06-0086

United States Court of Appeals

for the

Second Circuit

ARBOR HILL CONCERNED CITIZENS NEIGHBORHOOD ASSOCIATION, ALBANY COUNTY BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AARON MAIR, MARYAM MAIR, and MILDRED CHANG,

Plaintiffs-Appellants,

v.

COUNTY OF ALBANY and ALBANY COUNTY BOARD OF ELECTIONS,

Defendants-Appellees,

and

THE REPUBLICAN CAUCUS OF THE ALBANY COUNTY LEGISLATURE,

Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS' MOTION FOR PANEL REHEARING OR REHEARING *EN BANC*

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INTEREST OF AMICI CURIAE

Amici are The Association of the Bar of the City of New York (the "Association") and The New York County Lawyers' Association ("NYCLA") (collectively, the "Associations"). The Associations submit this brief in support of plaintiffs-appellants' Petition For Panel Rehearing And Rehearing En Banc.

The Association is a nongovernmental professional association with a membership of more than 23,000 lawyers, judges, and legal scholars. The Association, through its Committee on Civil Rights, has long promoted the enforcement of civil rights. The Association also promotes *pro bono* work generally through sponsorship of the City Bar Justice Center, which harnesses the resources of the Association's membership to provide direct legal representation, information, and advocacy to tens of thousands of impoverished and underserved New York City residents.

NYCLA is a bar association with 9,000 lawyer members. As provided in its certificate of incorporation, NYCLA has from its founding in 1908 focused on promoting the public interest by, among other things, advancing the science of jurisprudence, elevating the standards of the legal profession, promoting the public good, and promoting the administration of justice through reforms in the law.

The Associations are concerned that the standard for calculating fees in civil rights cases as enunciated by the panel in this case will adversely affect the

willingness of private law firms engaged in a predominantly commercial practice ("private firms") to take on civil rights cases as part of their *pro bono* programs and have other negative consequences on *pro bono* and public interest litigation.

The parties to this appeal have consented to the filing of this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

The Associations support the Petition For Rehearing And Rehearing En Banc and urge the Court to reconsider the novel standard enunciated in this case for determining the reasonableness of fees awarded under the civil rights laws. The Associations are deeply concerned about how the standard would alter application of the fee-shifting provisions of the civil rights laws, which were intended by Congress to serve as incentives to civil rights enforcement. While other *amici* address the impact on the civil rights bar, the Associations focus on the impact of the panel's standard on the incentives for private firms to undertake, as part of their *pro bono* programs, costly and complex civil rights litigations that civil rights organizations or firms do not have the resources to tackle.

In affirming the fee awarded by the district court, the panel hypothesized a negotiation between a "thrifty, hypothetical plaintiff" and the law firm and concluded that such a hypothetical "reasonable paying client would have known that law firms undertaking [civil rights] litigation such as that of plaintiffs often obtain considerable non-monetary benefits—in experience, reputation, or

achievement of the attorneys' own interests and agendas—and would have insisted on paying his attorneys at a rate no higher than that charged by Albany attorneys." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, No. 06-0086 cv, -- F.3d --, 2007 WL 1189487, at *9 (2d Cir. Apr. 24, 2007). *See also id.* at *1, *7-8. As Petitioner argues, and as *amici* in their Brief *Amici Curiae* for 29 Public Interest Organizations, Legal Services Organizations, and Civil Rights Law Firms ("Organizations' Brief") show, this standard conflicts with the intent of Congress and controlling precedent of this Court and the Supreme Court, and in addition is impractical and unworkable. *See* Petition at 5-6; Organizations' Br. at 4-18.

The Associations recognize that the Court may not have intended non-monetary factors to be considered where the plaintiffs' lawyers are public interest or legal services organizations, or firms specializing in civil rights work; those entities are dependent on legal fees in civil rights cases for all or part of their existence and would seem unlikely to bargain away a part of their fees for a non-monetary benefit. Whether or not the Court intended its new standard to affect the amount of fees awarded in civil rights cases to entities that depend on such fees for their existence, the Court unquestionably did focus its analysis on firms like the one in this case—private law firms that undertake civil rights litigation as part of their *pro bono* programs. Thus, the panel says that in calculating the fee, one of

the factors to be considered by district courts is "whether the attorney was initially acting pro bono (such that a client might be aware that the attorney expected low or non-existent remuneration)." *Arbor Hill*, 2007 WL 1189487, at *1; *see also id.* at *8. As discussed below, this standard significantly undercuts the incentives for such firms to take on civil rights litigation—incentives that Congress intended to establish by enacting the fee-shifting provisions. The panel's decision thus not only could have a serious negative effect on civil rights enforcement, but it could also have adverse consequences beyond the civil rights context, affecting both public interest organizations like some of those represented on the Organizations' Brief and law firm *pro bono* programs generally.[1]

Finally, rehearing or rehearing *en banc* is especially appropriate here because the panel adopted its novel standard without the benefit of any briefing by the parties concerning these issues and hence without any opportunity to consider the substantial impact its proposed standard would have on civil rights enforcement in general and law firm *pro bono* programs in particular.[2]

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[1] As the Organizations' Brief also notes, the standard may affect other areas of law that rely on statutory fee-shifting provisions to ensure vigorous enforcement. *See* Organizations' Br. at n.1.

[2] This brief does not address the issue of whether Albany or S.D.N.Y. rates should apply to this case. As the Organizations' Brief notes at 3-4, the panel's language cited *supra* at page 2 is unnecessary to the resolution of that issue.

ARGUMENT

I. The Panel's New Standard Conflicts With Congress's Intent And Judicial Precedent.

While most civil rights litigation is brought by public interest and legal services organizations and firms specializing in civil rights litigation, *see* 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, 768 (1988), private law firms play an important and special role in civil rights enforcement. Private firms that handle civil rights cases as part of their *pro bono* programs not only provide an effective complement to the work done by public interest and legal services organizations and civil rights firms, but they are uniquely equipped to litigate cases that no one else can afford to take on. *See, e.g.*, *Chan v. Sung Yue Tung Corp.*, No. 03 Civ 6048 (GEL), 2007 WL 1373118, at *3 (S.D.N.Y. May 8, 2007) (The resources of a private firm "were in all likelihood a necessary condition for the successful prosecution of this multi-year action . . . . It would have been difficult, if not impossible, for most small civil rights firms or nonprofit organizations to take on the case at all."); *see also* William A. Bradford, Jr., *Private Enforcement of Public Rights: The Role of Fee-Shifting Statutes in Pro Bono Lawyering*, in THE LAW FIRM AND THE PUBLIC GOOD, 126 (Robert A. Katzman ed., 1995) (private firms have "resources to provide effective *pro bono* lawyering on an institutional basis, and in many instances to

take on *pro bono* matters that could not be handled by smaller firms or solo practitioners").

The availability of fee awards to private law firms that handle civil rights cases is specifically contemplated by the Congressionally-created fee award scheme codified at 42 U.S.C. §§ 1988(b) and 1973l(e). By crafting these statutes carefully to provide that "reasonable" attorneys' fees may be awarded to *any* prevailing plaintiff in a civil rights action, Congress demonstrated that it intended that fees be awarded no matter what type of lawyer was representing the civil rights plaintiff. *Id.* As the Organizations' Brief shows, Congress specifically intended that fees be calculated based on comparable fees charged for complex cases like antitrust cases to put them on par with those charged in private commercial cases. *See* Organizations' Br. at 4-8. Further, Congress specifically identified instances where courts correctly applied fee-shifting standards, thereby awarding "fees which are adequate to attract competent counsel." *See* S. Rep. No. 94-1011, at 6 (1976), *as reprinted in* U.S.C.C.A.N. 5908, 5913. Thus, for example, Congress cited approvingly to *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 682 (N.D. Cal. 1974), in which the court expressly declared that courts "must avoid . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return." Further, such an approach to "reasonable" attorneys' fees is in line with

traditional notions of how to determine a "reasonable" attorneys' fee. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.11 (2007) (setting forth factors to be used in judging what constitutes a reasonable fee under New York's ethics rules, such as the time and labor required and results obtained).

As the Organizations' Brief demonstrates, the Supreme Court and this Court have specifically rejected the notion that fees for civil rights cases should be reduced based on the subjective motivations of counsel. *See* Organizations' Br. at 4-8, 10-13. Of particular relevance here, this Court emphasized in *Reiter v. MTA New York City Transit Authority*, 457 F.3d 224, 233 (2d Cir. 2006) (internal quotations and citations omitted) that "[i]mportant public policy considerations dictate that we should not punish an under-charging civil rights attorney . . . . [C]ourts must avoid decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing large monetary returns." Thus, the *Arbor Hill* panel's view that courts should award a reduced rate where lawyers took the case *pro bono*, or for other non-monetary considerations, is directly in conflict with both Congress's intent and this Court's prior decision in *Reiter*.

In fact, courts have not hesitated to award fees to private law firms in civil rights litigation based on the rates they typically charge to their commercial clients, notwithstanding that they initially took on the cases *pro bono*. *See, e.g.*, *Lowrance*

v. Coughlin, 88 Civ. 3343 (LBS), 1995 WL 103277, at *1 (S.D.N.Y. Mar. 8, 1995) (granting a fee request under a fee-shifting statute of $155 - $295 hourly for associates and $465 hourly for partners because such awards were consistent with standard Paul Weiss rates, which were in line "with the prevailing market rates and billing practices for New York City firms of comparable size and expertise."); *Burr v. Sobol*, 748 F. Supp. 97, 102 (S.D.N.Y. 1990) (finding fees acceptable because "Cravath has much higher overhead . . . which is reflected in the rate per hour charged.").

The difficulties created for district courts by the conflict between the panel's direction that the *pro bono* nature of the firm's role be considered in calculating a reasonable fee and long-established case law to the contrary is already evident in the first district court case decided since the panel's decision. *See Chan*, 2007 WL 1373118. Judge Lynch was plainly struggling to reconcile the panel's language, his understanding from Supreme Court and other precedent that "[i]t is well established that civil rights attorneys not working for profit are entitled to fees that are comparable to those awarded to private attorneys with fee paying clients," and his conclusion that, the panel's language notwithstanding, "the fact that an attorney is willing to take a case pro bono is not itself a basis for reducing fees . . . ." *Id.* at *2-3. Rehearing is therefore needed at the very least for the benefit of the district judges who will confront the same conundrum facing Judge Lynch.

II. The Panel's New Standard Will Likely Adversely Affect The Ability And Willingness Of Private Firms To Handle Civil Rights Litigation.

While rehearing is justified given the conflict between the panel's standard, Congress's express intent, and prior decisions of this Court and the Supreme Court, it is also warranted because of the consequences the panel's standard will have for enforcement of civil rights laws. This is especially so given the fact that nowhere in its decision does the panel acknowledge these consequences or the consequences on public interest programs generally. Fee reduction for *pro bono* practitioners threatens to undercut their willingness to litigate civil rights cases as part of their *pro bono* practice.

For at least some of the private firms that handle civil rights cases on a *pro bono* basis, the potential for fee recovery serves as an incentive to take on those cases. As has already been pointed out, civil rights cases can be expensive, complex, and time-consuming, and can divert lawyers from work for paying clients for considerable periods of time. Especially where a firm's capacity is taxed by heavy commercial burdens, the possibility of a fee sometimes is a consideration in taking on a case—at least for the decision-makers in a firm, if not for the individual lawyers who are handling the case. Further, there is no shortage of *pro bono* opportunities: 80% of the legal needs of the poor remain unmet. *See, e.g.*, A.B.A. Presidential Task Force on Access to Civil Justice, *Executive Summary Report with Recommendation on Civil Right to Counsel* 4-5 (Aug. 7, 2006),

http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf; Deborah L. Rhode, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 3 (2005). In deciding how to allocate finite *pro bono* resources, private firms may well turn to other, less complex and time-consuming cases to meet their *pro bono* obligations if they perceive that attorneys' fees awards in civil rights cases would be discounted because the cases were taken on *pro bono* or because of perceived reputational or other non-monetary benefits such as the lawyer's or law firm's "agendas." *See Arbor Hill*, 2007 WL 1189487, at *9.

Some firms are also motivated to take on civil rights cases as part of their *pro bono* programs because the recovery of fees can be put to good use, either in support of the firm's *pro bono* program, as a donation to the public interest group that originally involved the law firm in the litigation, or for other charitable endeavors. *See, e.g.*, Pro Bono Institute at Georgetown University Law Center April 2004 Survey of Large Law Firms (forthcoming 2007) (on file with author) (over 70% of responding large law firms awarded fees through fee-shifting statutes either donate all fees to public interest organizations or retain only a small portion for out-of-pocket expenses, and roughly one-half of those that retain any fees designate them for use in administering the firm's *pro bono* program, donate the fees to public interest or community groups, or earmark them for use by the firm's charitable foundation).

The ability to further the public interest through these uses is a real benefit to the firms, and the fees awarded constitute a real monetary incentive even when donated by the firm to civil rights organizations or used for other public interest, *pro bono*, or charitable benefits. Reducing the attorneys' fees award in civil rights cases because a law firm is motivated to act in the public interest is likely to have a domino effect of reducing the resources available for law firms to make donations to civil rights organizations that retain them, their *pro bono* programs, or other charitable purposes.

In addition, if the language used by the panel remains in effect, some private law firms will inevitably decide that they have no interest in having their motivations for taking on civil rights cases exposed to public scrutiny. Some lawyers within a firm may wish to take on civil rights cases for moral or political reasons, and some may wish to take them on because they will enhance the reputation of the firm in the eyes of clients or law students; other lawyers in the same firm may oppose taking on the cases at all but nevertheless be willing for the firm to be involved out of deference to their colleagues or to induce young lawyers to work long hours on paying matters. But if the partners in the firm thought that those mixed motivations might be plumbed in open court as part of a fee application, they might conclude, notwithstanding their statutory right to a fee, that the firm should not pursue the fee application. Further, without the possibility of a

fee award to defray at least some of their expenses on civil rights cases, the firm might well decide not to get involved in civil rights cases at all. In this way, Congress's purpose in enacting the fee-shifting provisions would be frustrated.[3]

Finally, as the Organizations' Brief shows, the proposed reliance on a hypothetical bargain between the "thrifty, hypothetical plaintiff" and the law firm not only ignores the fact that Congress created the fee-shifting statutes because a free market did not exist for these services, but that any attempt to simulate such a market is impractical and unworkable. *See* Organizations' Br. at 8-16. Indeed, the panel's assumptions concerning how these considerations play in fee negotiations is inconsistent with actual practice. The panel assumes that the prospect of reputational benefits for the firm would result in a reduction of the rates paid by the reasonable civil rights client. In the commercial context, however, when a law firm accepts a high profile, high stakes litigation, it can expect to receive significant reputational benefits—but the paying client nevertheless may pay a *premium* for the firm's work. The only conclusion that can be drawn from the panel's analysis is that it is assuming that a paying client would not attach the same value to civil rights as a commercial client would to money. But that is an

[3] Failure by a law firm to seek an attorneys' fee award would also remove the deterrent effect inherent in Congress's fee-shifting scheme: "because in a fee-shifting case the wrongdoer pays the fee . . . society is imposing an additional cost on the wrongdoer as a deterrent." Bradford, *supra*, at 130. *See* Organizations' Brief at 14-15.

assumption totally at odds with the legislative scheme underlying attorneys' fees statutes and is forbidden by the case law. *See* Organizations' Br. at 5, 6-8 (discussing legislative history and judicial authority).

CONCLUSION

For the foregoing reasons, *amici curiae* The Association of the Bar of the City of New York and The New York County Lawyers' Association respectfully request that the Court grant the Petition For Rehearing And Rehearing En Banc and urge the Court to reconsider the novel standard enunciated in this case for determining the reasonableness of fees awarded under the civil rights laws.

Dated: May 24, 2007

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, Marjorie Press Lindblom, the undersigned, certify under penalty of perjury, that on May 24, 2007, I caused two (2) true and correct copies of the Brief for The Association of the Bar of the City of New York and The New York County Lawyers Association as *Amici Curiae* Supporting Plaintiffs-Appellants' Motion for Panel Rehearing or Rehearing *En Banc* to be served by hand upon :

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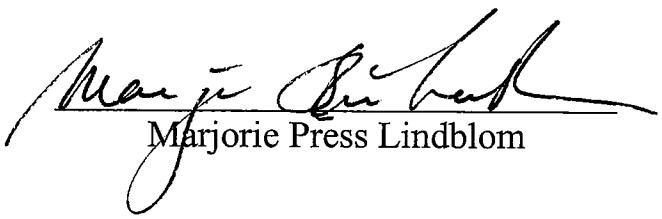

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