travel expenses as prohibited on page 3 of EPA Ethics Advisory 91–1, under 5 C.F.R. § 2635.807(a), 5 C.F.R. § 2636.202(b) and under 41 C.F.R. § 304–1.3." *Id.* at 1.

[1] The government challenges plaintiffs' requested relief on three grounds. First, the government contends that plaintiffs' proposed order is overbroad because it provides for a government-wide injunction. Defendants argue that because plaintiffs did not litigate this case as a class action, any relief entered by this Court should be restricted to the plaintiffs.

The *Sanjour* decision explicitly contemplates an injunction granting government-wide relief. The Court of Appeals explained that the test for "determining the constitutionality of a statute or regulation restricting government employee speech requires the reviewing court to consider ... the 'interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression.'" *Sanjour*, 56 F.3d at 92 (quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 468, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995)). The Court of Appeals

went on to note that this test "requires the court to go beyond the facts of the particular case before it." *Id.* 56 F.3d at 92. The only limitation on the court's decision was its statement that, though it was looking beyond the particular facts of the plaintiffs' case:

> [W]e cannot go so far as to include every possible application of the challenged scheme .... [T]he balancing of interests relevant to senior executive officials might "present[ ] a different constitutional question than the one we decide today." We therefore express no view on whether the challenged regulations may be applied to senior executive employees.

Id. 56 F.3d at 93 (internal citations omitted).

This Court thus concludes that government-wide relief for plaintiffs and all similarly situated government employees is appropriate. Such a ruling is well-supported by precedent, as courts frequently enjoin the enforcement of regulations ultimately held to be invalid. *See, e.g., Harmon v. Thornburgh,* 878 F.2d 484, 495 n .21 (D.C.Cir.1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed."), *cert. denied,* 493 U.S. 1056, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990); *Planned Parenthood Fed'n of Amer., Inc. v. Department of Health and Human Resources,* 712 F.2d 650 (D.C.Cir.1983) (affirming final injunction prohibiting enforcement of invalidated regulations); *Dimension Fin. Corp. v. Board of Governors of the Fed. Reserve Sys.,* 744 F.2d 1402 (10th Cir.1984) (enjoining Board from enforcing or implementing invalidated regulations), *aff'd,* 474 U.S. 361, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986); *Service Employees Int'l Union v. General Servs. Admin.,* 830 F.Supp. 5 (D.D.C.1993) (invalidating GSA regulation and enjoining further enforcement of the rule).

[2] Moreover, courts may issue injunctions that benefit non-parties where they are necessary to give the prevailing parties the relief to which they are entitled. *See Brown v. Trustees of Boston Univ.,* 891 F.2d 337 (1st Cir.1989), *cert. denied,* 496 U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990); *Bresgal v. Brock,* 843 F.2d 1163, 1170–71 (9th Cir. 1987); *Professional Ass'n of College Educators v. El Paso County Community College Dist.,* 730 F.2d 258, 274 (5th Cir.), *cert. denied,* 469 U.S. 881, 105 S.Ct. 248, 83 L.Ed.2d 186 (1984); *Evans v. Harnett County Bd. of Educ.,* 684 F.2d 304, 306 (4th Cir. 1982). Here, plaintiff NC WARN has an interest in inviting government employees (besides plaintiffs) to meetings and conferences. Anything other than a government-wide injunction would "[d]eprive NC WARN and the general populace of government employees' novel and valuable perspective." *Sanjour,* 56 F.3d at 94.

[3] The government further contends that plaintiffs' proposed order improperly involves this Court in formulating standards of ethical conduct by usurping the Office of Government Ethics' ("OGE's") authority to promulgate regulatory amendments in response to the *Sanjour* decision. The Court disagrees. Plaintiffs' proposed government-wide injunction leaves the OGE free to promulgate new regulations which it believes are the most appropriate response to *Sanjour;* it does not involve the Court in such decisions. The OGE simply is prohibited from enforcing the current regulations against employees below the senior executive service level of employment.[1]

Finally, defendants argue that plaintiffs' proposed order is overbroad because it enjoins the enforcement of more regulations

1. Defendants argue that plaintiffs' proposed injunction usurps the OGE's authority by choosing the senior executive service level as a cut-off point. The *Sanjour* court, however, explicitly stated that it expressed "no view on whether the challenged regulations may be applied to senior executive employees." *Sanjour,* 56 F.3d at 93. It appears clear to this Court that the Court of Appeals was referring to employees in the senior executive service, due to the reference to *NTEU,* in which the Supreme Court limited relief to "all Executive Branch employees below Grade GS–16." *NTEU,* 513 U.S. at 477–478, 115 S.Ct. 1003. Therefore, in order to narrowly tailor the remedy to the harm shown, the injunction is limited to all federal employees below the senior executive service level of employment. *See National Treasury Employees Union v. Yeutter,* 918 F.2d 968, 977 (D.C.Cir.1990).

than necessary to carry out the *Sanjour* court's mandate. Defendants argue that the Court should not enjoin the enforcement of the GSA regulation found at 41 C.F.R. § 304–1.3(a) [hereinafter "GSA Regulation"] or any provisions of 5 C.F.R. § 2635.807(a) other than subsection (a)(2)(i)(E)(2).[2]

[4] The Court of Appeals clearly considered the constitutionality of the entire regulatory scheme in *Sanjour*, including §§ 2636.202(b), 2635.807(a), and the GSA Regulation. *Sanjour*, 56 F.3d at 90. The key to that court's decision appears to have been that the regulatory scheme—allowing reimbursements for official, sanctioned speeches but not for unofficial ones—posed a "real and substantial threat of . . . censorship risks" and "discrimination on the basis of the viewpoint expressed by the employee" without adequate justification. *Id.* 56 F.3d at 97 (citation omitted). It is the duty of this Court to craft an appropriate remedy eliminating this burden on plaintiffs' First Amendment rights, yet which is "no more burdensome to . . . defendants than necessary to provide complete relief." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (internal quotation omitted).

An injunction against the enforcement of 5 C.F.R. § 2635.807(a) in its entirety is necessary to provide plaintiffs with complete relief. The *Sanjour* court never broke § 2635.807(a) into subsections; it evaluated the statute as a whole. *Sanjour*, 56 F.3d at 90. Defendants argue that when the Court of Appeals observed that the "challenged regulations clearly prevent Sanjour . . . from addressing *current government policies*," *id.* 56 F.3d at 91 (emphasis added), it intended to single out and limit its analysis to § 2635.807(a)(2)(i)(E)(2), which prohibits compensation, other than from the government, for teaching, speaking, or writing concerning "[a]ny ongoing or announced *policy*, program, or operation of the agency." 5 C.F.R. § 2635.807(a)(2)(i)(E)(2) (emphasis added). The fact that the word "policy" appears in § 2635.807(a)(2)(i)(E)(2) and not in the remaining subsections does not mean that it is the only subsection which must be enjoined. For example, if § 2635(a)(2)(i)(C) is not enjoined, plaintiffs Sanjour and Kaufman may be prohibited from receiving reimbursement for travel expenses from coalitions such as NC WARN because NC WARN, an environmental coalition of over 50 North Carolina environmental and community organizations, may be characterized as an entity with "interests that may be affected substantially by performance or nonperformance of the employee's official duties." 5 C.F.R. § 2635(a)(2)(i)(C). This Court, therefore, will enjoin the enforcement of 5 C.F.R. § 2635(a) in its entirety.[3]

[5, 6] The Court does, however, agree with defendants that the GSA Regulation need not be enjoined in order to fully vindicate plaintiffs' interests.[4] Though plaintiffs rightly point out that the *Sanjour* court held the entire regulatory scheme (§§ 2636.202(b), 2635.807(a), the GSA Regulation, and EPA Ethics Advisory 91–1) invalid, that holding does not mean the entire regulatory scheme must be enjoined. *See Sanjour*, 56 F.3d at 90. The scheme is problematic because it inhibits free speech and promotes viewpoint discrimination by allowing travel reimbursements for "official" but

2. Defendants also argue that § 2636.202(b) need not be enjoined because it was superseded by 5 C.F.R. § 2635.807(a). The D.C. Circuit, however, indicated that § 2636.202(b) remains in effect, thus the Court will enjoin its enforcement. *See Sanjour*, 56 F.3d at 90.

3. Defendants point out that some speech which falls under § 2635.807(a) may not involve speech of "public concern" and, therefore, the regulation as applied to that speech may be constitutionally permissible. However "[w]hen a court finds that an agency regulation is invalid in substantial part, and that the invalid portion cannot be severed from the rest of the rule, its typical response is to vacate the rule." *Harmon*, 878 F.2d at 494 (footnote omitted).

4. The GSA Regulation provides, in relevant part:

> Acceptance of payment for employee. As provided in this part, an agency may accept payment from a non-Federal source (or authorize an employee to receive such payment on its behalf) with respect to attendance of the employee at a meeting or similar function which the employee has been authorized to attend in an official capacity on behalf of the employing agency.

41 C.F.R. § 304–1.3(a).