No. 08-970

In The
Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA IN SUPPORT OF PETITIONERS

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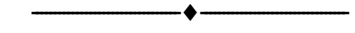
BRIEF OF THE ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER, SONNY PERDUE

INTRODUCTION

COMES NOW the Association County Commissioners of Georgia, as *Amicus Curiae*, and hereby submits the following brief in support of the Petitioner, Sonny Perdue, in his official capacity as Governor of the State of Georgia (the "State") and respectfully requests that this Court reverse the United States Court of Appeals' decision to allow an enhancement of respondents' attorneys' fees beyond the lodestar amount because of quality of performance and results obtained.



STATEMENT OF INTEREST[1]

The Association County Commissioners of Georgia ("ACCG") is a nonprofit instrumentality of Georgia's county governments. Formed in 1914 with nineteen charter county members, today ACCG serves as the consensus building, training, and legislative advocacy

[1] The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

organization for all 159 county governments in the State of Georgia. These counties are represented by more than 800 county commissioners. ACCG's constituency also includes 400 appointed county clerks, managers, administrators, and attorneys and more than 30,000 full-time and part-time employees. With this primary charge, ACCG works to ensure that the counties can provide the necessary leadership, services, and programs to meet the health, safety, and welfare needs of their citizens.

ACCG and its members have a direct interest in this case. County governments are statutorily charged with fulfilling some of the most fundamental needs and rights of individuals, including providing law enforcement and emergency services, *see* O.C.G.A. §§ 36-8-1, 5*,* health services, *see* O.C.G.A. § 31-3-4, a court system, *see* O.C.G.A. §§ 15-7-4(a)-(b), 15-6-8(1), 15-10-2(5)*,* 15-11-63, 65, legal defense for indigents, *see* O.C.G.A. §§ 17-12-1, 23, 24, and child protection services, *see* O.C.G.A. §§ 15-11-54 through 56.

In addition to being required to provide essential services to their constituents, counties are also charged with being good stewards of taxpayer funds. In fact, under the Georgia Constitution, county commissioners are deemed trustees of the people. 1983 Ga. Const., Art. I Sec. II Para. I. Taxpayer dollars spent on unreasonable litigation expenses takes money away from county taxpayers unnecessarily and makes it more difficult for counties to provide

the more than sixty mandated services they are required by law to provide to their citizens.

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of facts as presented in the brief of the petitioner, Sonny Perdue.

ARGUMENT AND CITATION OF AUTHORITY

The district court in this case made several errors in awarding an enhanced fee to respondents' counsel, which, if affirmed, will establish harmful precedent that will diminish funds necessary for counties to perform their legally mandated duties. *Amicus Curiae* shows that its member counties and their taxpaying constituents could be directly harmed if this Court finds that a fee enhancement may be awarded to a prevailing party under 42 U.S.C. § 1988 merely for quality of representation and superior results alone. Additionally, *Amicus* shows that county taxpayers will experience unreasonable hardship due to unwarranted fee awards and increased litigation.

Because the district court's award of a fee enhancement is inconsistent with prior opinions of this Court, and because allowing enhancements for the aforementioned reasons could significantly harm county governments and their taxpayers, this Court should overrule the holdings of the district court and

court of appeals in this case and find that attorneys' fees may not be enhanced under the relevant federal fee-shifting statutes for mere quality of performance and superior results.

I. The District Court Abused Its Discretion, and the Court of Appeals Erred in Affirming an Enhanced Award of Attorneys' Fees to Respondents' Counsel Above the Lodestar Amount

The court of appeals' decision affirming an enhancement of attorneys' fees for respondent's counsel is based on misguided Eleventh Circuit precedent stating that "superior results coupled with superior performance can be the basis for an enhancement of the lodestar amount." *Kenny A. ex rel. Winn v. Perdue*, 532 F.3d 1209, 1238 (11th Cir. 2008). In spite of its disagreement with the holdings of prior panels, the court of appeals was bound in this case by the prior panel precedent rule and reluctantly affirmed the district court's award of an enhanced fee to respondents' counsel upon a finding that counsel provided quality performance and superior results. Although the court of appeals could have granted the State's motion for rehearing en banc and overruled the misguided precedent, that court, instead, denied the motion and provided this Court the opportunity to clarify the issue.

A. Quality Representation and Favorable Results Obtained Do Not Alone Justify an Enhancement to the Lodestar Amount

The district court in this case pointed to the "superb quality" of representation and "truly exceptional" results achieved by counsel as reasons to enhance the fee awarded to respondents' counsel. *Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260 at 1289-1290 (N.D. Ga. 2006). These factors are erroneous grounds for upwardly modifying a lodestar amount.

In *Blum v. Stenson*, 465 U.S. 886 (1984), this Court held that while a district court is in the best position to evaluate quality of performance, generally this factor "is reflected in the reasonable hourly rate . . . [and] may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence" that the performance of counsel was superior to what could reasonably be expected. *Blum*, 465 U.S. at 899. Later, this Court explained that *Blum* was intended to limit the factors upon which a district court could base an enhancement, and specifically rejected that several factors, including "quality of representation" and "results obtained" could serve as "independent bases for increasing the basic fee award." *Penn. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986).

Accordingly, it was erroneous for the district court in the present case to modify respondents' counsels' fee award based on these factors. While the

district court acknowledged in its findings that the "superb quality" and "sweeping relief" obtained by respondents' counsel was "truly exceptional," *Kenny A.*, 454 F. Supp. 2d at 1289, it is plain from the decisions of this Court that these factors are simply improper bases for enhancing a fee award. In cases such as the present one, where there are no other rare or exceptional circumstances beyond performance and results, it is the lodestar figure that is the proper and reasonable fee.

B. Even if Quality Representation and Favorable Outcome May Sometimes Justify an Enhancement, Respondents Failed to Establish this Case as "Rare" or "Exceptional" to Warrant a Modification of the Lodestar

As indicated, there is a "strong presumption" that the lodestar figure represents a "reasonable fee," and "quality of representation" and "results obtained" cannot serve as grounds for a fee enhancement. *Del. Valley*, 478 U.S. at 565. However, when there may be reason for an upward modification, the "fee applicant bears the burden of establishing entitlement to an award." *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983). In the case at hand, the respondents failed to meet their burden of establishing entitlement to an enhanced fee award.

This Court has stated "when an attorney . . . accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability

. . . commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for th[is] factor[ ] . . . adequately compensates the attorney." *Del. Valley*, 478 U.S. at 565. In this case, respondents' counsel no doubt provided quality representation to their clients. However, such excellence should always be demonstrated and is expected when attorneys with the skill and experience of respondents' counsel in this case "perform to the best of [their] ability," as is their duty. *Id.* at 565. Absent some *specific evidence* that this case was "rare" or "exceptional," beyond what was to be expected from respondents' counsel, an enhanced fee award was improper.

To that end, the respondents in this case provided no specific evidence to support an enhancement, even for high quality of representation and results obtained, if enhancements were allowed for those reasons. The district court based its decision to grant an enhancement on essentially two factors: (1) personal observation of the record and respondents' counsels' performance and (2) affidavits by Atlanta attorneys offered by respondents' counsel. *Kenny A.*, 454 F. Supp. 2d at 1288-1290. However, because it is the fee seeking party's burden to establish that an enhancement is warranted, the district court's own observations of the court record and the quality of respondents' counsels' representation is of little consequence in the initial analysis.

The respondents themselves offered only the affidavits of five Atlanta attorneys who stated that

the quality of work produced in this case was deserving of an enhanced fee award. However, as the court of appeals pointed out, the attorneys providing the affidavits stand to profit from a decision allowing for enhancements in this case. *Kenny A.*, 532 F.3d at 1231-1232. As such, this evidence only serves to show the opinions of five attorneys who believe that enhancements should be awarded with a low standard, and does not establish that this case exhibited the "rare" and "exceptional" qualities that validate an enhanced fee award.

Accordingly, the respondents failed to meet their fundamental burden of providing specific evidence to justify an enhanced fee award, and the upward modification should therefore not have been granted to them by the district court.

C. Allowing Enhancements for "Quality of Representation" and "Results Obtained" Gives District Courts Unbridled Discretion for Fee Awards with Unfair and Harmful Results

If district courts are given the ability to award enhanced fees for "quality of performance" and "superior results," the true application will give district courts full discretion to grant fee enhancements at their whim, resulting in disparate awards among courts. As we have seen in this case, it is far too easy for a district court to find that the performance of a plaintiffs' counsel is one of the rarest quality, and the

achieved results are truly exceptional. If this standard is allowed to apply, there will likely be many cases that are found to be "rare" and "exceptional," simply because a district court is impressed by counsel. While a job well done is commendable, it is certainly not rare, and a fee enhancement is not an appropriate reward for doing what one is already obligated to do. Plainly, this formula is problematic and will prove harmful to the judicial system and to counties.

The consequence of allowing such fee enhancements to be awarded at the full discretion of a district court will result in unfairness and, thus, will undermine public confidence in the judicial system. As noted, if fees may be upwardly adjusted because of exceptional performance and results, district courts may award such enhancements simply because they feel an attorney did a particularly good job. However, some courts are likely to interpret the standard more conservatively and reserve enhancement awards for the truly rare and exceptional case where an attorney has not been fully compensated by the lodestar amount because of some unique extenuating circumstances.

As we have seen in other matters, the interpretation and application of the standard is likely to be widely diverse, resulting in some attorneys receiving windfall awards while others are simply awarded the lodestar fee. Large disparities in fees awarded across districts would be unfair and will be perceived as such by the public whose taxpayer dollars will be

used to pay the enhancements. This inequality will be harmful to the reputation and perception of judicial integrity.

Moreover, allowing district courts unbridled discretion to award attorneys' fees will futher reduce the foreseeability of litigation expenses. It is important for the efficient operation of government that counties are able to predict any major expenses that will be incurred. If district courts may award enhancements without a bright line standard, it will be difficult for a county, or any other entity required to pay such fees, to predict which level of fees will be granted, hindering the financial planning process beyond the existing burden. It is therefore important that this Court provide a clear standard as to when the lodestar fee may be enhanced by not allowing district courts to award modifications for mere quality performance and results.

II. An Enhancement of the Lodestar Amount for "Quality of Representation" and "Results Obtained" Does Not Further the Legislative Intent of the Fee-Shifting Statutes and Promotes Poor Public Policy

This Court has acknowledged that 42 U.S.C. § 1988, and other similar fee-shifting statutes, were enacted by Congress to provide an incentive for otherwise underrepresented clients to obtain competent legal counsel in certain important federal cases. *See Blum*, 464 U.S. at 893-894; *see also, Del. Valley*, 478

U.S. at 565. Congress certainly enacted these statutes as a way of protecting the public good and ensuring that adequate representation is provided to legitimate clients. Therefore, it is reasonable to assume that by enacting these statutes, Congress did *not* intend to bring about a policy that would harm the very public that it sought to protect by allowing increased amounts of taxpayer money to be paid in attorneys' fees without proper justification. If enhancements are to be awarded in the way that respondents' counsel contend and the lower courts in this case held, the end product is not only contrary to the intent of Congress, but also affirmatively creates a system that is contrary to good public policy by encouraging the squandering of taxpayer money that could be better utilized for the greater public good.

A. Unnecessary Enhancements to Fee Awards Are a Waste of County Tax Dollars and Have a Direct and Negative Impact on County Taxpayers

Cases involving government parties are unique for a number of reasons, but perhaps most distinctly because a harm caused by, and a redress ordered to come from a government cannot be isolated to an individual or a narrow group of violators. Because a government represents all of the citizens within its borders, any harm caused by a government is assigned to the constituents of that government. While this does not diminish the significance of the harm caused nor the amends owed to the violated, it does

create a unique circumstance whereby a broader context needs be evaluated. Care must be taken to ensure that a larger social harm is not initiated and that the rights of all taxpayers are not compromised in the effort to relieve the harm to a single party.

In the present case, evaluation of that broader context includes considering whether Congress's purpose in passing the fee-shifting statutes is advanced by allowing for unbridled awards of fee enhancements and considering the potential harm to external parties under such circumstances. While Congress's intent was served when respondents were able to secure competent counsel, it is unlikely that it was the prospect of earning an enhanced award that drew counsel to the case. On the other hand, good public policy is not served when taxpayer money was unreasonably awarded to respondents' counsel in the form of an enhanced fee.

Although governments typically do not seek to violate the law, and in fact, work diligently to uphold the law and protect the rights of their constituents, there are certainly times when agents of the government do breach their duties. In such instances, governments should be required to redress grievances for the harm caused, including any reasonable attorneys' fees when the law allows it. However, there is a notable difference in paying what is required to secure competent counsel for legitimate clients versus paying an amount above and beyond what is necessary, which serves only to enrich opposing counsel.

It is also important to consider that while it may appear that it is "the government" that is called upon to pay any enhanced attorneys' fees that may be ordered when harm is caused by its agents, in actuality, it is the taxpayers who ultimately bear the cost. In other words, it is the taxpayers who potentially suffer the consequences of reduced public services or increased taxes to compensate the wronged party. A service reduction or increase in taxes may be warranted when an important social good is achieved, such as a legitimate civil rights plaintiff securing competent representation; however, the use of taxpayer dollars cannot be justified when the outcome is simply "a form of economic relief to improve the financial lot of attorneys," as the enhancement is in the present case. *Del. Valley*, 478 U.S. at 565.

This argument is particularly poignant at the local government level. As previously noted, counties are statutorily required to provide some of the most fundamental public services to their citizens. *See supra* "Statement of Interest." In addition to the over sixty mandated services that Georgia counties are required to perform, they also provide countless discretionary services to their constituents, such as recreation, 1983 Ga. Const., Art. IX Sec. II Para. III(a)(5), *see* O.C.G.A. § 36-64-1 et seq., land use control, *see* 1983 Ga. Const., Art. IX Sec. II Para. IV; O.C.G.A. §§ 36-66-1, 2, green space and conservation, *see* O.C.G.A. § 12-6A-1, airports, *see* O.C.G.A. § 6-3-20, and mass transit, *see* 1983 Ga. Const., Art. IX Sec. II Para. III(a)(9). *See* 1983 Ga. Const., Art. IX Sec. II

Paras. III and IV; O.C.G.A. §§ 36-1-20, 36-5-22.1. Whether the services provided are mandatory or discretionary, the cost to provide these services must be budgeted by the county.

Counties operate with much smaller budgets than state and federal governments. Furthermore, unlike the federal government, each county is required to adopt and operate under a balanced budget. *See* O.C.G.A. § 36-81-2. According to the latest available information on Georgia county finances provided by the Georgia Department of Community Affairs, at least eleven counties had an operating budget of less than $5 million for the 2007 fiscal year. In fact, of the eleven counties listed, nine had an operating budget of less than the amount of the $4,419,599.18 lodestar enhancement awarded in this case, with the smallest county budget totaling no more than $2.1 million.[2] Accordingly, the allowance of unnecessary attorneys' fee enhancements could have a direct impact on counties' ability to perform mandated duties and to provide quality services to their citizens. While not every enhancement awarded will force counties to raise taxes or reduce services, it is certainly the case that the application of a lowered standard for awarding fee enhancements could have a direct and unnecessary impact on county citizens. If mere quality representation and favorable results are allowed to

[2] Schley County had the smallest reported budget for the FY 07 budget year with a total budget of $2,125,054.

become the new threshold for fee modifications by the district court, there will be no limit to the amount of money that could be taken out of the pockets of taxpayers.

Because Congress's intended results for fee-shifting statutes are not better served by the unconstrained award of enhancements, and because county taxpayers would be directly and unnecessarily harmed by unreasonably unfettered enhanced fee awards, *Amicus* asserts that it would be inappropriate for this Court to uphold the lowered threshold for enhanced fee awards that have been approved by the lower courts in this case.

B. Unreasonable Enhancements Promote Meritless Lawsuits and Needless Satellite Litigation which Will Utilize Taxpayer Dollars Unnecessarily, Burden County Budgets, and Cause Administrative Hardships

In addition to the potential for lodestar enhancements to soar out of control and to operate as a misallocation of taxpayer dollars, the opportunity to earn huge awards will tempt attorneys to bring meritless claims and to initiate unnecessary satellite litigation, which could further injure county taxpayers.

This Court has held that the purpose of the fee-shifting statutes such as 42 U.S.C. § 1988 is to award "fees which are adequate to attract competent counsel,

but which do not produce windfalls to attorneys," *Blum*, 465 U.S. at 893-894; *see also Del. Valley*, 478 U.S. at 565, and that "burdensome satellite litigation," should be avoided, rather than encouraged. *Burlington v. Dague*, 505 U.S. 557, 573 (1992); *see also Hensley*, 461 U.S. at 437. However, precedent which allows attorneys' fees to be enhanced at the whim of a district court will no doubt allow some attorneys to enjoy windfalls. Additionally, due to the high opportunity for a large award set by this precedent, attorneys will be tempted to accept cases with little merit and engage in unnecessary litigation.

As the court of appeals in this case opined, "the lodestar amount will never suffice for attorneys who practice in this area. They will always believe, in all sincerity, that they deserve more and that the justice system will function better if they are paid more." *Kenny A.*, 532 F.3d at 1232. If there is no clear and strict standard by which a district court may award an enhanced fee, there will always be a viable opportunity for counsel to argue that an upward adjustment is warranted. The prospect of earning a large fee could motivate attorneys in these cases to aggressively seek that award, potentially increasing the amount of litigation against counties unnecessarily. As a consequence, county taxpayers would again bear the financial burden of funding needless litigation expenses.

As attorneys aggressively seek enhanced awards, counties and, therefore, county taxpayers will be forced to pay the tab for unnecessary litigation of attorneys' fees. While litigation expenses are often

necessary expenditures for county governments, it would be unfair for taxpayers to have to pay to defend worthless lawsuits or to pay for litigation initiated solely to elicit more money from them. Also, while not likely in every county or circumstance, increased litigation could serve to limit the public dollars available for performing mandatory duties and providing other important county services, especially in some of the less populous counties with smaller operating budgets. While it is certainly important for wronged parties with legitimate claims to be able to secure competent counsel, allowing the district court's lowered standard to stand would only encourage *meritless* suits. In turn, such litigation stands to harm taxpayers and does nothing for the legitimate civil rights plaintiff. Clearly, excessive litigation should not be incentivized with a low threshold for the award of fee enhancements.

In addition to financial burdens caused by unnecessary litigation, there could also be significant administrative consequences for counties. In Georgia, much of the administration of the superior court system is financed by the counties in which they sit. O.C.G.A. § 15-6-24; 1983 Ga. Const., Art. VI Sec. VII Para. V. The administration of the court system is a significant expense and typically represents approximately eight percent of counties' budgets according to county budget information derived from the Georgia Department of Community Affairs.

As such, court systems in many Georgia counties are already stretched to their limits. Any increase in

litigation could require counties to endure additional administrative costs to accommodate the new litigation, such as new staff or more office space. Unnecessary pressures on county court systems should be avoided, and any incentive for additional or extended litigation due to the expanded potential for enhancements should not be endorsed by this Court.

CONCLUSION

Affirmation of the United States Court of Appeals' decision to allow an enhancement of respondents' attorneys' fees beyond the lodestar amount merely because counsel does a good job or gets favorable results will have a number of unintended and harmful consequences. Not only will such a holding set a dangerous precedent by encouraging meritless and unnecessary satellite litigation, but, more importantly, it will likely result in taking additional money unnecessarily out of the pockets of taxpayers to pay for litigation expenses and perhaps inflated attorneys' fees. Further, allowing district courts such broad discretion in awarding attorneys' fees will result in widely disparate results that will undermine the integrity of government and the judicial system.

As a matter of public policy, *Amicus* asserts that, ultimately, claimants and the public are best protected by authorizing enhanced attorneys' fees only in truly rare and exceptional circumstances and by establishing a bright line for the award of enhanced

fees. Doing so would mitigate the negative effects of the above described peripheral consequences. Because such a holding would be entirely consistent with prior opinions of this Court, *Amicus* respectively requests this Court to overrule the holding of the Eleventh Circuit Court of Appeals in this case and remand to the district court so that appropriate attorneys' fees consistent with this Court's order may be awarded.

Respectfully submitted,

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