No. 08-970

IN THE
Supreme Court of the United States

SONNY PERDUE, Governor 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 NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Can an attorney's fees award under a federal fee-shifting statute ever be enhanced based on quality of performance and results obtained?

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that has assisted African Americans and other people of color in securing their civil and constitutional rights for more than six decades. LDF litigated key cases that developed the legal framework for attorney's fees awards in civil rights cases, and that were incorporated into the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988). *See, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975); *see also Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 54 (1975) (statement of Rep. Drinan) (citing LDF's reliance on the availability of attorney's fees awards to litigate civil rights cases).

LDF has also participated as an amicus in cases before this Court interpreting the scope of reasonable attorney's fees provisions in various federal statutes. *See, e.g.*, *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

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[1] Pursuant to Rule 37.6, counsel for the amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than the amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent from the parties are lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

Effective civil rights laws are vital to the health of our democracy. But even the best statute is essentially a dead letter without vigorous enforcement. Congress was well aware of the dangers of underenforcement when it passed the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988) [hereinafter Section 1988]. It was Congress's reasoned determination that robust attorney's fees awards, including enhancements for extraordinary performance and results, would provide a much-needed catalyst to encourage citizens to pursue the types of litigation that most boldly defend and enhance civil rights. This case presents no occasion for the Court to displace Congress's well-considered judgment.

Section 1988 was Congress's swift and decisive response to a decision of this Court that prohibited attorney's fees awards absent express statutory authorization. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). A little over a year after *Alyeska* was decided, Congress overcame a Senate filibuster and enacted Section 1988, which authorizes "a reasonable attorney's fee" for prevailing litigants under an array of civil rights laws, including 42 U.S.C. §§ 1981, 1982, and 1983.

This brief supplements Respondents' analysis of Section 1988's legislative history in three distinctive ways. First, Section 1988 does more than simply provide access to the courts for plaintiffs seeking redress for individual wrongs. Congress also sought to promote *vigorous* and *effective* civil rights enforce-

ment. To achieve this broad-reaching objective, Congress adopted an expansive view of what constitutes a reasonable attorney's fee. In no way did Congress intend to restrict fees awards to the "lodestar" calculation that results from multiplying the number of hours an attorney worked by a reasonable rate for his or her services. Rather, Congress gave clear direction that enhancements above the lodestar are permitted in exceptional circumstances for extraordinary performance and results that forcefully advance civil rights.

Second, the legislative history emphasizes the symmetry between Section 1988 and Congress's simultaneous enactment of a statute that filled another gap created by *Alyeska*. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 302(3), 90 Stat. 1396 (codified as amended at 15 U.S.C. § 26) [hereinafter Antitrust Improvements Act], provided for reasonable attorney's fees in certain antitrust cases. Congress determined that courts should have the same power to grant enhancements to promote vigorous civil rights enforcement and to encourage the efficacious implementation of antitrust policy.

Third, in 1976, when Congress was considering Section 1988, it rejected an amendment that would have done exactly what Petitioners urge. It is an established principle of statutory construction that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded. Moreover, subsequent Congresses have confirmed the importance of enhancements by repeatedly rebuffing legislation to curtail or ban them.

After highlighting these distinctive features of the legislative history, this brief surveys cases decided after the enactment of Section 1988. Contrary to the assertions of Petitioners and their amici, courts have proved adept at crafting workable criteria for determining the rare circumstances in which enhancements for extraordinary performance and results are warranted to promote vigorous enforcement of civil rights. Courts have found it reasonable to enhance fees in cases that set important precedents or otherwise pave the way for future federal and private enforcement, recognizing that these cases require the greatest degree of ingenuity, and thus the number of hours an attorney works are less likely to reflect the true value of his or her services. In addition, courts have granted enhancements in cases that do not merely remedy violations of an individual's rights, but provide broad-reaching relief that roots out entrenched discrimination or eradicates systemic inequities.

ARGUMENT

I. Section 1988's legislative history demonstrates that Congress intended to permit enhancements for extraordinary performance and results that vindicate civil rights.

This Court has repeatedly relied upon legislative history in the interpretation of statutory terms that are not clear on their face. The "reasonable attorney's fee" language in Section 1988 is no exception. *See*, *e.g.*, *Blum v. Stenson*, 465 U.S. 886, 893-97 (1984). This section highlights three distinctive aspects of Section 1988's legislative history that are

not addressed in Respondents' brief. Close review of the legislative history confirms that the availability of enhancements was part of a deliberate congressional determination that civil rights enforcement should be vigorous, incentivized, and compensated on terms no less favorable than in other substantive areas where enhancements have long been granted to further key national priorities.

A. It was Congress's well-considered judgment that Section 1988 should provide significant incentives for vigorous and effective civil rights enforcement.

1. While Section 1988 ultimately passed by broad margins in both the House and Senate, *see* 122 Cong. Rec. 33315, 35130 (1976), the process preceding the vote reveals significant deliberation and intense debate—an illustration of Congress's carefully considered judgment. Indeed, proponents had to devote extraordinary resources to bring the legislation to a vote. The Senate approved Section 1988 after a cloture vote ended an unusually hard-fought filibuster. *Id.* at 32172. In the House, proponents utilized a procedural maneuver reserved for "emergency" legislation to ensure prompt consideration. *Id.* at 35118, 35119.

Congress thought these emergency measures were necessary because this Court's decision in *Alyeska* "dealt a serious blow to the effective enforcement of our civil rights laws." 122 Cong. Rec. 31471 (1976) (statement of Sen. Mathias). Fresh from the battles of the initial decades of modern civil rights enforcement, Congress intended its authorization of reasonable attorney's fees awards to do more than

simply provide access to the courts for those seeking redress for individual wrongs. It provided for robust attorney's fees awards as a catalyst for citizens to pursue "vigorous enforcement" of civil rights laws. S. Rep. No. 94-1011, at 4 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5911 [hereinafter Senate Report]; H.R. Rep. No. 94-1558, at 2-3 (1976) [hereinafter House Report].

Senator Tunney, the Senate bill's sponsor, reminded his colleagues that "[w]e cannot hope for *vigorous enforcement* of our civil rights laws unless we . . . remove the burden from the shoulders of the plaintiff seeking to vindicate the public right." 122 Cong. Rec. 33314 (1976) (emphasis added) (internal quotation marks omitted); *see also id.* at 31472 (statement of Sen. Kennedy) (Section 1988 will "assure all the citizens of this Nation . . . that Congress firmly intends that all our civil rights laws be *vigorously enforced*." (emphasis added)).[2] A key House proponent aptly summed up Section 1988's broad-reaching objectives: "A vote for the bill is a vote for effective civil rights laws." *Id.* at 35129 (statement of Rep. Seiberling).

2. To achieve these far-reaching objectives, Congress repeatedly recognized the multi-factor test set

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[2] References to the importance of "vigorous enforcement" also feature prominently in subcommittee hearings. *See*, *e.g.*, *Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 85 (1975) (statement of Armand Derfner, Lawyers' Committee for Civil Rights); *id.* at 122 (statement of Charles R. Halpern, Executive Director, Council for Public Interest Law); *id.* at 285 (recommendation of American Bar Association).

forth in a pre-*Alyeska* employment discrimination case litigated by amicus LDF—*Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)—as establishing "[t]he appropriate standards" for determining reasonable attorney's fees awards. Senate Report 6; *see also* House Report 8. The Senate Judiciary Committee further explained that the *Johnson* factors "are correctly applied" in three cases: *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, No. 73-63-WPG, 1974 WL 180 (C.D. Cal. June 5, 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). *See* Senate Report 6.

Congress deliberately chose this trilogy to emphasize its commitment to vigorous and effective civil rights enforcement. As detailed in Part II.A.3 *infra*, all three cases substantially advanced the state of civil rights law. *Davis* and *Stanford Daily* expressly granted enhancements for extraordinary performance and results, and the fees awards in all three cases were among the most robust of the pre-*Alyeska* era. *See Legal Fees: Hearings Before the Subcomm. on Representation of Citizen Interests of the S. Comm. on the Judiciary*, 93rd Cong. 862-1107 (1974) (collecting cases). Because these cases are particularly instructive with respect to the question presented, they merit the same close attention that the Court has devoted to them in prior interpretations of Section 1988. *See*, *e.g.*, *Blanchard v. Bergeron*, 489 U.S. 87, 92-93 (1989); *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) (plurality opinion); *Blum*, 465 U.S. at 893-95; *Hensley v. Eckerhart*, 461 U.S. 424, 430-32 (1983).

The legislative history thus refutes Petitioners' assertions that enhancements are unnecessary to achieve the "the clear purpose" of Section 1988. Pet. Br. 19-20. Their view that Section 1988 simply ensures that aggrieved individuals are able to attract the services of "competent counsel" is too narrow. *Id.* at 20. While Congress sought to eliminate unfairness to individuals deprived of their rights who do not have resources to hire an attorney, it also endorsed "the broadest and most effective remedies available to achieve the goals of our civil rights laws." Senate Report 3. Enhanced fees awards for extraordinary representation and results further Congress's broad-reaching objectives by encouraging attorneys to seek cases that will not simply apply well-settled precedents to remedy garden-variety statutory or constitutional violations, but that will also advance the state of civil rights law, dismantle entrenched institutional discrimination, or eradicate other systemic injustices.

B. Congress intended for the same standards to govern civil rights fees awards as apply in antitrust cases, where courts have long awarded enhancements for extraordinary performance and results.

Enhancements for extraordinary performance and results are also consistent with Congress's intent that "the amount of fees awarded under [Section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases." Senate Report 6. Respondents aptly demonstrate that, during the period preceding enactment of Section 1988, courts endorsed enhancements for extroardinary performance

and results in antitrust and securities cases, especially those with substantial public benefits. *See* Respondents' Br. 27-31 & n.3 (collecting cases).

For this reason, it is particularly significant that, on the day before Section 1988 passed the House, President Ford signed into law the Antitrust Improvements Act. Like Section 1988, the Antitrust Improvements Act filled a void created by *Alyeska*. As pertinent here, it authorized the award of reasonable attorney's fees for antitrust claims for injunctive relief.[3] H.R. Rep. No. 94-499(I), at 18-20 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2572, 2588-90. As with Section 1988, Congress concluded that reasonable attorney's fees in antitrust cases seeking injunctive relief were "an effective enforcement tool" to advance an important congressional policy objective. *Id*. at 2589.

In the House floor debates regarding Section 1988, Representative Seiberling expressly noted parallels to the Antitrust Improvements Act and observed that "certainly the laws protecting people's civil and constitutional rights are at least as important as are antitrust laws." 122 Cong. Rec. 35118 (1976).

Section 1988's legislative history also contains express reference to *Arenson v. Board of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974), a significant pre-*Alyeska* antitrust case that awarded an enhancement for extraordinary performance and results. *See*

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[3] Congress had previously authorized the award of reasonable attorney's fees for damages claims in antitrust cases. Clayton Antitrust Act, ch. 323, 38 Stat. 731 (1914) (codified as amended at 15 U.S.C. § 15).

Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary, 94th Cong. 421 (1975) (reprinting law review article discussing *Arenson*); Respondent's Br. 27 (citing *Arenson*).

The enhancement in *Arenson* was explicitly geared to ensuring vigorous enforcement of key congressional policy objectives in the antitrust context. The district court recognized "the social effect of th[e] litigation," 372 F. Supp. at 1352, noting that: "[a]n entire industry has been restructured" as a result of the suit, *id.*; "[t]his achievement could well be of great instructive precedent in subsequent litigation," *id.* at 1358; and the litigation was "fought out at a legal frontier where no lawyer knew all the answers," with plaintiffs' attorneys "blazing new legal trails," *id.* at 1352-53. The court further observed that "[t]he value of a lawyer's services is not merely measured by time or labor" because "[t]he practice of law is an art in which success depends as much as in any other art on the application of imagination—and sometimes inspiration—to the subject matter." *Id.* at 1356.

The enactment of the Antitrust Improvements Act nearly simultaneously with Section 1988 underscores Congress's considered judgment that Section 1988 should permit courts to award adjustments above the lodestar for vigorous enforcement of federal civil rights laws using the same standards applied in other complex federal litigation, particularly antitrust cases. It would be wholly inconsistent with Congress's intent for courts to remain free to grant enhancements for successful antitrust litigation but

not for vigorous civil rights enforcement, which Congress has long considered an equally critical national priority.

C. Congress has repeatedly rejected proposals that would have expressly prohibited enhancements.

1. In 1976, as Congress was debating Section 1988, it considered and rejected alternative language that would have made explicit the factors for setting a fees award and would have precluded enhancements for extraordinary performance and results. 122 Cong. Rec. 31477 (Amendment 470 to S. 2278). Specifically, an amendment from Senator Helms proposed that an attorney's fees award be "based upon the actual time expended by [an] attorney or agent and his or her staff in advising or representing a party (at prevailing rates for such services, including any reasonable risk factor component)." *Id.* at 31477-78.

After careful consideration, Congress rejected the Helms amendment. *Id.* at 31480-81. Instead, Congress adopted the "reasonable attorney's fee" language that it had previously used to ensure vigorous and effective enforcement of other civil rights statutes, including Titles II and VII of the Civil Rights Act of 1964. *See* 42 U.S.C. §§ 2000a-3(b), 2000e-5(k); *see also Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (interpreting the attorney's fees provision of Title VII so as not to "undercut the efforts of Congress to promote the vigorous enforcement" of that key employment antidiscrimination statute). The rejection of the Helms amendment is significant because, as this Court has held, "[f]ew

principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).

Petitioners' claim that "the plain statutory language" does not "permit[ ] any type of enhancement to an attorney's fee award," Pet. Br. 13, is therefore incorrect. Section 1988 adopted the "reasonable attorney's fee" language that Congress had long used in prior statutes authorizing fee-shifting for civil rights enforcement, because that language had already been interpreted in a manner that Congress sought to affirm. *See* Senate Report 4 ("It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act."); *Blum*, 465 U.S. at 894 n.10 ("Congress was legislating in light of experience when it enacted the 1976 fee statute."). Indeed, Congress deliberately chose to reinstate the court-created regime employed prior to *Alyeska*, which permitted courts to enhance fee awards for extraordinary performance and results in appropriate circumstances. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987) ("It is therefore clear that when Congress meant to set a limit on fees, it knew how to do so.").

2. Post-enactment legislative activity confirms that Congress did not intend for Section 1988 to preclude enhancements for extraordinary performance and results. Congress has adopted several amend-

ments to expand and revise Section 1988's coverage. *See*, *e.g.*, Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(b), 110 Stat. 3853; Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 4(a), 107 Stat. 1489. Yet Congress has never acted to restrict enhancements for extraordinary performance and results, even though courts, as discussed in Part II.A *infra*, have granted such enhancements during the decades since Section 1988 was enacted. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983) (holding that Congress can be assumed to have endorsed—by failing to overturn—a "well-established judicial interpretation").

Moreover, Congress has repeatedly rejected proposals to proscribe enhancements to attorney's fees awards. For instance, as Respondents point out, the Senate considered but opted not to act on legislation introduced in 1984 that would have amended Section 1988 to prohibit enhancements. *See* Legal Fees Equity Act, S. 2802, 98th Cong. § 6(a)(2) (1984); *The Legal Fee Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 98th Cong. 4-5 (1985); Respondent's Br. 45-46.

This 1984 effort to ban enhancements is only the tip of the iceberg. From 1982 through 1991, similar proposals were repeatedly introduced in the Senate, and at least two subcommittee hearings were held, but none of these bills was ever even voted out of committee. *See* S. 585, 97th Cong. § 722A(e) (1982); Legal Fees Equity Act, S. 1580, 99th Cong. § 6(a)(2) (1985); Legal Fees Equity Act, S. 1253, 100th Cong. § 6(a)(2) (1987); Legal Fees Equity Act, S. 90, 101st

Cong. § 6(a)(2) (1989); Legal Fees Equity Act, S. 133, 102nd Cong. § 6(a)(2) (1991); 131 Cong. Rec. 22346-67 (1985); 133 Cong. Rec. 13556-63 (1987); *see also Attorney's Fees Awards: Hearings on S. 585 (and on Amendments to Be Proposed by Senator Orrin G. Hatch) Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 8 (1982); *Legal Fees Equity Act: Hearings on S. 1580, S. 1794, and S. 1795 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 99th Cong. 2 (1986).[4]

Opponents of enhancements tried a different tactic in 1991. They proposed an amendment to the Civil Rights Act of 1991 that would have limited attorneys' fees to 20% of monetary awards. *See* 137 Cong. Rec. 28871-80 (1991). This approach also failed.

By contrast, Congress has explicitly proscribed enhancements in other contexts. In numerous statutory schemes, Congress has capped fees awards.[5]

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[4] In other contexts, Congress has resisted aggressive lobbying by state and local officials to limit enhancements. *See*, *e.g.*, *Municipal Liability Under 42 U.S.C. 1983: Hearings on S. 584, S. 585, and S. 990 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 550 (1981) (report of National Association of Attorneys General) (proposing that "amounts awarded as attorneys' fees should be limited by Congress to a reasonable hourly rate" and not "awarded based on some 'benefit to the class' or private attorney general theory"); *id*. at 104 (prepared statement on behalf of the National Institute of Municipal Law Officers) (proposing a ban on enhancements).

[5] *See*, *e.g.*, 28 U.S.C. § 2412(d)(1)(A) and (2)(A) (capping fees under the Equal Access to Justice Act at $125 per hour "unless the court determines that an increase in the cost of living or a

Moreover, a provision enacted by Congress in 1986 to govern attorney's fees for claims brought under the Individuals with Disabilities Education Act explicitly states that "[n]o bonus or multiplier may be used in calculating the fees awarded." 20 U.S.C. § 1415(i)(3)(C). Legislative history reveals that this statutory language was intended to adopt a more restrictive approach than permitted under Section 1988. *See* H.R. Rep. No. 99-687, at 6 (1986) (Conf. Rep.), *as reprinted in* 1986 U.S.C.C.A.N. 1807, 1808; Respondents' Br. 18, 45.

Congress's repeated consideration and rejection of efforts to eliminate enhancements during the thirty-two years that Section 1988 has been in force confirms that Congress intended to authorize these incentives to encourage vigorous enforcement, and that it has never chosen to abandon this approach.

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special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee"); 28 U.S.C. § 2678 (fees under the Federal Tort Claims Act limited to 20% of an administrative settlement and 25% for fees in cases that are litigated); 42 U.S.C. § 406(b)(1) (fees under the Social Security Act for past-due benefits capped at the lesser of 25% of the award or $4,000); 22 U.S.C. § 277d-21 (fees under the American-Mexican Chamizal Convention Act limited to 10% of the award); 48 U.S.C. § 1424c(f) (fees in claims regarding land under the Guam Organic Act capped at 5% of the award); 50 U.S.C. App. § 1985 (fees under the Japanese-American Evacuation Claims Act limited to 10% of the award).

II. Federal courts have developed workable criteria that reserve enhancements for litigation that substantially furthers Congress's objective of vigorous civil rights enforcement.

Cases that obtain far-reaching results or break new ground for civil rights further the purposes of Section 1988 described in Part I.A *supra* by making a significant contribution to the vigorous enforcement scheme envisioned by Congress. Enhancements for extraordinary performance and results recognize that if private attorneys do not have appropriate incentives to bring such cases, civil rights laws may be under-enforced. Contrary to the arguments of Petitioners and the United States, *see* Pet. Br. 50-51; U.S. Br. 22, courts have developed manageable standards to distinguish the exceptional cases warranting enhancements for extraordinary performance and results that further Congress's broad-reaching goals.[6]

A. Courts have properly limited enhancements to those cases that establish important precedents or achieve broad relief that roots out entrenched inequities.

Courts have developed workable criteria to limit enhancements to the rare and exceptional cases

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[6] Some of the cases discussed below were decided prior to this Court's decisions proscribing enhancements for contingency and certain other factors. *See*, *e.g.*, *City of Burlington v. Dague*, 505 U.S. 557 (1992). Nevertheless, the reasoning in these cases supporting enhancements awarded for extraordinary performance and results is still valid because the courts considered these factors independently.

where attorneys have achieved results that further the purposes of Section 1988 by promoting vigorous civil rights enforcement. *See*, *e.g.*, *Hughes v. Repko*, 578 F.2d 483, 488-489 (3rd Cir. 1978) ("We emphasize, as did the Congress that enacted [Section 1988], that the district court should evaluate the fee to be awarded in light of the important substantive purposes of the Civil Rights Act, 42 U.S.C. § 1982 (1970), upon which plaintiffs relied."). Courts have found it reasonable to enhance fees in cases that set important civil rights precedents or otherwise pave the way for future effective federal and private enforcement; or cases that do not merely remedy an individual case of discrimination, but also obtain substantial relief that ends discriminatory policies of large institutions or roots out entrenched inequities.

1. When a civil rights lawsuit resolves unsettled legal questions or creates a new cause of action, the effect of the decision extends beyond that case through the creation of precedent, which furthers the development of the law, creates a foundation for future litigation, and increases voluntary compliance. *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183, 201 ("A private attorney general whose activities produce precedent is thus in some important ways more effective than a private attorney general whose activities produce only local change."); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557, 611-15 (1992) (describing the costs to the legal system when judicial interpretation is delayed). When attorneys succeed in obtaining such groundbreaking decisions, they have advanced Section 1988's goal of vigorous civil rights enforcement.

In these limited instances, courts have awarded enhancements above the lodestar, recognizing that these cases require the greatest degree of ingenuity, and thus the hours that an attorney works are less likely to reflect the value of his or her services.[7]

For example, the Sixth Circuit found that a successful challenge to entrenched segregation in Tennessee's university system was a "rare and exceptional" case that could meet the high standard for an enhancement. *Geier v. Sundquist*, 372 F.3d 784, 796 (6th Cir. 2004). The *Geier* litigation included the first holding by a federal appellate court that there is "an affirmative duty to remove all vestiges of state-imposed segregation in institutions of public higher education, just as there [is] such an obligation at lower educational levels." *Id.* at 795; *see also Geier v. Univ. of Tenn.*, 597 F.2d 1056, 1065 (6th Cir. 1979).

In its 2004 decision regarding attorney's fees for co-counsel who litigated *Geier* with LDF, the Sixth Circuit determined that the district court had failed to consider sufficiently whether the results obtained in a particular phase of the litigation warranted an enhancement. The Sixth Circuit observed that "[t]he

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[7] Enhancements for precedent-setting results are different from enhancements based on novelty or complexity, which this Court criticized in *Blum*, 465 U.S. at 898-99, on the ground that such factors increase either the number of hours a lawyer must spend on the case or the lawyer's hourly rate and thus are reflected in the lodestar. In some cases, the lodestar figure might fully account for extraordinary performance and results, but truly precedent-setting cases like *Geier v. Sundquist*, discussed *infra*, are often not merely the result of additional hours or higher fees.

legal principles advanced by the Geier Plaintiffs were pathbreaking and of great social import." *Geier*, 372 F.3d at 795. The court further emphasized the "exceptional nature and national significance of this case" insofar as it "steered the jurisprudence in a different direction" and provided the impetus for "concerted" federal enforcement efforts, including litigation to desegregate the systems of public higher education in four other states. *Id.* at 796. Moreover, the groundbreaking legal principles established in *Geier* were subsequently affirmed by this Court in *United States v. Fordice*, 505 U.S. 717 (1992).

Geier thus contributed significantly to the enforcement of civil rights law by clarifying the constitutional obligations of state higher education systems and spurring additional enforcement efforts. On remand, the district court took these factors into account and concluded that a 25% enhancement was "justified and reasonable" given the "overall result obtained and the rare and exceptional nature of the case." *Geier v. Sundquist*, No. 5077, slip op. at 10 (M.D. Tenn. Jan. 21, 2005).

In a similarly pathmarking case that provided significant guidance regarding compliance with antidiscrimination law, the district court in *Chrapliwy v. Uniroyal, Inc.*, 583 F. Supp. 40, 45 (N.D. Ind. 1983), awarded an enhancement for "exceptional" performance and results under Title VII's attorney's fees provision, 42 U.S.C. § 2000e-5(k), which served as a template for Section 1988. In *Chrapliwy*, the plaintiff class of over 500 female workers at an Indiana factory obtained a substantial settlement in a

Title VII action challenging gender-segregated hiring and seniority policies. 583 F. Supp. at 42.

The settlement was prompted by the plaintiffs' separate administrative action, in which the U.S. Department of Labor threatened to bar the factory's corporate owner, then one of the federal government's largest contractors, from future contracts, pursuant to Executive Order No. 11246, 30 Fed. Reg. 12,319 (1965), *reprinted as subsequently amended in* 42 U.S.C. § 2000e app. (prohibiting discrimination by federal contractors). *Chrapliwy*, 583 F. Supp. at 42-43; *see also Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 444-48 (N.D. Ind. 1981). In awarding an enhancement, the district court emphasized the "impact of this lawsuit on the Department of Labor":

> The actions by the plaintiffs' attorneys forced the Labor Department to create a working enforcement system to implement Executive Order 11246, and police other federal contractors in their compliance with its procedures. This mechanism will continue to operate, vindicating the rights of other employees and effectuating the congressional intent behind both Title VII and the Executive Order.

Chrapliwy, 583 F. Supp. at 45 (quoting *Chrapliwy*, 509 F. Supp. at 462).[8]

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[8] The district court originally approved a larger enhancement. *See Chrapliwy*, 509 F. Supp. at 462. The Seventh Circuit held that the district court "carefully evaluated its reasons for allowing" the enhancement. *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 770 (7th Cir. 1982). But the Seventh Circuit determined that the district court's lodestar calculation was too

Also illustrative of this category of cases is *Shakman v. Democratic Organization of Cook County*, 677 F. Supp. 933 (N.D. Ill. 1987), in which the district court granted an enhancement equal to one-third of the lodestar because it had "never presided over a case with greater significance or more widefelt impact in the area of civil rights." *Id.* at 944-48. Counsel was able to "invoke judicial protection of constitutional rights which previously had not been clearly recognized by the courts"; and the litigation gave "rise to a new class of equitable actions" to protect the "constitutional right[ ] to be free from political coercion in public employment" and "resulted in substantial political, social and economic benefits not only for members of the plaintiff classes, but also for all who are affected by the public officers and entities named as defendants in this action." *Id.* at 945, 947.[9]

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low and ordered increases. *Id.* Due to this alteration, the Seventh Circuit remanded for the district court to check for "possible overlaps" between the factors encompassed in the new lodestar figure and the enhancement. *Id.* On remand, the district court reduced the amount of the enhancement to account for overlap. *Chrapliwy*, 583 F. Supp. at 45.

[9] *See also Rajender v. Univ. of Minn.*, 546 F. Supp. 158, 171 (D. Minn. 1982) (granting an enhancement in a case that resulted in comprehensive policy reforms "to ensure that the University of Minnesota is purged of discriminatory employment practices"); *Reynolds v. Abbeville County Sch. Dist. No. 60*, No. 72-1209, 1978 WL 64, at *8 (D.S.C. Mar. 16, 1978) (granting a 10% enhancement because the case contributed to "the elimination of discrimination by the Edgefield public schools in faculty employment and assignment [which] will produce benefits for all teachers, principals and residents of the county," and "[t]he case also established precedent which will

2. Courts have also found it appropriate to enhance fees in civil rights cases that achieve far-reaching policy changes and root out entrenched statutory or constitutional violations. As this Court has recognized, Congress intended for fee-shifting provisions to promote broad, rather than piecemeal, civil rights compliance. *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of *securing broad compliance with the law*." (emphasis added)).

This Court's observations in *Piggie Park*—a case that was cited favorably in the legislative history of Section 1988, *see* Senate Report 3; House Report 6—remain relevant today given the central role that private litigants continue to play in the enforcement of civil rights laws. Cases that establish broad-based relief vindicate the public interest by bringing large institutions or government agencies into full compliance with the law, which benefits similarly-situated plaintiffs and the public generally.

Awarding an enhancement on this basis does not conflict with this Court's admonition in *Blum* that the "number of persons benefited" should not be a significant consideration in calculating fees. 465 U.S. at 900 n.16 (emphasis omitted). In the context of a class action, *Blum* held that an attorney should not need enhanced compensation merely because the class includes a large number of individuals. *Id.*

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benefit faculty members, present and future, in the jurisdiction of the Fourth Circuit").

("Presumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual."). *Blum* did not, however, consider the incentives that may be necessary to attract attorneys to cases with sweeping public benefits; it addressed only the level of lawyerly diligence required once a case has been filed.

For example, a district court awarded a 50% enhancement for exceptional performance and results in a class action that successfully challenged the hiring and promotion practices of the Pennsylvania State Police, where racial discrimination "was so entrenched that the Governor of the Commonwealth conceded he could not eliminate it—and he had failed in the attempt." *Bolden v. Pa. State Police*, 491 F. Supp. 958, 966 (E.D. Pa. 1980). The court recognized that the lawsuit resulted in "tangible benefits flowing directly to the citizenry of the Commonwealth." *Id.* As a consequence of the case, "minorities have access to employment in the Pennsylvania State Police on a nondiscriminatory basis, and the citizens of Pennsylvania will have a representative law enforcement agency that is not tainted by constitutional illegality." *Id.*

An equally far-reaching outcome was one of the key factors justifying the enhancement in *White v. City of Richmond*, 559 F. Supp. 127 (N.D. Cal. 1982), *aff'd*, 713 F.2d 458 (9th Cir. 1983). The plaintiffs in *White* alleged that Richmond, California police officers routinely beat, harassed, and then filed groundless charges against African-American residents. The lawsuit resulted in a consent decree that required the police department to overhaul its policies

on the use of deadly and non-deadly force, establish training programs and counseling for all officers, permit an independent monitor to inspect the department's internal affairs and citizen complaint files, and provide an affirmative action program for minority officers. *White*, 559 F. Supp. at 130, 134. The Ninth Circuit upheld the district court's conclusion that the comprehensive remedial scheme represented the type of "exceptional success" warranting an enhancement. *White*, 713 F.2d. at 462.

Similar considerations have guided other courts in awarding enhancements for outcomes that contributed exceptionally to civil rights enforcement, and especially those that precipitated "fundamental change to a recalcitrant agency" or institution. *Hyatt v. Apfel*, 195 F.3d 188, 192 (4th Cir. 1999).[10] This criterion has also been applied in cases in which LDF opposed the substantive result for which the enhancement was awarded. *See*, *e.g.*, *Parents In-*

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[10] *See also*, *e.g.*, *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 330-31, 334 (W.D. Tex. 2007) (awarding an enhancement for a successful challenge to a racially discriminatory credit-scoring system where attorneys achieved "extraordinary results," including a "change in the credit scoring formula, an educational outreach program, multi-cultural marketing, [and] an improved appeals process"); *Morales Feliciano v. Hernandez Colon*, 697 F. Supp. 51, 61 (D.P.R. 1988) (granting an enhancement because, *inter alia*, plaintiffs' attorneys were "pioneers of the prisoners' rights movement in Puerto Rico" and "[w]ithout their initiative, more than 8,000 citizens would probably still be held under custody in violation of their basic constitutional rights"); *Kirksey v. Danks*, 608 F. Supp. 1448, 1458 (S.D. Miss. 1985) (awarding an enhancement where, *inter alia*, "this lawsuit was the one major factor causing the petition drive and referendum election ultimately changing the form of government for the City of Jackson").

volved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); *Meredith v. Jefferson County Bd. of Educ.,* No. 3:02CV-620-H, 2007 WL 3342282, at *4 (W.D. Ky. Nov. 9, 2007) ("Regardless of one's view of the law or educational policy, this case has changed the face of American jurisprudence.").

The instant case squarely meets this second criterion for awarding an enhancement for extraordinary performance and results. As the district court recognized, Respondents secured "sweeping relief to the plaintiff class" of 3,000 foster care children who alleged widespread constitutional and statutory violations, and they did so through a consent decree that is both "comprehensive in its scope and detailed in its coverage." Pet. App. 152-54 (reviewing the decree's thirty-one outcome measures that seek improvement in different areas of the foster care system). The district judge further concluded: "After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.* at 154.

3. The three attorney's fees cases cited in the legislative history of Section 1988, *see* Part I.A *supra*, are also consistent with the criteria outlined above:

Davis v. County of Los Angeles. In *Davis*, a class of Latino and African-American plaintiffs prevailed on their claim that the Los Angeles County Fire Department's hiring practices were racially discriminatory. A sweeping remedial order provided "substantial and significant benefits" to the class, including fair and equitable hiring procedures. *Davis*, 1974 WL 180, at *1. On a motion for attorney's fees, the

district court enhanced the lodestar figure by more than 13%, after considering the "excellent results" achieved by the plaintiffs' attorneys. *Id*. at *2.[11]

Stanford Daily v. Zurcher. After demonstrators injured several police officers during a protest against Stanford University Hospital's firing of an African-American employee, the *Stanford Daily* published photographs of the incident. *See* William Trombley, *Campuses Optimistic That Calm Will Prevail*, L.A. Times, Apr. 12, 1971, at D1. A federal district court held that the police violated the Fourth Amendment when they searched the newspaper's office for negatives of unpublished photographs in an effort to identify the assailants. *Stanford Daily v. Zurcher*, 353 F. Supp. 124, 126-27 (N.D. Cal. 1972). On a motion for attorney's fees, the district court granted an enhancement based in part on the extraordinary "results obtained by the litigation," which set a new constitutional standard for searches of individuals who are not themselves suspected of a crime. *Stanford Daily*, 64 F.R.D. at 687-88.[12]

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[11] The Ninth Circuit affirmed in part the liability and remedial rulings. *See Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977). This Court granted certiorari, but subsequently dismissed the case as moot. *County of Los Angeles v. Davis*, 440 U.S. 625 (1979).

[12] Although this Court acknowledged that the district court's constitutional analysis was pathmarking, it ultimately rejected such a "sweeping revision of the Fourth Amendment." *Zurcher v. Stanford Daily*, 436 U.S. 547, 554 (1978). In doing so, however, the Court did "not consider the propriety of [the fees] award," *id.* at 553 n.3, and its decision does not disavow Congress's intent to authorize Section 1988 enhancements where a similarly precedent-setting result is obtained.

Swann v. Charlotte-Mecklenburg Board of Education. This case, which was litigated by amicus LDF and local co-counsel, involved "the largest metropolitan school system which at that time had ever been completely desegregated by order of court." *Swann*, 66 F.R.D. at 485. Ruling on a motion from LDF's local co-counsel for attorney's fees after years of litigation including a victory in this Court, *see Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the district court did not expressly award an enhancement; but, relying in part on the attorneys' "excellent" results in the face of significant obstacles, the district court granted them more than double the rate it identified as the minimum hourly fee charged by counsel appearing in federal courts. *Swann*, 66 F.R.D. at 484, 486.

Enhancements in antitrust cases, including *Arenson* described in Part I.B *supra*, also are consistent with these criteria. *See* 372 F. Supp. at 1352, 1358 (awarding an enhancement where "[a]n entire industry has been restructured" as a result of the suit and the case "could well be of great instructive precedent in subsequent litigation").

4. Federal courts have been careful to respect this Court's mandate that enhancements for extraordinary performance and results should only be granted in exceptional circumstances. Enhancements are uncommon, and courts have consistently denied them for garden-variety discrimination claims brought by individual plaintiffs. *See*, *e.g.*, *West v. Tyson Foods, Inc.*, No. 4:05-cv-183M, 2008 WL 5110954, at *3 (W.D. Ky. Dec. 3, 2008); *Baty v. Willamette Indus., Inc.,* 985 F. Supp. 1002, 1008 (D. Kan. 1997); *see also Lynch v. City of Milwaukee*, 747

F.2d 423, 428 (7th Cir. 1984) ("[P]ositive multipliers should be given only in cases that are significant and where the quality of the attorney's work is considerably above average. . . ." (internal citations and quotation marks omitted)).

Federal courts have thus consistently recognized the link between achievement of the important objectives set out by Congress in federal civil rights statutes and the practical reality that lawyers need incentives to choose cases that challenge entrenched inequities and have the potential to produce groundbreaking results, and then to advocate for appropriately wide-ranging relief. *See Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of City of White Plains*, 533 F. Supp. 1054, 1065-66 (S.D.N.Y. 1982) (finding an enhancement justified to encourage private attorneys to take "cases such as the present one, which succeed in accomplishing major changes in the hiring policies and practices of municipal agencies, and which open up significant employment opportunities to minorities").

B. The criteria that courts have used to award enhancements for extraordinary performance and results are consistent with Supreme Court precedent.

The criteria outlined in Part II.A *supra* are consistent with the guidelines set forth by this Court's interpretations of Section 1988 and similar attorney's fees provisions in other federal statutes.

In *Blum*, this Court rejected a categorical rule that enhancements are never permissible in cases of "exceptional success." 465 U.S. at 897, 901. *Blum* stressed that it was not precluding consideration of

"results obtained" but rather establishing a strong presumption that results are factored into the lodestar calculation. *Id.* at 900-01. That presumption may be rebutted, but "only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower court." *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (quoting *Blum*, 465 U.S. at 898-901). As discussed in Part II.A *supra*, federal courts have appropriately applied these instructions to distinguish those rare and exceptional cases for which results-based enhancements are justified.

Federal courts' awards of enhancements for extraordinary performance and results are also consistent with *City of Burlington v. Dague*, 505 U.S. 557 (1992) (denying an enhancement on the ground that the case was taken on a contingency basis). In *Dague*, the Court was concerned that awarding contingency enhancements would create incentives for attorneys to bring "relatively meritless claims," which is "an unlikely objective of the 'reasonable fees' provisions." *Id.* at 563. In sharp contrast, enhancements for extraordinary performance and results create exactly the sort of incentives that Congress contemplated: They encourage attorneys to choose and pursue cases with strong factual bases that significantly further equality of opportunity and other critical civil rights.

The Court in *Dague* also worried that contingency enhancements would already be reflected in the lodestar calculation. *Id.* at 562-63. But in the rare cases warranting enhancements for exceptional performance and results, the lodestar does not always

provide the appropriate incentives to attract competent counsel to assert bold legal theories in challenges to entrenched discrimination and other inequities. *See, e.g.*, *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala. 1972) (noting that a voting discrimination case, where "plaintiffs have benefited their class and have effectuated a strong congressional policy," "clearly falls among those *meant to be encouraged* under the principles articulated in [Supreme Court precedents endorsing attorney's fees for citizens acting as private attorneys general]" (emphasis added)), *cited with approval in* Senate Report 4 n. 3. Without incentives for attorneys to take on these types of cases, civil rights laws will not always be vigorously and effectively enforced, contrary to the intent of Congress.

Moreover, while the lodestar calculation typically reflects the skills and experience that a lawyer brings to bear on a case, it is not determined based on the type of case and relief the lawyer chooses to pursue. *Cf. Graves v. Barnes*, 700 F.2d 220, 223 (5th Cir. 1983). The proper inquiry in determining an enhancement for extraordinary performance and results is the *value* of the legal services provided—more value is provided through broad-reaching relief. For example, where a civil rights litigant secures an order or consent decree that results in groundbreaking policy reforms, the outcome affects not only the plaintiffs but also numerous other individuals who do not have to sue to obtain relief on their own.

In sum, Petitioners urge—without any basis in text, precedent, or legislative history—a new Court-made rule that would structurally under-compensate

civil rights litigants in key cases yielding the most extraordinary results that significantly safeguard and enhance critical civil rights. The Court should reject Petitioners' unsupported attempt to ignore Congress's considered judgment that the full availability of reasonable attorney's fees is crucial to the vigorous and effective enforcement of federal civil rights laws.

CONCLUSION

For the foregoing reasons, as well as those outlined by Respondents, the decision below should be affirmed.

Respectfully submitted,

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