No. 08-970

In The Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF AMICI CURIAE OF LIBERTY LEGAL INSTITUTE, AMERICAN CENTER FOR LAW AND JUSTICE, CATO INSTITUTE, INSTITUTE FOR JUSTICE, LIBERTY COUNSEL, ALLIANCE DEFENSE FUND, JAMES MADISON CENTER FOR FREE SPEECH IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Liberty Legal Institute – Liberty Legal Institute is a legal organization devoted to the defense of religious freedoms and First Amendment rights, representing individuals and institutions across the country. The Institute is committed to the principals of limited government, robust protections of constitutional freedoms and government accountability. The Institute has considerable experience in civil rights litigation, including argument and numerous appearances before this Court, and is greatly concerned with the potential threat this case poses to the nation's privatized system of civil rights enforcement.

American Center for Law and Justice – The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys appear frequently before this Court representing either parties or amici. The Chief Counsel for the ACLJ has argued twelve times before this Court, most recently in *Pleasant Grove City v. Summum*, No. 07-665. ACLJ attorneys often litigate civil rights cases in which the prevailing party is entitled to an award of attorney fees under Section 1988.

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[1] All parties consented to the filing of this brief. Amici state that no portion of this brief was authored by counsel for a party and that no person or entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Cato Institute – The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual Cato Supreme Court Review, and files amicus briefs with the courts. This case is of central concern to Cato because it highlights the importance of properly compensating those who take great risk to enforce our civil rights and of harnessing market principles to promote lawful government behavior.

Institute for Justice – The Institute for Justice (IJ) is a nonprofit, public interest law center dedicated to advancing the essential foundation of a free society: constitutional protection for individual liberty. Since its founding in 1991, IJ has litigated in federal and state courts across the country protecting property rights, freedom of speech, economic liberty, and educational choice. Like the other amici, IJ on occasion seeks to recover attorney fees under 42 U.S.C. § 1988 when it successfully defends the rights enshrined in the United States Constitution.

Liberty Counsel – Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Founded in 1989 by Anita and Mathew Staver, who also serves as

the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Texas, Virginia and Washington, D.C., and has affiliate attorneys throughout the country. Liberty Counsel represents citizens, organizations and governmental entities in matters related to religious liberties, sanctity of human life and the traditional family. Liberty Counsel provides representation at no charge. In many cases, the clients represented by Liberty Counsel would otherwise not be able to seek redress for their grievances. The fee recovery provisions, including the fee enhancement provisions of 42 U.S.C. § 1988 are of critical importance to Liberty Counsel's ability to continue to provide representation to those seeking to halt unconstitutional conduct. It respectfully submits that its perspective on this issue will aid this Court's determination of this important issue.

Alliance Defense Fund – Alliance Defense Fund (ADF) is a national not-for-profit public interest organization that litigates civil rights cases and provides strategic legal planning, training, and funding to attorneys and organizations regarding religious civil liberties and family values. ADF attorneys function as private attorneys general, representing clients to vindicate their constitutional rights. The ability to recover attorney fees via the fee shifting provisions of 42 U.S.C. § 1988 enables ADF to stretch its donor dollars to defend the rights of more Americans. ADF attorneys have also observed that the prospect of liability for attorney fees often motivates government

actors to "do the right thing" and promptly resolve matters where the constitutional mischief is obvious.

ADF has advocated for the rights of Americans to exercise their religious beliefs and to express those beliefs in our society, and has handled over 3300 legal matters and 370 lawsuits, including involvement in cases before this Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000).

James Madison Center for Free Speech – The mission of the James Madison Center for Free Speech ("Madison Center") is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation. The Madison Center is an internal educational fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation. The James Madison Center for Free Speech is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). *See* http://www.jamesmadisoncenter.org. The Madison Center and its counsel have been involved in numerous

election-law cases, including the challenges to the Bipartisan Campaign Reform Act of 2002 ("BCRA") in *McConnell v. FEC*, 540 U.S. 93 (2003), *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*").

INTRODUCTION

In order to enforce civil rights guaranteed by the Constitution and by statute, Congress had two principal choices. As the representatives of the American taxpayers, Congress could authorize a massive expansion of the Department of Justice to cover all civil rights cases. It could, alternatively, privatize the system and allow free market principles to encourage private attorneys to undertake the massive effort of private attorneys general, holding government power accountable to the citizen-taxpayers. The former would require Congress to raise the taxes on all Americans to support a vast government bureaucracy charged with enforcing the civil rights of all, while the latter would require civil rights offenders to bear the burdens of their own actions. Congress could, with the former, disperse the cost of freedom across the entire nation, or, with the latter, force civil rights violators themselves, such as cities and states, to be accountable to their own constituencies for lightening the civil coffers with the discretionary attorney fees liability that accompanies the finding of a civil rights violation.

Congress chose to privatize the system, provide market incentives to private attorneys to enforce civil rights, and subject government to the proverbial "invisible hand" of local taxpayers to hold elected representatives responsible for the waste of taxpayer dollars lost in defense of legitimate civil rights violations. *See* Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 456 (Roy Hutcheson Campbell et al. eds., Liberty Fund Glasgow 1981) (1776). In short, Congress, by enacting Section 1988, harnessed free market principles to incentivize lawful government behavior, and justifiably so. *See* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1090 (2007) ("This private enforcement system decentralizes enforcement decisions . . . and helps insulate enforcement from capture by established interests. It is also less expensive for taxpayers. . . ."); George L. Priest, *The Ambiguous Moral Foundations of the Underground Economy*, 103 YALE L.J. 2259, 2274-75 (1994) (finding that "[t]raditional comparisons of the market to political organization have conceded the superiority of the market in terms of both wealth creation and the *maximization of individual liberty*") (emphasis added).

Thus, every time an attorney successfully navigates the heavily mined waters of civil rights litigation – including immunity defenses, mootness issues, and lack of respondeat superior liability – to find his

attorney fee request being reduced by a court for some reason or another, there is some erosion of the free market principles upon which rests the privatized enforcement of civil rights. That is not to say that attorney fee awards must always be robust. But it is important to note that when a court is addressing an attorney fee award, it is because the civil rights plaintiff suffered and proved a civil rights violation – a difficult task for even the most accomplished attorney.

Suffice it to say, attorney fees are not merely about compensating attorneys who undertake the representation of those oppressed and damaged by government, often at significant risk to their regular practice. Just as important, and possibly more so, they provide the incentive for governments, especially with the outcry of local taxpayers upon the media announcement of an attorney fee judgment, to reform their unlawful conduct and refrain from civil rights violations in the future.[2]

This case is about a civil rights fee enhancement. More importantly, however, it is an opportunity to solidify the market based incentives and free

[2] In addition, because school districts, counties, cities and other political sub-divisions are usually insured by an insurance carrier common to many other government entities, attorney fee awards, especially those with enhancements, serve to motivate the insurance carrier to notify all of its clients to reform their unlawful practices to conform to the ruling and avoid future insurance losses.

enterprise principles that undergird the private enforcement of civil rights laws to ensure actual violations are cured as soon as possible, reducing needless waste of scant judicial resources and saving American taxpayers untold millions of dollars.

SUMMARY OF THE ARGUMENT

As is clear from the legislative history, the American taxpayers, through their representatives in Congress, intended upward fee enhancements in certain cases, and the present case certainly qualifies. This was an exceptionally complex civil rights case involving multiple plaintiffs, multiple defendants, a vast quantity of discovery and many moving pieces. Amici have litigated numerous civil rights matters involving complex legal issues and extensive facts, but few cases compare to this one. The very idea of litigating such a case is daunting, and the actual execution even more so.

From the outset, counsel for plaintiffs attempted, without success, to bring a rapid resolution to the case by seeking expedited discovery and an early preliminary injunction. Due, however, to the government's "strategy of resistance against efforts to reform a foster care system that even [it] ultimately admitted was badly in need of reform" and its excessive delay tactics that "undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were *required* to

incur," *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1266 (N.D. Ga. 2006) (emphasis added), seven years later the case rages on. This case, as with almost all civil rights cases, was never about financial gain – at least not that of plaintiffs or their counsel. It was about providing an adequate remedy to ensure the government permanently ceased blatant civil rights violations. And yet, for all the reform plaintiffs' counsel have provided, the changed lives of thousands of children in foster care in the State of Georgia and 30,000 hours of work, the government defendant now seeks to avoid the consequences of refusing to settle much earlier in the litigation when its violations were known and clear. More than that, it hopes to eliminate a major incentive – possible enhancement of fees – that works as an additional incentive to encourage government entities to resolve clear civil rights violations early and expeditiously.

ARGUMENT

I. The American Taxpayers, Through Their Elected Representatives, Clearly Endorsed Attorney Fee Enhancements When Enacting Section 1988.

The arduous, precarious and often sacrificial endeavor of civil rights litigation was well known to Congress when it enacted Section 1988. Congress was aware of the "gap between citizens and government officials" due to the "substantial resources" available to government that cause an "inequality of litigating

strength." H. REP. NO. 94-1558, at 7 (1976). Though civil rights litigation was recognized as "equally complex" and thus costly and time consuming as any "antitrust cases," S. REP. NO. 94-1011, at 6 (1976), Congress understood

> [t]he lawyer who undertakes to represent a client alleging a violation of the civil rights statutes covered by this bill faces significant uncertainty of payment, even where he has a strong case. For there is [sic] often important principles to be gained in such litigation, and rights to be conferred or enforced, but just as often no large promise of monetary recovery lies at the end of the tunnel.
>
> . . .
>
> Even with the enactment of this bill, the lawyer who undertakes to represent a client will face more uncertainty of payment than one involved in a usual contingency fee case. His fee is contingent not only upon his success, but also upon the discretion of the judge before whom he appears.
>
> Even if he wins his case, and the judge decides he has won a fee as well, his rate of compensation is fixed not by a grateful client, but by a disinterested judge.

122 CONG. REC. 33314 (1976) (statement of Sen. Kennedy).

The corresponding legislative history of Section 1988 is short, clear and instructive. It establishes that in setting the standard for determining a

reasonable fee under the Act, Congress "create[d] no startling new remedy" but merely "provide[d] the fee awards which are necessary if citizens are to be able to effectively secure compliance" with the civil rights laws. S. REP. NO. 94-1011, at 6. To avoid the creation of a new remedy, or even the appearance of one, Congress chose five model cases from the federal courts that "correctly applied" the "appropriate standards" for awarding fees to successful civil rights litigants in order to set the standards for determining "reasonable counsel fees" and illustrate how those standards are properly applied under Section 1988.[3] S. REP. NO. 94-1011, at 6; H. REP. NO. 94-1558, at 8 (internal quotation marks omitted). Congress was clear that the standards as applied in these cases result in "reasonable fees" "which are adequate to attract competent counsel" but "do not produce windfalls to attorneys." H. REP. NO. 94-1558, at 8; S. REP. NO. 94-1011, at 6.

As even petitioners begrudgingly admit, Pet. Brief at 22 n.11, two of these five cases expressly chosen by Congress to set the standard for awarding fees under Section 1988 awarded upward adjustments to the lodestar amount, and did so for the very

[3] *United States Steel Corp. v. United States,* 519 F.2d 359 (3d Cir. 1975); *Swann v. Charlotte-Mecklenburg Board of Education,* 66 F.R.D. 483 (W.D.N.C. 1975); *Stanford Daily v. Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles,* 8 E.P.D. ¶9444 (C.D. Cal. 1974), 1974 U.S. Dist. LEXIS 8204; *Evans v. Sheraton Park Hotel,* 503 F.2d 177 (D.C. Cir. 1974). *See* H. REP. NO. 94-1558, at 8; S. REP. NO. 94-1011, at 6.

same reasons at issue in this case. In *Stanford Daily v. Zurcher*, the court calculated and awarded the lodestar amount only after it reduced the requested hourly rate. Once the lodestar was established, the court awarded plaintiffs an upward adjustment in fees of almost 27% of the lodestar amount. 64 F.R.D. 680, 685, 688 (N.D. Cal. 1974). The court's express reasons for this substantial enhancement of the lodestar were the "contingent nature of compensation, the quality of the attorneys' work, and the results obtained by the litigation." *Id.* at 688. In *Davis v. County of Los Angeles*, the court cut the hours billed submitted by plaintiffs' attorneys prior to calculating the lodestar and then cut the lodestar itself for duplication of effort. Only then, as in *Stanford Daily*, did the court award a substantial upward adjustment to the lodestar amount. 8 E.P.D. ¶9444 (C.D. Cal. 1974), 1974 U.S. Dist. LEXIS 8204 at *2-3. And again, as in *Stanford Daily*, the upward adjustment of the lodestar was expressly due to the excellent results achieved by plaintiffs' attorneys, the difficulty of the case and the quality of the representation. *Id.* at *3-4.

Congress had many cases from which to choose to illustrate the standards for determining attorney fees under Section 1988 and their proper application. It chose a total of five. Two of these expressly provided for and approved of substantial upward adjustments to the lodestar due expressly to quality of performance and results obtained. In the absence of express evidence to the contrary, there would seem

little room to quibble whether Congress endorsed these upward adjustments and the specific reasons for them.[4]

It would, then, appear obvious that upward adjustments to the lodestar for quality of performance and results obtained were understood and endorsed by Congress from the genesis of Section 1988. In considering attorney's fees, Congress found that "[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." S. REP. NO. 94-1011, at 6. As evidenced by the model cases cited by Congress as the primary guidance for awarding attorney's fees, the possibility of discretionary upward adjustments to the lodestar due to quality of performance and results obtained is a central tenet of this "traditionally effective remedy."[5] With such clear

[4] Accordingly, petitioner's contention and corresponding argument that "it would be incongruous to attribute much weight" to these cases must be met with a fair amount of incredulity. *See* Pet. Brief at 24. This is particularly so when the statement is made in an attempt to differentiate Congress' use of these cases both to illustrate the standards of calculating attorney's fees and the proper application of those standards from Congress' desire to avoid fee windfalls to attorneys. To the contrary, these very cases were chosen by Congress in part because the standards applied "do not produce windfalls" to the prevailing attorneys. S. REP. NO. 94-1011, at 6.

[5] This Court expressly rejected the "argument that an upward adjustment to an attorney's fee is never appropriate under §1988." *Blum v. Stenson*, 465 U.S. 886, 901 (1984).

and unmistakable illustration of legislative purpose, to find against these same upward adjustments would be in direct contravention to the goals and purposes of Congress in enacting Section 1988. Overturning the clear and lawful purpose of the legislature would be inappropriate; it would also remove a major incentive for the government to seek early resolution of civil rights violations, an incentive necessary to prevent increased waste of judicial resources and a greater burden on taxpayers.

II. Reducing Or Eliminating The Enhancement Will Lead To More Waste Of Judicial Resources And A Greater Burden On American Taxpayers.

The government is no ordinary defendant. It does not bear the same level of responsibility expected of the private sector, such as respondeat superior liability. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). Most importantly, government defendants are not subject to normal market principles regarding a cost-benefit analysis of litigation. Citizens raising families, working jobs and paying bills do not watch government as closely as shareholders or stakeholders in private enterprise. A local school district can spend a million dollars fighting a child who wants to hand a candy cane with a religious poem attached to his friends during Christmas, and then hold media events expressing a need for money for education. Few private enterprises would ever spend any amount of money fighting candy canes, and those

that did would probably cease to exist. Not so for government. Government has few natural financial boundaries – it can always generate new revenue. The free market incentives provided when Congress elected to privatize civil rights enforcement, including possible fee enhancement, serve to create the government accountability needed for a privatized system to achieve maximum benefits for citizens, reduce waste of judicial resources, and save taxpayer money.

A. Post-*Buckhannon* civil rights litigation tends to waste valuable judicial resources and taxpayer money, a deficiency upholding potential enhancement to attorney fees would help remedy.

In post-*Buckhannon* civil rights litigation, there is reduced incentive for an offending government entity to seek speedy and robust resolution of civil rights disputes. Albiston, *supra*, at 1133 (concluding the post-*Buckhannon* empirical data shows *Buckhannon* "removes a significant incentive for early settlement" by the state). While petitioners assert that an upward adjustment to the lodestar serves to discourage government entities from settling civil rights disputes, the reality is quite the contrary. The possibility of fee enhancement, though rare, provides additional incentive in the wake of *Buckhannon* for government to seek early resolution of a civil rights dispute.

Buckhannon requires civil rights plaintiffs to obtain a judgment or consent decree signed by the

Court in order to obtain an attorney fee award. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). Prior to *Buckhannon*, the catalyst theory of discretionary attorney fees provided strong incentives to both the plaintiff and the government to resolve civil rights disputes immediately upon the filing of the case and come to the negotiating table in good faith. The government could revise its policies or practices or take actions necessary to remedy the violation and then settle the dispute for the limited amount of attorney fees associated with filing the case. The plaintiff would be satisfied without a judgment signed by the court to enforce the government's change of heart, as the payment of the attorney fees, even if minimal, represented an effective warning for the government not to return to its former unlawful course of action.

Buckhannon altered this balance of incentives. Without the restraint of the catalyst theory, government now has a perverse incentive to vigorously defend even the most blatant civil rights violations in an effort to drain the pro bono counsel for the plaintiff of time and resources and possibly end the case without a decision. If the government is successful, the plaintiff is forced to withdraw from the case for lack of resources. If its efforts to discourage the plaintiff from continuing are ineffective, no matter over how many months or years, the government may simply change its position and moot the case prior to the court arriving at a judgment. Albiston, *supra*, at 1133 (following *Buckhannon*, a "state may feel free to

allow litigation to drag on and on, confident that strategic capitulation will protect it against an adverse judgment and a fee award."); *id.* at 1091 (the catalyst theory "prevented a litigation maneuver that we call strategic capitulation. By strategic capitulation we mean situations in which defendants faced with likely adverse judgments attempt to moot the case and to defeat the plaintiff's fee petition by providing the requested relief before judgment."). The litigation ends without permanent resolution, leaving the plaintiff with the mere promise to reform by the same government entity that thought nothing of violating his civil rights before. Plaintiff's counsel has no hope of recovering any compensation for his time, and the government, free of court order or settlement agreement, has the freedom to return to its unlawful behavior in the future.

In this case, counsel for Plaintiffs filed suit in 2002 and sought rapid resolution of a major claim through a preliminary injunction, the preferred method of litigating a civil rights case in a post-*Buckhannon* world.[6] Unfortunately, defense counsel deployed delay tactics in the discovery process, prompting judicial intervention to ensure compliance with the rules. The district court held a hearing for the preliminary injunction and made a significant but understandable error – despite realizing there was

[6] Preliminary injunctions provide a low cost, judicially efficient method of resolving civil rights cases and, at least in most circuits, help bring finality to the dispute and provide for the lowest anticipated attorney fee recovery.

a violation, it showed deference to the government defendant. Although the court found that the government was in violation of basic rights of abused and neglected children in its care, the court nevertheless denied the injunction because the government promised to reform.[7]

What ensued was a post-*Buckhannon* government "strategy of resistance against efforts to reform a foster care system that even [the government defendants] ultimately admitted was badly in need of reform." *Kenny A.*, 454 F. Supp. 2d at 1296. Though well aware of its unlawful and destructive practices regarding the foster children in its care, as evidenced by its sweeping concessions in the consent decree, the government nonetheless filed an extensive motion to dismiss followed by a massive motion for summary judgment and even a *Daubert* motion to exclude the reports and testimony of *all* of plaintiffs' experts.[8] Not content to flood the docket with a vast motions practice, the government resorted to scorched earth

[7] Holding the government accountable for the unlawful activity challenged by the preliminary injunction motion would have been a tremendous aid in settling the case early on by reducing the government's incentive to continue its defense knowing plaintiffs had prevailed such that they could petition the court for attorney fees for their efforts up to that point in the litigation. This would have helped bring the government to the negotiation table at the start of the litigation in much the same way the catalyst theory once did. Failing to hold the government accountable for admittedly unlawful behavior only emboldened the government to wage a years long drawn-out defense, which it did.

[8] Each motion was denied by the district court.

tactics and "s[ought] repeatedly to limit plaintiffs' discovery efforts." *Kenny A.*, 454 F. Supp. 2d at 1266. At one point the district court was actually forced to admonish the government for "relying on technical legal objections to discovery requests in order to delay and hinder the discovery process." *Kenny A.*, 454 F. Supp. 2d at 1268 (quoting Dist. Crt. Order of January 7, 2003, at 4). The government's tactics were so blatant and extensive that the district court directly referenced them no less than five times in its opinion. *See Kenny A.*, 454 F. Supp. 2d at 1266, 1268, 1277, 1279, 1296. There can be little credible question that this scorched earth "strategy of resistance undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were *required* to incur." *Kenny A.*, 454 F. Supp. 2d at 1266 (emphasis added).

With no preliminary injunction and faced with nearly three years of litigation and half a million pages of documents, the district court ordered mediation. The parties, three years and a half million pages of record later, agreed to terms in the consent decree that awarded plaintiffs substantially all the relief originally requested. The post-*Buckhannon* disincentive[9] for government to seek early resolution of civil rights violations cost the people of Georgia not merely the fees reasonably due the plaintiffs but also

[9] Petitioners obviously did not believe upward fee adjustments were possible, as evidenced by their appeal, and thus the normal incentive of a possibility of upward adjustments encouraging early resolution was lost.

the outrageous sum of $2.4M paid by their government to hire attorneys to defend the unlawful practices to which the government eventually admitted.

Such waste of judicial resources and taxpayer money has become more common in post-*Buckhannon* civil rights litigation. Albiston, *supra*, at 1133. Predictably, the government chose to gamble that it could survive the litigation and employ a massive defense without ever being held accountable for its actions. It confessed error early on and avoided the preliminary injunction, with the court relying on its promise to reform instead of enjoining it. It then proceeded to use every instrumentality available to drain plaintiffs of their resources and discourage them from continuing with the case, resisting the "reform [of] a foster care system that even [it] ultimately admitted was badly in need of reform." *Kenny A.*, 454 F. Supp. 2d at 1296.

Many such cases currently clog the dockets of district courts across the country and will continue to burden limited judicial resources unless the government has the necessary incentive to seek resolution at the early stages of litigation. Eliminating incentives, such as fees and their possible enhancement, that encourage early settlement is not only a rejection of Congress' purpose but also a step leading to more waste of taxpayer and judicial resources.

B. Reducing or eliminating the enhancement awarded in this case will disserve the American taxpayers.

"[P]etitioners could have avoided liability for the bulk of the attorney's fees for which they now find themselves liable by making a reasonable settlement offer in a timely manner." *Riverside v. Rivera*, 477 U.S. 561, 581 n.11 (1986). In the private sector, there are natural incentives for businesses to disengage when they have violated the law and the cost-benefit analysis of a massive defense demonstrates that early settlement or acquiescence is less costly than prolonging the inevitable when plaintiffs present legitimate claims. No such natural incentives exist for government. The State of Georgia, well aware of its unlawful treatment of the children in its care, hired some of the best attorneys it could find to defend this unlawful behavior. To avoid an early preliminary injunction and any other form of judicial relief qualifying plaintiffs as prevailing parties (thus entitling them to fees far less than finally recovered), the Georgia taxpayers were forced to pay $2.4M to outside defense counsel. While the district court properly noted that the outside counsel for the government cut their hourly rate in half, this rate was no noble act of benevolent service to the state. It is normal practice for private attorneys working for a government entity to charge a low market rate as payment is guaranteed and work is plentiful. That is not the case for private civil rights counsel.

There are very few full time civil rights plaintiff's attorneys in the country, due largely to the economic hindrances the government's preferred defendant status and the uncertainty of payment present any who would hold the government accountable to the law. Most attorneys who represent civil rights plaintiffs are solo practitioners and "local, small-firm lawyer[s]" who must be able to obtain attorney fees in order to take a case. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 767-69 (1988); *see also* Carl Tobias, *Rule 11 & Civil Rights Litigation*, 37 BUFF. L. REV. 485, 486 n.41 (1989) ("The civil rights bar is comprised essentially of specialized, solo practitioners, who depend on fee shifting and contingency fees for their income."). Accordingly, for most a full time civil rights practice is simply not economically feasible. Most attorneys representing citizens against overreaching governmental entities are thus taking on a case that necessarily interferes with their regular legal practice.

There are, however, thousands of professional civil rights *defense* attorneys whose firms make millions of dollars defending government entities, and many, if not most, government entities are represented by them. For these attorneys, their entire firm or practice group within the firm is dedicated to defending civil rights cases for government. The more protracted the litigation and the greater the girth of

the docket, the greater their economic success. In a post-*Buckhannon* world, this has led to a substantial increase in the size of the dockets and records in civil rights cases. Albiston, *supra*, at 1130 ("[O]ur *qualitative data* suggest that, rather than promoting settlement at minimal cost to enforcement efforts, *Buckhannon* both *prolongs existing litigation* and discourages public interest organizations from taking on future enforcement actions." (emphasis added)).

Considering the lack of incentive that normal civil rights recoveries offer an attorney to represent a civil rights victim, along with the perverse incentives for an attorney defending the government, and the government itself, to engage in a long, protracted defense, Congress was wise to provide the possibility of an upward adjustment of fees to offer an additional incentive for earlier resolution. Additionally, winning cases against a government defense approach of attrition is more likely than normal to lead to the unusual case where a truly "reasonable" fee merits upward adjustment. Enduring a half million pages of discovery and motions requires extraordinary commitment and extraordinary work, especially if achieving extraordinary results.

In sum, civil rights attorneys representing damaged citizens bringing legitimate claims desire expeditious and frugal methods to resolve cases. Non-profit organizations such as amici and private attorneys seeking to benefit the community do not desire to expend a decade's worth of financial resources on one case. They seek early resolution out of

economic necessity. Private attorneys employed by government and guaranteed monthly payment for all their hours worked have no such incentive to urge their clients toward an early resolution. They have, instead, significant incentives to prolong litigation, both to increase their own income and drain the comparatively meager resources available to counsel seeking to rectify a civil rights violation. The solution most compatible with a privatized system of enforcement is to provide the government incentives to early resolution of civil rights violations commensurate with that of civil rights victims. Congress did exactly that in passing Section 1988, guaranteeing a truly reasonable recovery specifically including the possibility of enhancement of fees.

C. A privatized system of enforcement requires adequate incentives to encourage speedy and robust resolution of civil rights violations.

The enhancement awarded by the district court is substantial, and it should be. Georgia was always in the driver's seat regarding the size of the attorney fee award in this case, and engaged in a "strategy of resistance [that] undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." *Kenny A.*, 454 F. Supp. 2d at 1266. If the Court upholds the enhancement, it will save American taxpayers millions of dollars in future litigation expenses and judicial resources.

Most Georgia taxpayers are probably unaware of the facts of this case or the conditions these children were forced to endure. They will, however, be made very aware of the size of the attorney fee award. They will demand answers. They will demand fiscal accountability and that the government behave responsibly. Georgia, in the future, will be somewhat leery of paying $2.4M to outside counsel plus an enhanced attorney fee judgment to defend known civil rights violations merely to avoid paying a fraction of that amount to reform and settle with the victims early on. Georgia, and other government entities, will begin to reconsider the false post-*Buckhannon* strategy of government delay and obfuscation and will engage instead in some cost-benefit analysis reminiscent of the private sector. In short, in any future civil rights violations for which Georgia realizes it is responsible and must remedy, it will work to resolve the dispute as early as possible in the litigation to avoid the needless ballooning and possible enhancement of the attorney fee award. This possibility of enhancement will merely serve to realign the incentives for government to approach civil rights violations with the same desire for early resolution as the victims themselves.

Upholding the enhancement will also send the message that others gambling with American taxpayer dollars defending civil rights violations through a strategy of attrition could face a steep penalty in cases where civil rights claims finally prevail. The American taxpayers deserve incentives to drive both

parties to the settlement table early on in the litigation, not only to reduce both the amount of attorney fees paid to government counsel and to the civil rights plaintiff presenting a legitimate claim, but also to encourage ending ongoing violations as quickly as possible.

Publicly scourging the winning attorneys over fees properly recovered for a hard-won victory is not helpful. Attorneys for civil rights plaintiffs already have every incentive to reduce their commitment of time and resources in the risky endeavor of a civil rights case. The probability of success is very low. Courts generally show deference to government defendants. Governments enjoy preferred defendant status over private institutions, including immunity defenses and no respondeat superior liability. Even payment for services rendered is uncertain and subject to a level of scrutiny unheard of in the normal private sector: upon victory, the prevailing attorneys are subjected to attacks on all their hours, rates and bills by the very attorneys they just defeated.

Not surprisingly, the "competent counsel" Section 1988 expressly was intended to attract are highly encouraged to go elsewhere. *See Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982) ("The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned. . . ."). The attorney for the citizen seeking merely to enforce the law toils often for years without payment and with very low odds of recovering even a substantial portion of the time and

resources invested in a public service. On the other side, private attorneys representing the government are paid in full and on time, usually at the end of each month's work. The longer the case proceeds, the greater the burden on the attorney representing the citizen and the greater the financial reward for the private defense attorney. The potential of fee enhancement provides the counterbalancing incentive needed to attract the "competent counsel" required by this system of privatized enforcement, as Congress clearly intended. *See, e.g.*, 122 CONG. REC. 33313 (1976) (remarks of Sen. Tunney) ("If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.").

The enhancement in this case will certainly give governments pause before they engage in an unnecessarily protracted or scorched earth defense. There is no good reason for a government to squander $2.4M to mount a protracted defense of a course of conduct it well knew was unlawful and wrong. It is that $2.4M that is the truly shocking figure in this case, especially so when considering the only reason this case settled at all is because the district court essentially ordered settlement to stop the fee hemorrhaging. Even then, the government spent an incredible amount of money over the course of 110 hours of mediation to simply acquiesce to substantially all the relief originally requested by the victims.

The most effective, and perhaps the only, way to prevent the similar government abuse of taxpayer resources represented by this case and hundreds of others currently on the federal dockets is to uphold the possibility of fee enhancement. These plaintiffs took on a heavily entrenched government defendant in a legally and factually complex case and endured a vigorous scorched earth defense, which caused the fees on *both* sides to grow. Plaintiffs attempted quick and inexpensive resolution of the case early on only to have the government repeatedly thwart their efforts. Georgia and hundreds of other government defendants represented by private attorneys paid by the hour need an incentive that levels the playing field in a post-*Buckhannon* world to motivate them to similarly seek early resolution to legitimate civil rights violations. The potential of increasing fees and a discretionary upward adjustment of the lodestar provides just that.

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CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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