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 WYNN, *et al.*,
*Respondents.*

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

## BRIEF OF THE CIVIL RIGHTS CLINIC AT HOWARD UNIVERSITY SCHOOL OF LAW, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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## STATEMENT OF INTEREST

*Amici curiae* are faculty members at Howard University School of Law and Student Attorneys of the Civil Rights Clinic at the Law School.[1] The Civil

[1] Pursuant to Rule 37.6, 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 of the brief. The written consent of the parties accompanies this brief.

Rights Clinic at Howard University School of Law engages in trial and appellate impact litigation in the service of human rights, social justice, economic fairness and political equality. The Clinic provides *pro bono* services to indigent, prisoner, and *pro se* clients in federal and state courts on a range of civil rights matters, including but not limited to employment and housing discrimination, voting rights, police brutality, unconstitutional prison conditions, habeas corpus, and unfair procedural barriers to the courts. Like many such public-interest law school clinics around the country, the Civil Rights Clinic typically initiates cases that, due to their extraordinarily long-time commitments, novel constitutional arguments, and lack of direct financial remuneration, the private bar is unable or unwilling to litigate.

We submit this brief in support of Respondents in order to respectfully urge this Honorable Court to affirm the decision of the United States Court of Appeals for the Eleventh Circuit, holding that federal district courts have the discretion to use such legitimate factors as quality of performance and results obtained to properly enhance the lodestar calculation of attorney fee awards under federal fee-shifting statutes.

## SUMMARY OF ARGUMENT

Lawyers who undertake public interest work often do so in the face of difficult constitutional precedent, limited financial resources, unremitting government opposition, and public attention verging from lukewarm apathy to outright hostility. But when, as in *Kenny A. v. Perdue*, these advocates prevail, their work benefits not just their named clients, not just the members of the plaintiff class, and not even just the larger community, but also future generations of

children who, as a result of the litigation may yet grow up safe from abuse and neglect, and free of fear and pain.

*LaShawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991), a case pending before the Honorable Thomas F. Hogan in the U.S. District Court for the District of Columbia, not only exemplifies the skill, diligence, and perseverance required by plaintiffs' counsel bringing successful child welfare reform cases, but also underscores the remarkable outcomes that can be achieved as a result. Amici write here to apprise the Court of the following: (I) the *LaShawn A.* action was brought because children in foster care in the District of Columbia were being harmed by the District's child welfare system; (II) the federal court's decision in *LaShawn A.* has led to a major overhaul of the District's foster care system and a marked improvement in the lives of children living in the District; and (III) child welfare reform cases, such as *Kenny A., LaShawn A. and others*, are hard-won, but are critical to securing the civil rights of abused and neglected children and keeping them safe from harm. In summary, this brief demonstrates that such cases are extremely complex and difficult, requiring specialized, experienced and skillful attorneys, but they can achieve transformative results. In order to properly encourage such skillful attorneys to take on these critical cases, courts must ensure that they are fully compensated for their work.

The direct issue before the Court today may be whether the award of attorneys' fees under a federal fee-shifting statute may be adjusted upward from the lodestar based on quality of performance and results obtained. But at the end of the day, the inescapable question both *Kenny A.* and *LaShawn A.* also raise

comes to this: Do we value the work public interest lawyers do in the name of children who may never be able to express, much less understand, the ways in which rarefied constitutional arguments translate into food, shelter, and care? "What is honored in a country," James Baldwin once wrote, "is cultivated there."[2] Given the great need for public interest lawyering in general and child welfare advocacy in particular, upholding the district court's discretion to apply an upward adjustment to the lodestar calculation of an attorney-fee award based on quality of performance and results obtained would seem to be nothing less than the cultivation of the professional ideals of public service we profess to honor.

## ARGUMENT

### I. PRIOR TO THE LITIGATION IN *LASHAWN A. V. DIXON* AND THE RESULTING DECISION BY THE HONORABLE THOMAS F. HOGAN OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, THE DISTRICT'S FOSTER CARE SYSTEM WAS IN SHAMBLES AND IN VIOLATION OF THE CONSTITUTIONAL RIGHTS OF FOSTER CHILDREN

#### A. The *Lashawn A.* Litigation Was Filed On Behalf of the District's Foster Care Children Because They Were Being Harmed by the Child Welfare System Charged with Protecting Them

In 1989, the American Civil Liberties Union's Children's Rights Project initiated an action in the U.S. District Court for the District of Columbia,

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[2] James Baldwin, *In Search of a Majority*, *in The Price of the Ticket* 231 (1985).

challenging unconstitutional violations in the foster care system of the District of Columbia. The action, titled *LaShawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991), was brought on behalf of a four-year old girl named LaShawn A. and six other foster children who had been neglected or abused both by their families and by the social system charged with protecting them. Complaint at 43, *LaShawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991) (No. 89CV1754). Space and scope prevent us from fully detailing the stories of the *LaShawn* children and the neglect the District visited upon them, but a brief recitation of the experiences of two of these children helps to illustrate the complex and difficult work the *LaShawn* attorneys, like their *Kenny A.* counterparts, undertake when they seek to litigate on behalf of abused and neglected children.

Plaintiff LaShawn had entered the District's custody at two-and-one-half years old when, as a "special-needs child," she was voluntarily placed in custody by her homeless mother. *LaShawn A.*, 762 F. Supp. at 983. LaShawn stayed in temporary "emergency custody" with an elderly foster mother, *Id.*, for two and one-half years. Complaint, *supra* at 44. In all that time, even though Child and Family Services Division's (CFSD) planning goal was to reunite LaShawn with her biological parent, the District offered no services to her mother to address the neglect that initially justified LaShawn's custody. *Id.* at 46. In June 1987, a psychiatrist who examined LaShawn identified potential developmental and psychiatric/psychological problems and recommended that LaShawn receive complete assessments. It took the Department one and one-half years to arrange these assessments. *Id.* at 48. A psychiatric evaluation conducted in May 1989 indicated that LaShawn may

have experienced an overuse of physical punishment and possibly even sexual abuse in her foster home. *LaShawn A.*, 762 F. Supp. at 983. At trial, child psychiatrist Dr. Harold Eist reported that six year-old LaShawn was likely to suffer from multiple future bouts of depression, and concluded that the longer that LaShawn remained with the current foster mother, the less she would be able to benefit from adoptive placement. *Id*. Nonetheless, LaShawn remained in this foster home at the time of trial. *Id*. In 1990, prodded into action by the pending lawsuit, the District finally rushed LaShawn into a new foster home, where she was ultimately adopted. Toni Locy, *Girl in Foster Care Suit Learns What Love Is*, Wash. Post, Oct. 3, 1994, at A7. She arrived at her adoptive home looking malnourished and unable to articulate when she felt sick. *Id*. Four years later, she was still in special education. *Id*.

Plaintiff Demerick B., like LaShawn A., spent years in short-term emergency placement, entering the custody of the District's Department of Health and Human Services (DHS) in 1986, when he was only eleven months old. Complaint, *supra* at 105. Demerick was initially placed at St. Ann's Infant and Maternity Home ("St. Ann's), a restrictive, short-term, emergency care facility in Maryland. *Id*. at 52. After four months, St. Ann's began repeatedly warning DHS that Demerick should be moved to a foster home. *Id*. In December 1988, St. Ann's wrote: "Demerick is suffering emotionally and developmentally because of his prolonged institutionalization. He needs to be moved to a home setting as soon as possible to prevent further emotional damage." *Id*. Nonetheless, Demerick remained at St. Ann's for at least three years. *Id*. at 53. During the crucial developmental years between infancy and primary school,

Demerick was denied the opportunity to develop a continuous and affectionate relationship with a single adult. *LaShawn A.*, 762 F. Supp. at 971. He was not visited once by either his mother or the DHS worker responsible for his care. *Id*. Late in 1988, Demerick was referred to the DHS' adoption unit but, by the time trial began, DHS had done little to facilitate Demerick's adoption. Complaint, *supra* at 54-55.

### B. By the Time of *LaShawn A.*, the Foster Care System was Systematically and Routinely Failing The Thousands of Children Who Depended on the District for Food, Shelter and Basic Care

By the time that Federal District Judge Thomas F. Hogan decided LaShawn A. in 1991, the District of Columbia's child welfare system was in shambles. From its management and infrastructure, to its services for children and families, to its placement of children, the system was failing the thousands of children who depended on the District for food, shelter, and basic care. *LaShawn A.*, 762 F. Supp. at 960.

As part of DHS, CFSD's five divisions were responsible for the bulk of the District's child welfare services. *Id*. at 968. In his findings of fact, Judge Hogan determined that all five branches of CFSD had failed to fulfill their statutory and professional duties. *Id*. at 997 n.30. Specifically, Judge Hogan found that the District had breached its constitutional and statutory duties[3] to perform abuse and

[3] At the time of the *LaShawn* litigation, both Federal and District law required child welfare services to meet minimal benchmarks. *See LaShawn A.* 762 F. Supp. at 960.

neglect investigations, to provide preventive services and continuing services, to monitor foster homes and institutions, and to properly manage its budgetary constraints. *Id*. at 968-69. In his opinion, Judge Hogan laid bare the District's breaches of professional and legal standards, including overwhelming caseloads, inadequate supervision, and insufficient staff training. *Id*. at 977-79.[4]

As a result, the District had failed to prioritize enabling a child to remain or return home when possible. *Id.* at 970 (citing 42 U.S.C. § 5106a(b)(2), (b)(3); D.C. Code Ann. § 6-2105, 6-2124). Even though CFSD was authorized to provide services such as emergency financial aid, shelter, emergency caretaker services, home-maker services, day care, counseling, and medical services, *Id*. (quoting D.C. Code Ann. § 6-2124), at trial, social workers and the former chief of Intake and Crisis Services confirmed that these services frequently were not provided. *Id*. at 970. With the District's foster system in chaos, the District resorted to misusing emergency short-term care so dramatically that children often disappeared into short-term solutions for years, deprived of the protections of federal law and denied opportunities to be either returned to their parents or freed for possi-

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[4] Then-Acting Chief of CFSD Evelyn Andrews reported to the Family Services Administration (FSA) in November 1988: "Staff shortages in the critical area of protecting children has required supervisors to take uncovered caseloads, staff to cover for co-workers who are in the field or on leave (there has been a significant increase in absenteeism), staff to attempt to fulfill the demands made through court orders, and make every effort to comply with mandated timeframes. It is virtually impossible to protect children in such environment and under current conditions. *Children are at risk.*" *LaShawn A.*, 762 F. Supp. at 969 (emphasis in original).

ble adoption. *Id*. at 971. Thus, between October 1, 1987 and September 30, 1988, nearly 75% of children in voluntary placement had been in this temporary status for longer than 90 days. *Id*.[5]

Meanwhile, CFSD's information system was so outdated that it did not identify all children in the District's foster care custody and could not locate all the children placed. *Id*. at 976[6]. Caseworkers resorted to tracking this crucial information on index cards. *Id*. No budget money was allocated for upgrading this system, and since the office that managed the tracking did not have an official status in DHS, the Department was not eligible for Federal funds that could have otherwise covered 90% of its costs. *Id*. at 976-77.

CFSD conceded many of Judge Hogan's findings, but argued that financial constraints were mainly responsible for these lapses. *Id*. at 997. Judge Hogan found these arguments unpersuasive in part because the District's own mismanagement had caused it. In 1980, Congress had enacted the Adoption Assistance and Child Welfare Act of 1980 (AACWA) in order to create incentives for states to de-emphasize foster

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[5] Many children in emergency care were ultimately returned to their families after these months or years in custody with no evidence that their formerly abusive and neglectful homes had improved. Complaint at ¶ 105, *LaShawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991) (No. 89CV1754). In a vicious cycle, these young children then often returned to foster care after suffering additional psychological and physical harm. *Id.*

[6] This was in direct violation of federal law, which requires that child welfare agencies receiving federal funds maintain an information system from which status, location, and goals for placement of all foster children may be determined. *LaShawn A. v.* Dixon, 762 F. Supp. at 976 (citing 42 U.S.C. § 627(a)(2)(A)).

care and promote efforts to find children permanent placements with either their biological or adoptive families. Karoline S. Homer, *Program Abuse in Foster Case: A Search for Solutions*, 1 Va. J. Soc. Pol'y & L. 177, 177 (1993) (citing S. Rep. No. 336, 96th Cong., 2d Sess. 11 (1980), *reprinted* in 1980 U.S.C.C.A.N. 1448, 1460). The District failed to follow protocols and maintain records that would have made it eligible for major increases in Federal funding under the AACWA. *LaShawn A.*, 762 F. Supp. at 980. While at least 75% of children in the District's care would have been eligible under AACWA's guidelines, CFSD established eligibility for less than 25% of children in care in both 1987 and 1988. *Id*. In 1985 and 1986, the U.S. Department of Health and Human Services (HHS) disallowed 76% of the District's claim for $7.8 million in reimbursements under the Act. *Id*. at 981. HHS reported that this high rate of disallowance was based on the District's noncompliance with both federal regulations and CFSD policies. In sum, the Center for the Study of Social Policy estimated that the District could have obtained at least an additional *$21 million* in federal reimbursements by complying with relevant procedures.[7] That unused $21 million was available to the District to pay salaries, finance considerable infrastructure improvements,

[7] The District also failed to maximize potential federal funds from the Social Security Act Titles IV-A (Emergency Assistance), IV-E (Child Welfare and Adoption Assistance), and XIX (Medicaid), which could conservatively total an extra $7 million in funding for the District. *Hearing Before the H. Comm. on the District of Columbia on Implementation of LaShawn A. v. Kelly*, 103rd Cong. (1994) (testimony of Judith W. Meltzer, Senior Associate, The Center for the Study of Social Policy); *LaShawn A.*, 762 F. Supp. at 981.

and generally improve the quality of foster children's care.

## II. JUDGE HOGAN'S DECISION IN *LASHAWN A.*, HAS MARKEDLY IMPROVED THE LIVES OF THE DISTRICT'S FOSTERS CARE CHILDREN

As Judge Hogan heard *LaShawn A.*, Federal courts, including the Second, Fourth, Sixth, Seventh, and Eleventh Circuits, issued decisions protecting the constitutional rights of foster children. *See Doe v. New York City Dept. of Social Servs.*, 649 F.2d 134, 145 (2d Cir. 1981); *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *L.J. v. Massinga*, 838 F.2d 118 (4th Cir. 1988); *K.H. v. Morgan*, 914 F.2d 846, 850 (7th Cir. 1990); *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir. 1990).[8]

Judge Hogan issued a 102-page opinion declaring his "inescapable conclusion" that the foster care system operated by the District did not comply with federal law, District law, or the United States Constitution. *LaShawn* at 960.[9] He appointed the Center for the Study of Social Policy to monitor the CFSD. Together, the city, the monitor, and Children's Rights authored a Remedial Order, which set timelines and deliverables for CFSD's progress. Shimica Gaskins, *Is it Possible to Reform a Child Welfare System? An Evaluation of the Current Progress in the District of Columbia and the Advocacy Strategies that Led to*

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[8] *See also* Arlene E. Fried, *The Foster Child's Avenues of Redress: Questions Left Unanswered*, 26 Colum. J.L. & Soc. Probs. 465, 480 (1993)

[9] Judge Hogan wrote: "The Court views the evidence in this case as nothing less than outrageous. The District's dereliction of its responsibilities to the children in its custody is a travesty." *LaShawn* at 998.

*Reform*, 5 Whittier J. of Child & Family Advocacy 165, 170 (2005). Early improvements under the Remedial Order proved modest at best. Gaskins, *supra* at 170. Court-appointed monitor Judith Meltzer noted that the District was initially noncompliant "in almost every area of the remedial order," including many of the serious problem areas exposed at trial. *Reforming the Adoption and Foster Care System in the District of Columbia: Hearing Before the Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia of the S. Comm. on Governmental Affairs*, 105th Cong. 36 (1998) [hereinafter 1998 Hearing] (testimony of Judith Meltzer, Senior Associate, Center for the Study of Social Policy.) By October 1994, Judge Hogan determined that "defendants were totally out of compliance with the Remedial Order and Revised Implementation Plan in the areas of Resource Development and Corrective Action." *LaShawn A. v. Kelly*, 887 F. Supp. 297 at 299 (D.D.C. 1995). Consequently, Judge Hogan initially put the District into a limited receivership and later determined that a full receivership was required. *Id*.

Receivership gave the District's foster-care system some much-needed attention. With the receiver, Judge Hogan, the court-appointed monitor, and Children's Rights focusing scrutiny on the District's child welfare services, the District government passed the Child and Family Services Establishment Amendment Act of 2000. Gaskins, *supra* at 170 (citing D.C. Stat. 13-277 (2001)). This Act established Child and Family Services as a cabinet-level agency, separating it from the District's Department of Health and Human Services. *Id*. at 170. This independence gave the District's Child and Family Services (now called Child and Family Services

Agency, or CFSA) direct control over child welfare matters. *Id*. Changes included consolidation of jurisdiction over neglect and abuse cases. *Id*. Furthermore, Child and Family Services was given control of its own personnel matters, allowing the agency to procure needed staff quickly. *Id*.

In 2001, the District having achieved significant improvements,[10] Children's Rights, the court-appointed monitor, and the District collaborated on plans to return control of the child welfare services to the District, *Id*., a process that was successfully completed in 2001 with the establishment of the Child and Family Services Agency. *Hearing Before the Subcomm. on the District of Columbia of the S. Comm. on Appropriations*, 108th Cong. (2003) [hereafter 2003 Hearing] (testimony of Judith W. Meltzer, Deputy Director, Center for the Study of Social Policy).

The plans to turn over management of foster care back to the District contemplated full compliance with the Court's 1993 order by December 2006. Gaskins, *supra* at 170. During a probationary period, which ran until January 7, 2003, the District met performance targets for 75% of agreed-upon standards designed as incremental measures of progress. *See 2003 Hearing*. Although this did not indicate either that the District's child welfare system was functioning consistently and acceptably or that it had achieved compliance with the *LaShawn* order, it

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[10] *See Termination of the LaShawn Receivership and the Status of the District of Columbia Child and Family Services Agency: Hearing Before the Subcomm. on the District of Columbia of the S. Comm. on Appropriations*, 107th Cong. (2001) (testimony of Judith Meltzer, Deputy Director, Center for the Study of Social Policy).

reflected "real improvement in the system." *Id*. Furthermore, the District's adherence to the implementation plan led to a dramatic increase in federal reimbursement for foster care services, from eight million dollars in 1992 to forty million dollars in 1998. Gaskins, *supra* at 170.

As of August 2009, *LaShawn* remains a regular fixture in Judge Hogan's courtroom. Full compliance has not yet been achieved. However its foster care system has been transformed. As a stand-alone agency, CFSA's budget is double what it was in 1995.[11] The agency has greatly increased its casework staff, improved their staff's qualification, and dramatically decreased average caseloads.[12] Other innovations include family-involved meetings to assess permanency planning for children, new family preservation programs, and a revamped hotline.[13] With functioning computer systems, CFSA can now quickly locate all children in its care.[14] In a January 2009 report to Judge Hogan, court-appointed monitor Judith Meltzer wrote that "the District should be commended for the success of its work,"[15] concluding that "[t]he ability of the Child and Family Services Agency, with support from the Executive Office of the Mayor, the City Administrator, and the Attorney

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[11] *LaShawn A. v. Fenty* Fact Sheet (2009), http://www.childrensrights.org/wp-content/uploads//2009/01/2009-01-21_dc_case_fact_sheet.pdf.

[12] *Id*

[13] *Id.*

[14] *Id.*

[15] Letter and Report from Judith Meltzer, Deputy Director, Center for the Study of Social Policy, to The Honorable Thomas F. Hogan (Jan. 5, 2009), http://www.cssp.org/whatsnew.html (last visited Aug. 27, 2009).

General to effectively implement the stipulation agreements has created an opportunity to move forward again to achieve the goals of child welfare reform which are at the heart of the *LaShawn* decree."[16]

In sum, twenty years after the litigation fist begun, *LaShawn A*. has made a significant difference in the lives of foster children in the District. With the public attention the case has brought to bear upon the system, the case serves as both inspiration for children's welfare attorneys, and as evidence of the long, tortuous, and difficult path these attorneys have to walk in order to prevail in these cases.

## III. BECAUSE FOSTER CARE ABUSES REMAIN A NATIONWIDE EPIDEMIC, THERE IS A GREAT NEED TO PROVIDE RESOURCES AND INCENTIVES FOR PUBLIC INTEREST LAWYERS TO WORK ON BEHALF OF THE NATION'S FOSTER CARE CHILDREN

### A. Abuses of Children in Foster Care Remain a Critical Problem Nationwide.

While *LaShawn* is a particularly dramatic example of the dysfunctions of a foster care agency, the District's failings are by no means unique. Gerard Wallace, *Foster Care Plus Love*, Wash. Post, June 9, 2004, at A21.[17] Nationwide, children in foster care are often shuffled from home to home over the course of many years, so they are unable to form lasting

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[16] *Id*.

[17] *See also* Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 Harv. C.R.-C.L. L. Rev. 199, 209 (1988).

bonds with any adult. *See* Mushlin, *supra* at 208.[18] They often do not receive proper medical or psychiatric attention;[19] however, it is common for foster parents to seek medication to control foster children more easily. Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 Cardozo Pub. L. Pol'y & Ethics J. 131, 160 (2003). A grand jury in San Diego found a large disparity between the care of foster children, and that of biological children; the foster children were given cheaper food and clothing, restricted to certain areas of the house, and sometimes forbidden to open the refrigerator or watch television with the family. *Id.* Most concerning, however, is the fact that children in foster care are physically abused at a much greater rate than children in the general population.

No one knows exactly how many children in foster care are being abused or neglected, but scholars who have studied the issue reason that a large number of such cases go unreported. Mushlin, *supra*, at 205. A study conducted between 1986 and 1990 by the National Foster Care Education Project found that the incidence of child abuse for children in foster care was more than ten times greater than in the general population. *Id*. at 206. Foster children are also more susceptible to sexual abuse because, as a practical matter, inhibition to incest does not apply within the foster family structure. *Id*. at 205. Accordingly, the

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[18] Program abuse is another form of mistreatment common to foster care. It occurs when the agency fails to provide children with a stable home environment or provide for medical and developmental needs. *Id.* at 207.

[19] *See* Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 Md. J. Contemp. Legal Issues 1, 7 (1995).

rate of substantiated allegations of sexual abuse is four times higher for children in foster care than children in the general population. *See* Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. Rev. L. & Soc. Change 1, 7 (1999). When accounting for the many cases of abuse and neglect that go unreported, one author reasoned that forty-three percent of all foster children were in unsuitable foster homes and fifty-seven percent were at risk of harm in foster care. Mushlin, *supra*, at 207. In part as a result of the neglect and abuse they suffer in foster care, an estimated forty percent of foster children end up on welfare or in prison, and foster children are 67 times more likely to be arrested than children who did not grow up in foster care. Chaifetz, *supra*, at 8.

### B. There Remains a Great Need for Public-Interest Lawyers in Collaboration with Members of the Private Bar Willing to Work on Behalf of the Nation's Foster Care Children

Litigation is a "blunt instrument."[20] Yet, this "blunt instrument" is often required to rescue children from the abuse and neglect of the very system charged with protecting them.[21] Litigation brings public awareness to the issues plaguing the child welfare system.[22] It also creates judicial oversight,

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[20] Children's Rights Organization, Winning for Children: Using the Courts to Reform Child Welfare 1, http://data.opi.state.mt.us/legbills/2005/Minutes/House/Exhibits/jhh25a110.PDF (last visited Aug. 5, 2009).

[21] *Id.*

[22] *Id.*

uses the fact gathering processes of the courts, prompts increased financial resources, and brings together the expertise needed to implement results.[23] *See generally* Child Welfare League of America, Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005 (2005). In the last fifteen years, Children's Rights and other child advocacy organizations have brought child welfare class action litigation in 32 states. *Id*. at 2. While progress has been slow, these lawsuits have often resulted in meaningful settlement agreements and significant court-approved consent decrees. *Id*.

In addition to *Kenny A.* and *LaShawn A.* examples from four other states also help to demonstrate some of the discrete ways in which litigation has been the catalyst in reforming child welfare systems across the country, as well as the long and arduous task lawyers face when they initiate litigation in the fight for children's rights.

On November 15, 1988, a class action lawsuit was filed against the Alabama Department of Human Resources (DHR) on behalf of a minor known as R.C. *R.C. v. Walley*, 390 F. Supp. 2d 1030, 1032 (M.D. Ala. 2005). The suit, which was filed when R.C. was an eight-year-old boy, *Id*., alleged that "DHR failed to maintain systems to ensure emotionally disturbed or behaviorally disordered foster children were adequately provided for when placed in the foster system."[24] Paradoxically, R.C., who himself had been abused by his mother and later neglected by his

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[23] *Id.*

[24] Alabama Department of Human Resources, R.C. Consent Decree, http://www.dhr.state.al.us/page.asp?pageid=245 (last visited Aug. 20, 2009).

father, was ultimately placed in the custody of DHR where he was subjected to "a series of short term placements, including confinement in psychiatric hospitals." *R.C.*, 390 F. Supp. 2d at 1032. Accordingly, R.C.'s counsel claimed that child welfare authorities failed to provide appropriate treatment to R.C. and were to blame for his deteriorated condition. Child Welfare League of America, *supra* at 33. Through this civil action, R.C. sought to rectify the systemic deficiencies within DHR's child welfare system, which allegedly affected numerous other children under its care. *R.C.*, 390 F. Supp. 2d at 1032.

Two years after the lawsuit was filed-thanks to the vigilant effort of R.C.'s attorneys-the parties reached a settlement in the form of a consent decree, thus averting a protracted season of litigation. *Id*. This case is particularly noteworthy because despite the fact that DHR acknowledged that a trial would have resulted in "a clear victory for the plaintiffs" and exposed "devastating" facts, *Id*., it took attorneys who were willing to sacrifice their time, energy, and resources to effectuate real change. To this end, the settlement "prompted statewide reform of the child welfare system, implementing a unique collaborative county-by-county model and dramatically improving the care of children in foster care and reducing their time in the system."[25] To this day, the initials "R.C." remain synonymous with this Consent Decree, which has been the catalyst for the overhaul of DHR's child welfare system. *R.C.*, 390 F. Supp. 2d at 1032.

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[25] Child Welfare League of America, *supra* note 150, at 33 (citing Bazelon Center for Mental Health Law, Making Child Welfare Work, http://www.bazelon.org/issues/children/publications/rc/index.htm (last visited Aug. 20, 2009)).

On the heels of the settlement reached in Alabama, attorneys in the state of Arkansas took up the cause for children in custody of Arkansas' Department of Human Services (DHS).[26] In *Angela R. v. Clinton*, 999 F.2d 320 (8th Cir. 1993), plaintiffs filed a 93-page complaint asserting, among other things, that "DHS and its Division of Children and Family Services (DCFS) have failed to investigate complaints of abuse and neglect, to make reasonable efforts to keep families together, to provide adequate care to children placed in foster homes, and to properly train foster parents." *Id*. at 322. After the court certified the class by stipulation on October 10, 1991, *Id*., the parties engaged in settlement negotiations through January of 1992, which resulted in a "lengthy and comprehensive consent decree. *Id*.

The Consent Decree, referred to as the "Arkansas Child Welfare Reform Document," required "substantial increases in foster care board rates and in the number of therapeutic foster homes, initial health screenings of all foster children within 72 hours, maximum caseload standards of 15 for abuse/neglect investigations, in home family services cases, out of home placement cases, statewide availability of basic prevention and reunification services by January 1993, and initiation of all child abuse/neglect investigations within 72 hours (24 for extreme cases)." Child Welfare League of America, *supra* at 34.

Although the district court entered final approval of the consent decree in April 1992, the state appealed to the Eighth Circuit, contesting the district

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[26] *See* National Center for Youth Law, *Angela R. v. Huckabee*, http://www.youthlaw.org/publications/fc_docket/alpha/angelarvhuckabee/ (last visited Aug. 23, 2009).

court's denial of their motion to narrow the plaintiff class.[27] As a result, on July 13, 1993, the Eighth Circuit issued a ruling, which rejected the state's jurisdictional challenge, but vacated the consent decree and remanded the case to the district court due to perceived ambiguity in the enforcement provisions of the decree. *Angela R.*, 999 F.2d at 326.

Using their newfound leverage, the state refused to negotiate a reinstatement of the settlement.[28] The plaintiffs then sought relief from the district court in an attempt to resolve the ambiguity found by the Eighth Circuit, but instead suffered an additional defeat when on March 30, 1994 the district court denied their motion and scheduled the trial to commence on October 17, 1994.[29] However, less than three weeks before trial—thanks to the perseverance of the plaintiffs' counsel—the defendants agreed to engage in settlement negotiations.[30] As a result of their efforts, the plaintiffs' counsel was able to finally have the Consent Decree established in 1994 and later renewed in 1999 and 2001. Child Welfare League of America, *supra* at 34.

Finally, in 2001, the Consent Decree expired, marking an end to nearly 10 years of reform efforts. *Id*. Despite the expiration of the Consent Decree, "DCFS still makes quarterly presentations to the executive and legislative branches concerning its service maintenance, and an advisory committee monitoring DCFS also meets quarterly." *Id*.

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

Yet another case that evinces the importance of creating incentives for the legal community to fight for children's rights is that of *Katie A. v. Bonta*, 433 F. Supp. 2d 1065 (C.D. Cal. 2006). Originally filed in federal district court in July 2002, the suit alleged that children with mental health needs within the custody of the Los Angeles County Department of Children and Family Services ("DCFS") were not being provided with adequate mental health services including wraparound services[31] and therapeutic foster care[32]. *Katie A.*, 433 F. Supp. 2d at 1067.

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[31] Wraparound services are defined in Welfare and Institutions Code § 18251(d) as 'community-based intervention services that emphasize the strengths of the child and family and includes delivery of coordinated, highly individualized unconditional services to address needs and achieve positive outcomes in their lives.' Providers of wraparound care services: (a) engage in a unique assessment and treatment planning process that is characterized by the formation of a child, family, and multi-agency team (b) marshal community and natural supports through intensive care management and (c) make available an array of therapeutic interventions, which may include behavioral support services, crisis planning and intervention, parent coaching and education, mobile therapy, and medication monitoring." National Center for Youth Law, *Katie A. v. Bontá: An Overview – Plaintiffs' Definition of Wraparound Services (Appendix A)*, http://www.youthlaw.org/fileadmin/ncyl/youthlaw/litigation/Katie_A.2/Katie_A_-_Appendix _A.pdf (last visited Aug. 23, 2009).

[32] "Therapeutic foster care is an intensive, individualized mental health service provided to a child in a family setting, utilizing specially trained and intensively supervised foster parents. Therapeutic foster care programs: (a) place a child singly, or at most in pairs, with a foster parent who is carefully selected, trained, and supervised and matched with the child's needs; (b) create through a team approach, an individualized treatment plan that builds on the child's strengths; (c) empower the therapeutic foster parent to act as a central agent in implementing the child's treatment plan; (d) provide intensive

"According to the complaint, children identified as having emotional or behavioral impairments were receiving few services and placed in multiple foster homes, many ending up in institutions due to their worsened conditions." Child Welfare League of America, *supra* at 35.

Due to the tireless efforts of plaintiffs' counsel, L.A. County entered into negotiations and settled in March of 2003, agreeing to implement a bevy of changes in its foster care system.[33] More specifically, the settlement agreement required the county to close its 150-bed MacLaren Children's Center, and to offer "intensive, comprehensive and specialized care to children with mental, behavioral, or emotional disorders." Child Welfare League of America, *supra* at 35. Additionally, the settlement-affecting approximately 30,000 children-required the county to comply with "several standards concerning assessment, service provision and accountability practices of the agency." *Id*. Moreover, an advisory panel has been installed to help monitor the county's imple-

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oversight of the child's treatment, often through daily contact with the foster parent; (e) make available an array of therapeutic interventions to the child, the child's family, and the foster family (interventions may include behavioral support services for the child, crisis planning and intervention, coaching and education for the foster parent and the child's family, mobile therapy for the child and the child's family, and medication monitoring); and (f) enable the child to successfully transition from therapeutic foster care to placement with the child's family or alternative placement by continuing to provide therapeutic interventions." National Center for Youth Law, *Katie A. v. Bontá: An Overview – Plaintiffs' Definition of Therapeutic Foster Care (Appendix B)*, http://www.youthlaw.org/fileadmin/ncyl/youthlaw/litigation/Katie_A.2/Katie_A_-_Appendix_B.pdf (last visited Aug. 23, 2009).

[33] *Id.*

mentation of the terms of the agreement. *Id*. The oversight of this panel has already proven to be critical: a report finding the county out of compliance with the agreement was filed on September 9, 2005.[34] While the plaintiffs have since met with the county and county stakeholders regarding various compliance concerns, the state agencies did not participate in the settlement and litigation against them continues to be ongoing.[35]

*Marisol v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996) also reflects an arduous, but successful battle for reform of a child welfare system. *Marisol* was a class action lawsuit filed by eleven abused and neglected children on behalf of over 100,000 children under the jurisdiction of the New York State Office of Children and Family Services (OCFS) and in custody of the New York City Administration for Children's Services ("ACS"). *Id.* at 669. When the lawsuit was filed, "New York operated one of the worst systems in the nation, resulting in the deaths of multiple children and causing irreparable physical and mental harm to thousands more."[36] The suit alleged, among other things, that ACS failed to: "(1) appropriately accept reports of abuse and neglect for investigation; (2) investigate those reports in the time and manner

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[34] Bazelon Center for Mental Health Law, *Court Asked to End California's Denial of Services to Foster Children*, http://www.bazelon.org/incourt/docket/katieA.htm (last visited Aug. 23, 2009).

[35] National Center for Youth Law, *Katie A. v. Bontá: An Overview*, http://www.youthlaw.org/litigation/ncyl_cases/child_welfare/00/ (last visited Aug. 23, 2009).

[36] Children's Rights, New York (*Marisol A. v. Giuliani*), http://www.childrensrights.org/reform-campaigns/legal-cases/new-york-marisol-v-giuliani/ (last visited Aug. 23, 2009).

required by law; (3) provide mandated pre-placement preventive services to enable children to remain at home whenever possible; (4) provide the least restrictive, most family-like placement to meet children's individual needs; 5) provide services to ensure that children do not deteriorate physically, psychologically, educationally, or otherwise in [ACS] custody; . . . (11) provide caseworkers with training, support, or supervision; and (12) maintain adequate systems to monitor, track, and plan for children." *Id*. at 672.

In June 1996, the court certified the plaintiff class, and on September 26, 1997, the Second Circuit affirmed the district court's certification of the plaintiff class.[37] Once again, the relentless efforts of the plaintiffs' counsel proved decisive, and in July 1998, the parties began settlement negotiations, resulting in historic settlement agreements with the state and city in 1999. Child Welfare League of America, *supra* at 46. The settlement with the state required New York to implement a computerized data management system and to engage in oversight responsibilities over the city's child welfare system.[38] While the state's failure to adequately develop its computer system resulted in further legal action in 2001, counsel for the plaintiffs, unwavering in their commitment to justice, continue to monitor the state's compliance with the remaining provisions of the settlement

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[37] National Center for Youth Law, *Marisol v. Pataki*, http://www.youthlaw.org/publications/fc_docket/alpha/marisolvpataki/ (last visited Aug. 23, 2009).

[38] Children's Rights, New York (*Marisol A. v. Giuliani*), http://www.childrensrights.org/reform-campaigns/legal-cases/new-york-marisol-v-giuliani/ (last visited Aug. 23, 2009).

agreement pertaining to the data management system.[39]

As the above cases show, lawyers who work on behalf of foster care children can and do change their lives for the better. But the work is neither easy nor complete, but instead requires years of effort, commitment, determination and passion. For all of the extraordinary results that have been achieved so far in cases such as *Kenny A.*, much more work remains to be done. It is now for us to provide the resources and incentives that will attract and reward the legal community to continue the fight for children's rights.

## CONCLUSION

For the foregoing reasons, we pray the Court uphold the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[39] *Id.* The settlement with the city also yielded such improvements as the creation of an advisory panel, lower caseloads, funding for additional placement, significant increases in staff training, improved data management systems, and reconfigured foster care services along neighborhood lines. Child Welfare League of America, *supra* at 46.

# APPENDIX

List of *Amici*

The following Howard University School of Law Professors participate as *amici*:

Derek W. Black, Associate Professor of Law

Lisa A. Crooms, Professor of Law

Okianer Christian Dark, Associate Dean and Professor of Law

Andrew I. Gavil, Professor of Law

Brian Gilmore, Supervising Attorney, Fair Housing Clinic

Alice Gresham, Professor of Law

Homer C. LaRue, Professor of Law

Warner Lawson, Jr., Professor of Law

Cynthia R. Mabry, Professor of Law

Lawrence C. Nolan, Professor of Law

Claire Raj, Director Equal Justice Project

Reginald L. Robinson, Professor of Law

Patrice Simms, Assistant Professor of Law

Frank H. Wu, Professor of Law