No. 08-970

IN THE
Supreme Court of the United States

SONNY PERDUE, Governor of Georgia, *et al.*,
Petitioners,
v.
KENNY A., by his next friend Linda Winn, *et al.*,
Respondents.

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

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

Whether a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in the appropriate use of public funds.[1] Although *amici* strongly support the nation's civil rights laws and appreciate the need for a fee-shifting provision such as 42 U.S.C. §1988, no purpose related to the protection of civil rights is furthered by very large and unpredictable results-based fee enhancements. At the same time, other citizens rely on state programs which of necessity must be diminished in order to pay a windfall bonus to plaintiffs' lawyers. Because *amici* believe results-based fee enhancements are a gross and unwarranted interference with state fiscal policy and planning, they respectfully submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

1. The purpose of §1988 is to attract competent counsel to civil rights cases so that plaintiffs obtain effective access to the judicial process. This purpose is undercut by performance and results-based fee enhancements. This Court has long supported settlements of appropriate civil rights cases by consent decree. If, however, the judgment of the court of appeals is affirmed, the unpredictability of attorney's fees will make States less likely to enter into consent decrees.

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[1] The parties have consented to the filing of this brief, which was not authored in whole or in part by counsel for any party. No person or entity other than *amici* and their members made a monetary contribution to the preparation or submission of this brief.

When Congress enacted §1988 it could not have intended that compensating lawyers would compromise the vindication of civil rights. Yet performance and results-based fee enhancements do precisely that because their unpredictability makes risk management even harder for state and local governments, and settlements commensurately less attractive. This works against the interests of civil rights plaintiffs, such as those in this case, who, by the district court's own admission, obtained more relief via settlement than the court could have awarded had they prevailed on the merits at trial. Such a perverse incentive squarely conflicts with this Court's teaching that attorney's fees are part of the "arsenal of remedies available" to plaintiffs "to combat violations of civil rights." *Evans v. Jeff D.*, 475 U.S. 717, 732 (1986).

There are particular reasons why federal judges should not order States to pay results-based fee enhancements. Giving the federal courts the discretion to enhance fee awards beyond the compensatory unilaterally reorders state fiscal and policy priorities by diverting public funds from other public uses. Such enhancements also favor particular rights, or particular plaintiff groups, over others. Because every judgment that supports a fee award under §1988 also vindicates civil rights, a rule that favors some rights or groups cannot be squared with the even-handed protection of all civil rights.

2. The purpose of §1988 is not advanced by performance and results-based fee enhancements. Instead of attracting counsel to civil rights cases, enhancements only give lawyers an incentive to perform exceptionally once they undertake representation of a client. This is unnecessary because "when

an attorney first accepts a case and agrees to represent the client," it is already his obligation "to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests." *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986).

In addition to lawyers' basic ethical duties, existing incentives make fee enhancement superfluous. Lawyers have an interest in enhancing their reputations by performing exceptionally and attaining exceptional results, and many lawyers are also motivated by serving the public interest. Such duties and incentives make fee enhancement neither necessary to motivate lawyers in civil rights cases to strive for excellence, nor to attract counsel to represent plaintiffs in civil rights cases.

ARGUMENT

I. THE UNPREDICTABILITY OF PERFORMANCE AND RESULTS-BASED FEE ENHANCEMENTS IMPEDES THE PURPOSE OF §1988.

A. Fee Enhancements Discourage Settlements.

The purpose of §1988 is "to attract competent counsel" to civil rights cases so that plaintiffs obtain "effective access to the judicial process." *Hensley v. Eckerhart*, 461 U.S. 424, 429, 430 n.4 (1983) (internal quotation marks omitted). This policy is undercut by a performance and results-based fee enhancement. Settlement via consent decree is critical to the vindication of civil rights, and this Court has declined to adopt rules that would "reduc[e] the attractiveness of settlement" to the detriment of plain-

tiffs. *Evans v. Jeff D.*, 475 U.S. 717 (1986). But if the judgment of the court of appeals is affirmed, the unpredictability of attorney's fees will make States less likely to enter into consent decrees and more likely to litigate cases to judgment.

Section 1988 works by providing prevailing counsel "a fully compensatory fee." *Hensley*, 461 U.S. at 435. Congress could not have intended, however, that compensating lawyers would in any way compromise the vindication of plaintiffs' civil rights. Fee-shifting statutes such as §1988 "were not designed as a form of economic relief to improve the financial lot of attorneys . . . . Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries." *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) ("*Delaware Valley I*").

Performance and results-based fee enhancements threaten the very policy they purport to advance; "many civil rights plaintiffs will benefit from . . . offers of settlement." *Marek v. Chesny*, 473 U.S. 1, 10 (1985). But because a substantial enhancement may be arbitrarily charged to defendants who consent to plaintiffs' relief, the cost of settlement becomes substantially less predictable, and settlement commensurately less attractive. Indeed, it was only through a consent decree in this case that the plaintiffs obtained such extensive relief from the State; the district court observed that it was doubtful plaintiffs could have obtained relief as "intricately detailed and comprehensive" if they had prevailed on the merits. Pet. App. 154.

"The parties' *consent* animates the legal force of a consent decree." *Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (emphasis added). As the

Court explained in *United States v. Armour & Co.*, "consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation."[2] 402 U.S. 673, 681-82 (1971). Accordingly, "[m]ost defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package." *Jeff D.*, 475 U.S. at 734.

As the $4.5 million awarded here illustrates, fee enhancements can be very costly to a State. Yet they are very difficult to predict, thereby impeding settlements and preventing States from carrying on with governance.[3] One of the principal advantages of settlement to defendants is the ability to "make lump-sum offers that would, if accepted, represent their total liability." *Chesny*, 473 U.S. at 6; *White v.*

[2] Consent decrees are subject to one qualitative standard: the determination that they are "fair, adequate, and reasonable." Fed. R. Civ. P. 23(e)(2). The form and structure of each consent decree will undoubtedly vary from case to case, but assuming that a court of equity discharges its function, it does not make sense for one settlement to be more "fair" or just than another, any more than one attorney's fee can be more "reasonable" than another. It does not make sense to define exceptional results by reference to the nature of the settlement.

[3] This Court has expressed grave misgivings about the 12-factor test that was employed prior to the enactment of §1988 because it "gave very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Delaware Valley I*, 478 U.S. at 562 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

New Hampshire Dep't of Employment Security, 455 U.S. 445, 454 n.15 (1982) ("In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from damages and fees.").

Although the lodestar is ordinarily not calculated until a consent decree is entered, *see id.* at 447-48, it provides a state defendant with a basis to estimate its maximum exposure for attorney's fees. *See Hensley*, 461 U.S. at 433. As this Court has stated, "many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff." *Chesny*, 473 U.S. at 7 (internal quotation marks omitted). And because "[t]he unpredictability of attorney's fees may be just as important as their magnitude [to] a defendant [who] is striving to fix its liability," *Jeff D.*, 475 U.S. at 735, the possibility of an even more unpredictable enhancement could tip the State's calculus against settlement.

At the very least, the prospect of a results-based enhancement following a consent decree will cause state defendants to agree to less than what plaintiffs might otherwise have obtained via settlement. Because of the State's duty to its citizens, consent decrees are not uncommon. *See Carlson v. Green*, 446 U.S. 14, 21 (1980) ("[R]esponsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity."). States may also agree to provide greater relief than what is legally required. *See Rufo v. Inmates of the Suffolk County Jail*, 520 U.S. 367, 389 (1992).

As the Court explained in *Chesny*, 473 U.S. at 10, "[s]ome plaintiffs will receive compensation in set-

tlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation." Where injunctive relief is at stake, moreover, timely relief may be essential. All of these potential benefits to plaintiffs are jeopardized by the prospect of results-based fee enhancements.

Such an outcome squarely conflicts with this Court's teaching that attorney's fees are part of the "arsenal of remedies available" to plaintiffs "to combat violations of civil rights." *Jeff D.*, 475 U.S. at 732. Indeed, in *Jeff D.*, this Court held that a plaintiff could agree to waive his attorney's fee altogether. *Id.* at 730-33. In that case, the waiver of fees was part of a State's settlement offer containing virtually all of the injunctive relief that the plaintiffs had sought—the "best result [plaintiffs] could have gotten" in court. *Id.* at 723. Declining to forbid waivers, the Court observed that the attorney's fee itself was a "bargaining chip" that was useful to both plaintiffs and defendants. "To promote both settlement and civil rights," the Court recognized "the possibility of a tradeoff between merits relief and attorney's fees." *Id.* at 733.

B. Rather Than Serving a Compensatory Purpose, Fee Enhancements Disrupt State Fiscal Policy.

There are other reasons why States should not bear the cost of results-based enhancement. First, if federal judges enjoyed the discretion to measure "superior results" according to their perceptions of the

public good,[4] they would be imposing their views of public priorities on a State, thereby overriding the State's own fiscal policy and legislative priorities.

Section 1988 does not express a preference for the vindication of particular rights, or classes rather than individual plaintiffs. Yet results-based enhancements enable federal judges to reward lawyers for taking on cases based on the nature of the right at stake or the class size. This Court has already rejected the argument that "the *number* of persons benefited" is relevant to the calculation of fees, *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), explaining that "[p]resumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or . . . in protecting the civil rights of a single individual." *Id.* Since the number of persons benefited is irrelevant, a determination of public benefit must be based on the judge's opinion of the importance of the vindicated right to the public good.

As the Court explained in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, "[a]bsent some judicially manageable standard for gauging 'importance,'" the criterion of awarding attorney's fees based on the importance of the statutory right being protected "would apply to all substantive congressional legislation providing for rights and duties generally applicable, that is, to virtually all congressional output." 421 U.S. 240, 264 n.39 (1976). Because every judgment that will support a fee award similarly vindi-

[4] *See* Pet. App. 90-92 (Wilson, J., concurring) (viewing public benefit as an appropriate factor to consider in support of enhancement); *Villano v. City of Boynton Beach*, 254 F.3d 1302 (11th Cir. 2001) (directing trial court to consider public benefit in its calculation of attorney's fees).

cates federal rights under §1983, the power to favor some rights cannot be squared with the even-handed protection of all civil rights.

A public-benefit-based enhancement thus contains the same flaw as the analytical framework for fee-shifting that was used prior to the enactment of §1988. In *Alyeska Pipeline*, the Court reaffirmed the American Rule, requiring each party to bear its own costs of litigation in the absence of fee-shifting statute. It expressly declined to recognize an exception that would allow "attorney's fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." *Id.* at 263. It is, the Court held, not a proper function of the judiciary "to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former." *Id.*

Fee enhancement also has a considerable impact on the public fisc. As Judge Carnes observed, "[t]he multi-million dollar enhancement, over and beyond the full lodestar sum . . . amounts to an involuntary, federal court ordered contribution from the taxpayers of Georgia to a non-profit organization." Pet. App. 56-57.[5] Unless the judgment below is reversed, the $4.5 million fee enhancement will, of necessity, reduce the amount of state funds available to address other public needs.

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[5] *See also In re North*, 8 F.3d 847, 851 (D.C. Cir. 1993) (while allowing fees, court noted that "attorney's fees in this range will not appear reasonable to most of the taxpayers who ultimately bear the burden of this award"); *id.* at 853 ("[W]e are quite certain that [Mr.] Cutler could have found more reasonable accommodations than this if he expects the taxpayers to reimburse his client.").

Because the use of state funds to pay court-ordered fee enhancements to the attorneys of one class of citizens comes at the expense of other citizens, it is highly problematic as a matter of public policy. Congress could not have intended this result when it enacted §1988. Indeed, the problem presented is analogous to the one this Court addressed in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), in which it held that punitive damages cannot be awarded against local governments under §1983.

In *Newport*, this Court reasoned that "punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Id.* at 453 U.S. at 267. Common-law tradition had long understood "punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised." *Id.* at 263. Accordingly, the courts "protected the public from unjust punishment, and the municipalities from undue fiscal constraints." *Id*. As the *Newport* Court, quoting a state supreme court opinion, explained, punitive damages

> can never be allowed against the innocent. Those which the plaintiff has recovered in the present case . . . , being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff,

> cannot be bound beyond that amount, which will be sufficient for her indemnification.

Id. at 261 (quoting *McGary v. President & Council of the City of Lafayette*, 12 Rob. 668, 677 (La. 1846)).

The primary purpose of damages under §1983 is compensation. *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978); *see id.* at 254-55 ("The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty." (quoting 2 F. Harper & F. James, Law of Torts § 25.1, p. 1299 (1956))). Any damages beyond compensation, however, must be based on specifically punitive or deterrent rationales. *See id.* at 257 n.11; *Carlson*, 446 U.S. at 21-22. Punitive damages, as an expression of the "community's vindictive sentiments," *Newport*, 453 U.S. at 267, may be available against government officials sued in their personal capacity. *See Kentucky v. Graham*, 473 U.S. 159 (1985). By contrast, when the defendants are state or local governments or officials sued in their official capacity, they "are not sensibly assessed" because a government cannot have malice or evil motive. *Newport*, 453 U.S. at 267. Moreover, there "is no reason to suppose that corrective action, such as the discharge of offending officials who were appointed and the public excoriation of those who were elected, will not occur unless punitive damages are awarded." *Id.* at 269. Compensatory damages would be sufficient to "induce the public to vote the wrongdoers out of office." *Id.*

Like §1983, the purpose of §1988 is served through the compensation principle, though according to the value of the lawyer's service, *see Hensley*, 461 U.S. at 435, not the plaintiff's injuries or costs. *White*, 455 U.S. at 452 ("Unlike other judicial relief,

the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to the action."); *see also City of Riverside v. Rivera*, 477 U.S. 561, 574-75 (1986). Thus, if an attorney's fee award is fully compensatory, the purpose of §1988 is satisfied. Any amount beyond what is necessary to compensate the lawyer must perforce serve a function that is not authorized by the statute.

To be sure, an enhancement based on superior performance and results is ostensibly a reward for a job well done, not an intentionally punitive sanction against the defendant. And just as compensatory damages serve an important deterrent function under §1983, *see Imbler v. Pachtman*, 424 U.S. 409, 442 (1976) (White J., concurring), the attorney's fee itself serves as a deterrent measure, particularly in cases involving only injunctive or declaratory relief. *Rivera*, 477 U.S. at 575. But as this case illustrates, no more than the lodestar amount—here, $6 million—is required to deter. *Cf. Carey*, 435 U.S. at 256-57 ("To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."). Furthermore, the gratuitous expenditure of state funds by federal courts to reward lawyers for doing good work bears no relation to any traditional function of damages. As petitioners demonstrate, Pet. Br. 18-28, nothing in the language or legislative history of §1988 suggests otherwise.

II. ENHANCING FEES FOR SUPERIOR PERFORMANCE AND RESULTS IS NOT NECESSARY TO ATTRACT COMPETENT COUNSEL TO CIVIL RIGHTS CASES.

The purpose of the fee shifting statutes is to "attract competent counsel." It is not to motivate competent counsel, once retained, to perform exceptionally or attain exceptional results—however these qualities may be gauged. This is already the duty of every lawyer who undertakes the representation of a client. Rather than being necessary to fully compensate counsel, a results-based fee enhancement is at best redundant and at worst distortive of lawyers' basic ethical duties.

This Court has never yet ruled that an enhancement to the lodestar was necessary to effectuate the purpose of §1988. In *City of Burlington v. Dague*, for example, the Court categorically barred the use of multipliers based on risk, rejecting the argument that a risk enhancement—which would approximate parity with what the private market would pay—was necessary to achieve the statute's purpose. 505 U.S. 557 (1992).

There is even less reason to allow enhancement based on superior performance and results. The risk multiplier rejected in *Dague* was at least related to the purpose of attracting competent counsel.[6] A re-

[6] It is a "fact of the market" that attorneys who take contingent fee cases tend to charge higher fees than hourly rates paid regardless of outcome. *Dague*, 505 U.S. at 567 (Blackmun, J., dissenting) (citing Posner, Economic Analysis of Law s 21.9, at 534-35 (3d ed. 1986)). Thus, as the *Dague* respondents urged, because plaintiffs who can only offer contingent payment must compete for attorneys' time in a market where other bidders of-

sults-based enhancement, however, does not advance this policy. At best, such an enhancement implicates pre-existing responsibilities that are triggered *once an attorney is retained*: "when an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests." *Delaware Valley I*, 478 U.S. at 565. The Court's directive, which expressly covers both performance and results, embodies two precepts of professional ethics.

First, zealous advocacy is the "fundamental principle of the law of lawyering." Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Rules of Professional Conduct 17 (Supp. 1998); *see also* Model Rules of Prof'l Conduct pmbl. ¶ 2 (2008); Model Code of Prof'l Responsibility Canon 7 (1980); Restatement (Third) of the Law Governing Lawyers §16 cmt. d (2000). In the current Model Rules, the principle is incorporated in the duties of diligence and competence.[7] *See* Model Rules of Prof'l Conduct R. 1.1, 1.3 (2008).

As for results, the duty of loyalty demands that lawyers dedicate themselves to their client's cause. This Court has recognized that "the duty of the lawyer . . . is to further the interests of his clients by all lawful means, even when those interests conflict with the interests of the United States or of a State."

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fer "certain" fees, without a risk enhancement fewer competent attorneys would be willing to take the plaintiffs' cause. *Id.* at 562.

[7] The duty of diligence in Model Rule of Professional Conduct 1.3 has been construed as zealousness. *See* Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Rules of Professional Conduct §6.2 (3d ed. 2001).

In re Griffiths, 413 U.S. 717, 724 n.14 (1973). Such representation "casts the lawyer in his honored and traditional role as an authorized and independent agent acting to vindicate the legal rights of a client, whoever it may be." *Id.*; *cf. Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981) ("[A] defense lawyer best serves the public . . . by advancing the undivided interests of his client."). Thus, it is the obligation of the lawyer to seek the results the client wants.

This duty can sometimes produce conflicts of interest that are exacerbated by the attractiveness of additional, results-based financial rewards. *Cf. Jeff D.*, 475 U.S. at 717 (conflict created by settlement offer stipulating the waiver of attorney's fee). Like an evaluation of contingency, an evaluation of superior performance and results partly depends on the "legal and factual merits of the [case] and the difficulty of establishing those merits."[8] *Dague*, 505 U.S. at 563. Similarly, consideration of these factors at a fee

[8] Indeed, the difficulty of the case and the contentiousness of litigation are also inappropriate factors to consider as the basis for enhancement. Close or complex cases will usually be the most difficult to litigate. Yet "[c]lose cases may . . . cast the loser assessed for fees in the role of one unfairly and severely punished for proceeding entirely reasonably. Though he may have lost, he acted not only within his rights but with good foundation in contesting the case." Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651 (1982). The same goes for contentiousness, since "[t]he paramount importance of vigorous representation follows from the nature of our adversarial system of justice." *Penson v. Ohio*, 488 U.S. 75, 84 (1988). And "[n]othing in the legislative history or the statute itself suggests that Congress intended section 1988 fees to be used to sanction government officials for rigorously defending their right—or, better, exercising their duty . . . ." *Robinson v. Ariyoshi*, 933 F.2d 781, 785-86 (9th Cir. 1991).

hearing may compel a lawyer to "show that his client had only a slight prospect of success when the case was brought" by "emphasiz[ing] the barriers the client faced: ambiguous precedents, conflicting evidence, [and] plausible defenses," thereby throwing the merits of the client's claim into doubt before the judge and opposing counsel. John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 482-83 (1981).

Superior performance and exceptional results ought to be the aspiration of every lawyer. But they are also already tied to natural incentives which underscore the redundancy of enhancement. Because a lawyer's livelihood is largely dependent upon reputation, it is in the lawyer's interest to perform exceptionally and achieve exceptional results. As Judge Carnes observed in this case, Jeffrey Bramlett, a private practitioner who was one of plaintiffs' counsel, enjoyed enhanced professional standing, prestige, and earning ability as a result of the plaintiffs' success. Pet. App. 52-53. In addition, many civil rights lawyers are motivated by social causes. *See id.* at 53-56 (discussing Marcia Lowry, founder and Executive Director of Children's Rights Group); *Jeff D.*, 475 U.S. at 721-22 & n.3 (upholding fee waiver where plaintiff's counsel was employed by a federally-funded legal aid society). In light of these pre-existing duties and incentives, results-based fee enhancements are unnecessary.

CONCLUSION

The judgment of the court of appeals should be reversed.

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