3 of 24 DOCUMENTS

 Go to Supreme Court Opinion       Go To Oral Argument Transcript

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SONNY PERDUE, Governor of Georgia, et al., Petitioners, v.

KENNY A., By His Next Friend Linda Winn, et al.,

Respondents.

No. 08-970

SUPREME COURT OF THE UNITED STATES

2008 U.S. Briefs 970; 2009 U.S. S. Ct. Briefs LEXIS 807

August 28, 2009

On Writ of Certiorari to the United States Court of Appeals

for the Eleventh Circuit.

Amicus Brief

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[\*i] 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? [\*ii]

INTERESTS: [\*1] INTEREST OF AMICUS CURIAE n1

n1 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.

   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).

TITLE: BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN

SUPPORT OF RESPONDENTS

[\*2] 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) [\*\*9] [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 muchneeded 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 [\*\*10] also sought to promote vigorous and effective civil

rights enforcement. [\*3] 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

[\*\*11] 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.

    [\*4] 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 [\*\*12] 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 [\*5] 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 [\*\*13] 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, [\*\*14] Congress intended its authorization of reasonable

attorney's fees awards to do more than [\*6] 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)). n2 A

key House proponent aptly summed up Section 1988's broadreaching objectives: "A

vote for the bill is a vote for effective civil rights laws. [\*\*15] " Id. at

35129 (statement of Rep. Seiberling).

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   n2 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).

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   2. To achieve these far-reaching objectives, Congress repeatedly recognized

the multi-factor test set [\*7] 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 [\*\*16] 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, [\*\*17] 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).

    [\*8] 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

[\*\*18] 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 [\*9] 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 [\*\*19] attorney's fees for antitrust claims for injunctive relief.

n3 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.

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   n3 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).

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   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), [\*\*20] a significant

pre-Alyeska antitrust case that awarded an enhancement for extraordinary

performance and results. See [\*10] 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 [\*\*21] 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 [\*11] 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 [\*\*22] 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 [\*12] principles of statutory construction are more compelling

[\*\*23] 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 courtcreated

regime employed prior to Alyeska, which permitted courts [\*\*24] 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 amendments [\*13] 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").

[\*\*25]

   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) [\*14] (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 [\*\*26] 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). n4

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   n4 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).

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[\*\*27]

   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. n5

[\*15] 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.

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   n5 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 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).

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[\*\*28]

   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.

[\*16] 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

[\*\*29] broad-reaching goals. n6

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   n6 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.

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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 [\*17] 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

[\*\*30] 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 [\*\*31] 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. [\*18] 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. n7

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   n7 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.

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[\*\*32]

   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

[\*19] 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 [\*\*33] 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), [\*\*34] 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 [\*20] 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 [\*\*35] 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). n8

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   n8 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 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.

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[\*\*36]

    [\*21] 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. n9

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   n9 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 benefit faculty members,

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

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[\*\*37]

    [\*22] 2. Courts have also found it appropriate to enhance fees in civil

rights cases that achieve farreaching 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 [\*\*38] 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. [\*23] ("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 [\*\*39] 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

[\*24] 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 [\*\*40] 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). n10 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 Involved [\*25]

in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Meredith v.

Jefferson County Bd. of Educ., No. 3:02 CV-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.").

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   n10 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").

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[\*\*41]

   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. [\*\*42] 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 [\*26] district court enhanced the

lodestar figure by more than 13%, after considering the "excellent results"

achieved by the plaintiffs' attorneys. Id. at \*2. n11

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   n11 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).

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   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 [\*\*43] 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. n12

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   n12 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.

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[\*\*44]

    [\*27] 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

[\*\*45] 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-183 M,

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 [\*28] (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, [\*\*46] 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 [\*29] "results obtained"

but rather establishing a strong presumption that results are factored into the

lodestar calculation. [\*\*47] 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 [\*\*48]

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 [\*30] 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 [\*\*49] 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 Courtmade rule that would structurally

under-compensate [\*31] 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 [\*\*50] 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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