NO. 08-970

IN THE
SUPREME COURT OF THE UNITED STATES

SONNY PERDUE, ET AL.,

Petitioners,

v.

KENNY A., ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The National School Boards Association ("NSBA") is a nonprofit organization representing state associations of school boards, as well as the Hawaii State Board of Education and the Board of Education of the U.S. Virgin Islands. Through its state associations, NSBA represents over 95,000 school board members who govern over 14,000 local school districts serving about 49.8 million students.

Serving a population of almost 50 million students, *Amicus* has a strong interest in ensuring that limited financial resources are directed toward providing the highest quality educational services for these students, rather than expended on attorneys or in litigation.

The Eleventh Circuit's decision permitting enhanced attorneys' fee awards based solely on the quality of performance and results obtained is against clear public policy and will result in scarce resources being redirected toward attorneys and litigation, and away from improving student achievement.

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[1] Pursuant to Sup. Ct. R. 37.6, *Amicus* notes that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Sup. Ct. R. 37.3, counsel further notes that counsel of record for the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Nation's public schools are especially vulnerable to the adverse consequences of permitting the unpredictable enhancement of attorneys' fees under federal fee-shifting statutes. The chronic inadequacy of available resources to fulfill the growing demands placed on public schools frequently results in programmatic compromises that engender dissatisfaction and legal controversy. Given the paramount role school districts play in the development of our youth and in our civic infrastructure, litigation against school districts is, by its very nature, often intended not only to vindicate individual interests, but also to effectuate systemic change—change of the kind that in this case had drastic consequences for the fees awarded. Confronted by the prospect of high legal costs and institutional distraction entailed by litigation, school districts have powerful incentives to resolve legal disputes amicably—even disputes in which, were they pursued to their conclusion, the school district ultimately would prevail—and to take steps, beyond those legally required, in an attempt to ensure that similar disputes will not recur. By doing so schools can avoid future litigation and focus their attention on their educational mission

The combination of these realities makes this case one of extreme importance to school boards. By diverting scarce funds from educational programs to legal costs, the kind of fee enhancement at issue in this case has the ironic but very real potential to disserve those whom the federal statutes are intended to protect. By undermining the relative

predictability of the "lodestar" approach to calculating attorneys' fees, the Eleventh's Circuit's historical approach to fee enhancement stands to turn school districts' good faith efforts to compromise in legal disputes into a serious fiscal gamble. The message that will be delivered to school officials should this Court affirm the Eleventh Circuit is this: When it comes to attempts to address legal dissatisfaction with school district programs or practices, no good deed goes unpunished.

ARGUMENT

I. ENHANCED FEE AWARDS ARE AGAINST PUBLIC POLICY, ACTUALLY HURTING STUDENTS SERVED BY PUBLIC SCHOOLS.

The State of Georgia, like many other states,[2] is suffering from a significant budgetary shortfall which has led to dramatic cuts in funding for public services, including education.[3] In the midst of these dire economic times, the Respondents ask this Court to adopt the Eleventh Circuit's novel "enhanced fee award" theory, giving lower courts the discretion to substantially increase fee awards above the lodestar

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[2] *See* Reports from the non-partisan Education Commission of the States: *State Budget Shortfalls: Postsecondary Education Impacts,* http://www.ecs.org/clearinghouse/80/47/8047.pdf *and State Budget Shortfalls: Examples of State Responses,* http://www.ecs.org/clearinghouse/79/52/7952.pdf, last visited 6/24/09).

[3] *See* http://www.opb.state.ga.us/media/9848/2009-01-26_web_fy2010_state%20of%20georgia%20budget.pdf, last visited 6/24/09).

amount, based solely on subjective evaluations of the results obtained and the quality of legal representation provided. As discussed in detail in Judge Carnes' opinion and in the State of Georgia's principal brief, an enhanced fee award runs counter to prior decisions of this Court and the public policy that underlies fee-shifting statutes. Because public schools have limited and defined budgets, bonuses paid to attorneys unavoidably reduce the amount of money available to serve the educational needs of school children, including those who are the intended beneficiaries of the underlying civil rights litigation. Especially in tough budgetary times, public policy favors the use of taxpayer funds to provide essential educational services to students, not to enrich lawyers who already are well-compensated under the lodestar amount.

The fee-shifting statute at issue in the present case, 42 U.S.C. § 1988 (2000), was enacted by Congress in response to this Court's decision in *Aleyska Pipeline Service Co. v. Wilderness Society* 421 U.S. 240, 270 (1975), affirming the so called "American rule" and permitting prevailing plaintiffs to recover a "reasonable fee award" in civil rights litigation. In *Hensley v. Eckerhart*, 461 U.S. 424 (1982), this Court noted that the "purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Id.* at 429. The Congressional Record indicates that § 1988 was enacted "to promote the enforcement of the Federal civil rights acts, as Congress intended, and to

achieve uniformity in those statutes and justice for all citizens."[4]

This goal, to provide "justice for all citizens," is a key factor when divining Congress's intent in using the term "reasonable" in § 1988. The intent of § 1988 was not to enrich attorneys, but to ensure that the civil rights of citizens are protected. Congress noted that the fees under § 1988 should be "adequate to attract competent counsel" to prosecute civil rights cases and obtain relief when appropriate, but should not "produce windfalls to attorneys." S.Rep. No. 94-1011, p. 6 (1976), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5913; see also H.R.Rep. No. 94-1558, *supra*, at 9.

Unfortunately, the Eleventh Circuit's historical approach to this issue, crafted prior to several recent decisions by this Court, requires that the enhanced fee award be based on quality of performance and results obtained. This approach cuts directly against the express public policy underlying § 1988 by providing windfalls to attorneys at the direct expense of the individuals whose interests they purport to represent.[5]

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[4] H.R. Rep.No. 94-1558, 94th Cong., 2d Sess. 1, 9 (1976); *see also* S. Rep.No. 94-1011, 94th Cong., 2d Sess. 6 (1976), 1976 U.S. Code Cong. & Adm. News at 6343; Remarks of Senators Scott, Mathias, Kennedy, and Tunney, 122 Cong.Rec. S16251-16252 (daily ed. Sept. 21, 1976); *id.* at S17051 (daily ed. Sept. 29, 1976), and Representatives Kastenmeier, Fish, Holtzman, Jordan, and Seiberling, *id.* at H12155, 12163-12165 (daily ed. Oct. 1, 1976).

[5] This argument is not intended to discount the valuable work that is accomplished by the attorneys who take on these cases. Indeed, the attorneys in this case clearly provided a valuable service by encouraging needed changes in the State's foster care system. However, the lodestar approach is crafted to

Like the present case, litigation against school districts frequently results from chronic underfunding that leads to systemic deficiencies.[6] In such cases, public schools will often seek to resolve the matter through mediation or negotiations that culminate in settlements or consent decrees that call for significant policy changes, structural overhauls, programmatic improvements and increased funding to correct the deficiencies. But under the Eleventh Circuit's "enhanced fee award theory," courts could reward the plaintiffs' attorneys with large performance bonuses that school systems can ill afford to pay, especially in light of the magnitude of the changes they have agreed to undertake in these settlement agreements. Under these circumstances, as Judge Carnes noted: "The perverse irony of the seven figure, court ordered gratuity . . . is that it reduces the amount of state funds available to care

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provide full compensation under these circumstances. *Amicus* simply believes that compensation for good lawyering already is a component of the rate portion of the lodestar calculation and therefore awarding a second bonus, as was done here, amounts to double-dipping. In the case of schools, this would wrongly reduce funds available to serve the educational needs of all students.

[6] For example, while the Federal Government committed to funding 40 percent of the cost per pupil for special education when it first enacted the predecessor statute to IDEA in 1974, it currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than $55 billion for the last four fiscal years. Ann Lordeman, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends*, CRS Report for Congress (April 11, 2008). Even with the additional temporary funding to be provided under the American Recovery and Reinvestment Act of 2009, the gap will remain substantial.

for . . .,' the very group that the [rewarded attorneys were so] dedicated to protecting."

This paradox—that scarce public funds intended to ensure all students receive appropriate educational services could be reallocated by court order to well-heeled attorneys—runs directly contrary to the public policies underlying our civil rights statutes and § 1988 in particular. The possibility that such a result will become commonplace is particularly troubling. Just at the point when public schools are facing both increasing expenses to serve a rapidly growing number of at-risk student groups, such as children with disabilities and English Language Learners, and declining revenues, the Eleventh Circuit's decision permits trial courts, at their own discretion, to redirect these scarce resources from needy students to attorneys. If Congress had intended such a result, it would have modified § 1988 after this Court's decisions in *Blum v. Stenson*, 465 U.S. 886 (1984), *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), which all rejected such enhancements.

The possibility of fee enhancements is particularly troublesome for school districts that adopt and operate on annual budgets that cannot begin to predict or accommodate fee enhancement awards. Since school districts frequently pay legal costs out of general operating funds, even one fee enhancement award has the potential to wreak havoc on their budgets. The deficit caused by the award would, in many instances, cause school

districts to fall out of compliance with state laws that mandate balanced budgets. *See, e.g,* Alaska Stat. § 14.17.099 (2009); Cal. Educ. Code § 42127 (2007); Mich. Comp. Laws Ann. § 388.1702 (2000); N.C. Gen. Stat. Ann § 115C-425 (1993); R.I. Gen. Laws § 45-12-22.1 (2003).

II. THE PROSPECT OF ENHANCED FEE AWARDS UNDERMINES THE RELATIVE CERTAINTY OF THE LODESTAR APPROACH, THEREBY REDUCING THE LIKELIHOOD OF SETTLING CERTAIN TYPES OF SCHOOL LITIGATION.

This Court has repeatedly noted that "[t]he 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence. We have established a 'strong presumption' that the lodestar represents the reasonable fee … ." *Dague*, 505 U.S. at 562. This language brings a degree of certainty to the calculation of the attorneys' fee component in civil rights litigation, which aids significantly in the resolution of these matters. This degree of certainty is critical to the advice school attorneys give to their school board clients about the prudence of proceeding with litigation or attempting good faith settlements.

Knowing the approximate range of the attorney's fees allows school boards to make more informed decisions about how to expend taxpayer dollars to resolve legal claims and gives the parties a structural framework within which to negotiate the resolution of attorneys' fees claims rather than litigate them. Indeed, that was the express purpose

of this approach: "[T]he interest in ready administrability that has underlain our adoption of the lodestar approach, *see, e. g., Hensley*, 461 U.S. at 433, and the related interest in avoiding burdensome satellite litigation (the fee application 'should not result in a second major litigation,' *id.*, at 437), counsel strongly against adoption of contingency enhancement." *Dague*, at 566. Unfortunately, the Eleventh Circuit's approach eliminates the certainty of the lodestar framework. Specifically, this new scheme could lead to satellite litigation over fees in virtually every case, brought by plaintiffs' attorneys who have decided to try to grab the enhancement brass ring instead of settling fee claims. Indeed, because a fee award includes fees incurred in an attempt to obtain fees, there is absolutely no disincentive to litigate these cases.

As noted in *Dague,* the lodestar approach promotes the prompt resolution of these fee disputes because it gives a degree of certainty to fee petition litigation. The parties know that the maximum exposure or ceiling for attorneys' fees is a simple factor of the hours being claimed times the rate being charged. By creating a ceiling on liability and thus a comfort level for the parties, the lodestar approach allows them to settle the underlying case while agreeing to disagree on fees and sometimes might even make disagreement over fees less likely. This option serves the public interest by allowing for the prompt resolution, short of trial, of underlying matters, thus providing needed benefits to the litigants and restricting any fee dispute to issues within the lodestar parameters.

Without the surety of the lodestar ceiling and with the prospect of being subjected to enhanced fee

awards, these settlements will become much less common and come at greater cost to school districts. In an attempt to avoid enhanced fee awards, school districts may opt to proceed with the litigation and prevail on the merits. Where the defendant has at least a tenable defense, there is markedly less incentive to settle since it opens the possibility of a fee enhancement. This is a waste of precious public resources.

In the present case the State of Georgia was faced with trying to resolve the underlying claims related to the foster care system as well as an attorneys' fee claim in the amount of $7,171,434.30 for 29,908.73 hours at rates of between $75 and $495 an hour. *Perdue v. Kenny A*, 532 F.3d 1209, 1216 (11th Cir. 2008). Georgia was able to successfully negotiate the resolution of the underlying claims, but the parties disagreed on the attorneys' fees component. They eventually settled the underlying claims and agreed that they would "'attempt without court intervention to resolve the proper amount of Class Counsel's fees and expenses of litigation.' If the parties could not reach an agreement, then [t]he amount of any award shall be determined by the Court in accordance with the requirements of applicable law and procedures." *Id.*

This process is fairly common in litigation against school districts, and is facilitated by the certainty that the lodestar approach brings to the table. Under the lodestar approach, a school district may be comfortable settling the underlying litigation and submitting the fee claim to a court for resolution, believing that there is a ceiling amount

on the fees being requested. However, if in addition to the lodestar amount, a school district could also be subjected to a drastic and unpredictable enhancement of the fee award, school boards may very well decline to settle the underlying litigation, and force the matter to trial. Such a result, and the attendant expense and distraction, would strip the benefits of a more expeditious relief from the plaintiffs as the litigation proceeds for many years. Certainly, such a result cuts against the express public policy underlying § 1988, which is to enhance the enforcement of federal laws, not prolong the deprivation of the rights afforded by them.

Moreover, such a result is particularly disconcerting in the federal cases brought against school districts. By their very nature, claims against school districts frequently involve issues in which the relief sought is of a systemic, rather than only an individualized, nature. Whether the case involves the provision of a particular type of special education services, student assignment plans, harassment or bullying, student-led prayer, cross-dressing at the prom, or alleged employment discrimination, settlement may be much less likely where the prospect of an enhanced fee award haunts any concession by the school district. This in turn diverts precious resources, both monetary and human, from education to unnecessarily prolonged litigation, and clogs the courts with cases that otherwise could have been resolved short of litigation. This Court's lodestar approach allows these cases to settle promptly leaving the fee dispute for later resolution. The Eleventh Circuit's

enhanced fee award approach substantially impedes settlement and encourages unnecessary litigation.

III. ENHANCED FEE AWARDS MAY DISCOURAGE VOLUNTARY CHANGES THAT SCHOOL DISTRICTS OTHERWISE WOULD BE WILLING TO MAKE.

The prospect of enhanced fee awards based on results obtained as proposed by the Eleventh Circuit also cuts directly against express public policy underlying § 1988 by punishing governmental entities who voluntarily modify policies and practices to benefit putative plaintiffs above and beyond what might be provided from litigation. The present case dramatically illustrates this point.

In the present case the District Court multiplied the base fee award by 1.75, effectively enhancing it by 75% to reflect the quality of the representation and because "the evidence establishes that plaintiffs' success in this case was truly exceptional." *Perdue*, 532 F.3d at 1218. In fact, the District Court went so far as to note that "even if the plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief as 'intricately detailed and comprehensive' as that contained in the Consent Decree." *Id.*, 1229.

It is not uncommon in civil rights litigation for the mere filing of litigation and attendant media coverage to bring about significant and warranted substantive changes to governmental policies and practices. For example, in *Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human*

Res., 532 U.S. 598 (2001) following the filing of the lawsuit the West Virginia legislature "enacted two bills eliminating the 'self-preservation' requirement," thus mooting the underlying litigation. 532 U.S. at 601. Similarly, in the present case, following the filing of the litigation, the State of Georgia made substantial changes to its foster care system. The District Court itself noted that these changes went beyond anything that could have been awarded on the merits of the litigation. As noted in Georgia's Brief to the Eleventh Circuit, "[e]ven before settlement, State Defendants had made great strides to improve Georgia's child welfare system, and the District Court emphasized that '[i]t is a tribute to all concerned that such a just settlement was consummated' [Doc. 486-Pg. 14]." Brief for the Appellant, at 50-51.

The unique civic role of our Nation's schools, serving every community with doors open to all, subjects them to potential claims from all fronts on many sensitive and controversial issues. Frequently in these cases, school districts will agree to settlements that provide remedies that not only resolve the case for the named litigants but also bring about changes in policy, programs and practices that have a wider impact on the school system and its surrounding community. For example, the Rapid City school board in South Dakota recently agreed to settle a lawsuit brought by a pro-life group that had sued the district over its facilities use policy, claiming the district engaged in viewpoint discrimination based on the group's anti-abortion stance. Under the settlement, the board revised the policy that governs use of school facilities

by outside groups to include clear and neutral language on how to handle certain political topics. *See* Gahagan, K. *Revised policy aims to settle school lawsuit*, RAPID CITY JOURNAL, (April 2, 2009), available at http://www.rapidcity journal.com/articles/2009/04/02/news/local/doc49d3f3 61e222e698885492.txt.

In another First Amendment case, a Delaware school district agreed to revise its policies on religion as part of a settlement with two Jewish families who had sued over the pervasiveness of Christian prayer and other religious activities in the schools. As a result of the settlement, the district agreed to amend its religion policy to clarify what practices are constitutional and send a detailed list of "real world examples" to staff members and parents, including situations like prayer before sports events and the distribution of religious materials at schools. The accord stipulated that school officials may not organize prayer at graduation. Under the changed policy, individuals can complain anonymously about violations about religious liberty or any other policies. *See* Banerjee, N. *School Board to Pay in Jesus Prayer Suit*, NEW YORK TIMES (Feb. 28, 2008), available at http://www.nytimes.com/2008/02/28/us/28delaware.h tml?ex=1361854800&en=89c181a811756868&ei=508 8&partner=rssnyt&emc=rss.

In a class action lawsuit alleging discrimination against Native American students, the Winner School District in South Dakota agreed to settle the case to avoid prolonged and expensive litigation that would be detrimental to the students' educational needs. The district agreed to numerous changes that included steps to improve graduation

rates, to reduce disciplinary incidents and to integrate the Native American culture and history into the curriculum. *See* Associated Press, *Settlement reached in South Dakota student discipline lawsuit*, NEWS FROM INDIAN COUNTRY (June 18, 2007), available at http://indiancountrynews.net/index.php?option=com_content&task=view&id=734&Itemid=109.

There can be no real dispute that the Nation's civil rights laws ought to encourage governmental entities to take prompt voluntary actions to remedy circumstances such as those noted above. Practices that deter such prompt voluntary remedial actions unquestionably run counter to the policy underlying these federal laws, which is to remedy these situations as promptly as possible. This is particularly true in school cases involving the education of school children, where legal delays work to the detriment of the individual child and the school system as a whole. For example, under the IDEA, disputes about appropriate educational service for children with disabilities are best resolved without invoking administrative or judicial proceedings so that the child starts receiving the needed services as soon as possible. In fact, the statute encourages early resolution and provides for tight timelines and many opportunities for parents and schools to reach agreement, thereby averting the need for formal litigation. Schools readily understand and welcome these opportunities for collaboration and frequently reach mutually acceptable settlements. However, if this Court adopts the Eleventh Circuit's approach, schools, out of fear of future enhancement awards, may become more wary of making concessions or providing more

than the law actually requires. Clearly, this would be to the detriment of the children whom the IDEA is intended to benefit.

In the present case, the District Court effectively punished the State of Georgia for going "above and beyond" what was sought in the litigation. When Georgia voluntarily took steps above and beyond what could have been recovered in this litigation to fix what was, by all accounts, a seriously broken foster care system, it got slapped with a 75% penalty for doing so. An enhanced fee award based on results in similar situations sends school districts the message that it may be better to take their chances at trial rather than voluntarily offer changes that the district recognizes are in the best educational interests of the children they serve but are beyond what the law would specifically require. This result gives the plaintiffs, at best, only the relief available on the merits and at worst much less than the school district might have been willing to do absent the prospect of a performance enhancement award. To give any more is to subject the district to a potentially devastating enhancement award that devours taxpayer funds intended for education.

The simple fact is that the Eleventh Circuit's proposed enhanced fee approach creates one big winner—attorneys—and a whole lot of losers, including taxpayers and the very citizens that these attorneys are purporting to protect. In this case the biggest losers would be the foster children in the State of Georgia who, if this Court adopts the Eleventh Circuit's approach, will see $4.5 million in

scarce resources leave the foster care system and go to pay attorneys a huge bonus. The other big losers are children in future cases who will not reap the benefits that would otherwise come when school districts and other governmental entities settle cases like this with voluntary changes in practices and procedures that go above and beyond the relief requested. This was certainly not the result Congress intended when it enacted § 1988 and added fee-shifting provisions to other federal laws.

CONCLUSION

For these reasons, *Amicus* urges the Court to follow its precedent and determine that a "reasonable fee award" under 42 U.S.C. § 1988 may not be enhanced solely based on the quality of performance and results obtained since these factors are already included in the lodestar calculation.

Respectfully submitted,

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