No. 01-131

IN THE
Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, and NANCY SANDINE,
Petitioners,
v.

JO ANNE B. BARNHART, Commissioner of Social Security,
Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When calculating a "reasonable fee" to be paid an attorney pursuant to 42 U.S.C. § 406(b), should a court use an hourly-based "lodestar" method (which multiplies the hours that the attorney worked by the reasonable hourly rate, with certain other adjustments), or should it employ a rebuttable presumption that the attorney should receive 25% of the benefits awarded to the plaintiff, the maximum award permitted by the statute.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting fairness in judicial proceedings. To that end, WLF has appeared before this Court as well as other federal and state courts in numerous cases involving the reasonableness of attorney fee awards. *See, e.g., Farrar v. Hobby,* 506 U.S. 103 (1992); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *King v. Palmer,* 950 F.2d 771 (D.C. Cir. 1991) (*en banc*). WLF has also filed petitions with the Federal Trade Commission and bar authorities in each of the 50 states regarding the need to more closely regulate contingent fee agreements entered into between attorneys and their clients.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Those who receive disability benefits under Title II of the Social Security Act are unable to work and thus are unlikely to have other substantial sources of income. *Amici* believe it is important that such individuals not be forced to pay large fees to their attorneys when they are awarded such benefits in a court proceeding. *Amici* are filing for the sole

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

purpose of sharing with the Court their views regarding what constitutes a "reasonable" attorney fee in such cases. They have no economic interest in the outcome of this or any other case involving fee awards under Title II of the Social Security Act.

Amici curiae are filing their brief with the consent of all parties. Letters of consent have been lodged with the Clerk of Court.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate by reference the Statement contained in the brief of Respondent.

In brief, this case involves attorneys who represented clients in successful suits to obtain disability benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.*[2] The attorneys subsequently obtained court orders mandating that they be paid fees out of the proceeds of the past-due disability benefits; the attorneys seek review of those orders, complaining that the fee awards were inadequate.

Section 206(b) of the Social Security Act, 42 U.S.C. § 406(b), provides that whenever a federal district court rules in favor of a Title II claimant who is represented by counsel,

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[2] Title II provides for payment of old-age, survivor, and disability benefits to insured individuals (*i.e.,* those who have made sufficient payments into Social Security, or the survivors of such individuals), without regard to financial need. Title II does not encompass Supplemental Security Income benefits (SSI). SSI is a welfare program set forth in Title XVI of the Social Security Act. Disabled individuals can become eligible for SSI payments only if they are financially needy.

the court "may" provide for the payment of a "reasonable" fee to attorney, "not in excess of 25 percent" of past-due benefits. Section 406(b)(1(A) further provides that in such cases in which a judgment has been entered for the claimant, the court-ordered fee is the only one that may be paid to the attorney for his work. It is a criminal act for an attorney to collect or even demand an additional fee in cases in which he is eligible for a court-awarded fee. 42 U.S.C. § 406(b)(2).[3]

Three attorneys, Tim, Ralph, and Etta Wilborn, represented each of the three Petitioners in their efforts to obtain Title II disability benefits. Petitioners Barbara A. Miller and

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[3] Section 406(b) provides in relevant part:

> (1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.
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> . . .
>
> (2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of what is allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

Nancy Sandine were unrepresented during their unsuccessful efforts at the administrative level to obtain disability benefits. The Wilborns filed suits on their behalf and obtained judgments that they were entitled to benefits. The Wilborns spent 39.91 hours on Miller's case and 52.4 hours on Sandine's case; the parties do not dispute the reasonableness of those hours.

An administrative law judge (ALJ) determined that Petitioner Gary E. Gisbrecht had been disabled from 1993 to 1996 but not thereafter; he was awarded benefits for that three-year period only. Ralph Wilborn represented Gisbrecht before the Social Security Administration's Appeals Council in any unsuccessful bid to overturn the ALJ's decision. Thereafter, the Wilborns filed suit on Gisbrecht's behalf in federal district court. Before the district judge could rule on the suit, the Commissioner confessed error and admitted that Gisbrecht's disability had not ceased in 1996. Again, there is no dispute as to the reasonableness of the 25.08 hours devoted to the case by the Wilborns before the Commissioner's confession of error.

Following entry of judgment in their clients' favor, the Wilborns filed motions for fee awards in each of the three cases. In each case, they requested an award of 25% of past-due benefits granted to their clients. That amounted to fee requests of $7,500 in the Miller case, $14,000 in the Sandine case, and $7,100 in the Gisbrecht case.[4]

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[4] The Wilborns also sought and received a $2,000 fee, pursuant to 42 U.S.C. § 406(a), for their representation of Gisbrecht before the Appeals Council. That amount is no longer at issue, and is in addition (continued...)

Each of the district courts before whom the cases were pending granted the fee requests in amounts significantly less than had been sought. The courts computed the fees using the "lodestar" method: they multiplied the number of hours devoted to the cases by a reasonable hourly fee. They then declined requests to adjust the lodestar amount upward to compensate the Wilborns for the contingent nature of their representation -- *i.e.,* the Wilborns would have received nothing if their clients had not prevailed. Petition Appendix ("Pet. App.") 17-22; *id.* at 23-26; *id.* at 33-41. The fees awarded to the Wilborns were $5,461.50 in the Miller case, $6,550.00 in the Sandine case, and $3,135.00 in the Gisbrecht case.

The U.S. Court of Appeals for the Ninth Circuit affirmed the fee awards. *Id.* at 1-11. The Ninth Circuit agreed with the district courts that the lodestar method should be used in calculating fees under 42 U.S.C. § 406(b). *Id.* at 6.[5] While recognizing that upward adjustments of the lodestar fee based on the contingent nature of the representation are appropriate in some cases, the appeals court held that the district courts did not abuse their discretion in declining to grant an upward adjustment in these cases. *Id.* at 8-10.

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[4](...continued)
to the fee sought by the Wilborns for their district court work.

[5] The appeals court noted that the Second, Sixth, and Seventh Circuits have rejected use of the lodestar method. Those courts have adopted the "contingency" method, under which a contingent fee contract entered into between the attorney and the claimant is presumptively reasonable and should be enforced, so long as the contracted fee is not greater than 25% of the past-due benefits. *Id.* at 6 n.2.

The Court granted review in order to resolve the conflict over whether the lodestar method or the contingency method should be used in calculating fees under § 406(b).

SUMMARY OF ARGUMENT

Congress adopted § 406(b) for the express purpose of imposing caps on the fees that attorneys could charge for representing clients in successful federal court suits for the recovery of Title II benefits. There are two distinct features of the cap. First, any fee awarded must be "reasonable." Second, fees may not under any circumstances exceed 25% of the past-due benefits awarded as a result of the suit. Petitioners essentially ask the Court to write the "reasonable-[ness]" requirement out of the statute; they argue that 25% of past-due benefits (the amount specified in virtually all contracts entered into between attorneys and their clients seeking Title II benefits) should be deemed presumptively reasonable. But Congress has determined that it should be up to the courts, not the parties, to determine what constitutes a "reasonable" fee. The "lodestar" method -- the number of attorney hours multiplied by a reasonable hourly rate, followed by appropriate adjustments -- is the method that courts historically have used to determine a "reasonable" fee award.

Moreover, the lodestar method is the fairest method of determining appropriate attorney fees in Title II cases. Petitioners concede that approximately the same number of hours are required to prepare every Title II suit; it seems only appropriate, therefore, that the fees awarded should be relatively uniform from case to case. Use of the lodestar method assures uniformity; use of the contingency method

does not. Cases that are delayed significantly from the date of the alleged onset of disability to the date of award will produce the largest past-due benefit awards -- and therefore the largest fee awards under the contingency method. Such delays are not a valid reason to grant premium fee awards; if anything, attorneys ought to be given the opposite financial incentive. Petitioners complain that the lodestar method does not appropriately compensate attorneys for assuming the risk that they may never be paid for their work. But such assumption of risk to a certain extent can be and presumably is worked into the computation of a reasonable hourly fee. Moreover, as the Ninth Circuit recognized, the lodestar amount can be adjusted upward where appropriate to compensate for unusually risky representation.

Petitioners cite *Venegas v. Mitchell,* 495 U.S. 82 (1990), for the proposition that courts should give effect to the intent of the parties, as expressed in the retainer contract entered into between the attorney and his client. In *Venegas*, the Court determined that Congress, when it adopted 42 U.S.C. § 1988, did not intend "to limit civil rights plaintiffs' freedom to contract with their attorneys." *Id.* at 87. *Venegas* is inapposite. In contrast to Congress's intent in adopting § 1988, it is undisputed that Congress adopted § 406(b) precisely because it wanted to limit the right of Title II plaintiffs to contract with their attorneys. Congress was concerned that due to unequal bargaining positions, Title II plaintiffs were agreeing to pay excessive fees.

Finally, the courts can administer the lodestar method without consuming excessive judicial and attorney resources. They have been doing so successfully for many years under federal fee-shifting statutes as well as in Title II cases. The

Wilborns's claim that use of the lodestar method unnecessarily complicated these cases rings hollow, when one considers that it was the Wilborns who chose to file additional fee claims under the Equal Access to Justice Act (EAJA), a claims process that is far more complex than use of the lodestar method in § 406(b) cases.

ARGUMENT

I. USE OF THE LODESTAR METHOD BETTER COMPORTS WITH THE LANGUAGE OF § 406(b) THAN DOES USE OF THE CONTINGENCY METHOD

The Wilborns assert that the Court should follow the lead of the Second, Sixth, and Seventh Circuits and treat as presumptively reasonable, and therefore controlling, any fee agreement entered into between an attorney and a client seeking Title II benefits, provided only that the agreement does not provide for a fee greater than 25% of past-due benefits. Because the fee agreements entered into between the Wilborns and each of their clients provided for a fee equal to 25% of the past-due benefits awarded by the courts, they assert that the Ninth Circuit erred in refusing to award them their requested 25% fee.

That argument is not consistent with the language and legislative history of § 406(b). Congress adopted § 406(b) in 1965 because it believed that some attorneys were charging "inordinately large fees" to represent Title II disability benefits claimants in federal court proceedings. S. Rep. No. 404, 89th Cong., 1st Sess., Pt. 1, at 122 (1965). Section 406(b) was designed to cap such fees, without regard to the

fees that claimants might have agreed to pay, because Congress did not believe that claimants were in a position to bargain with attorneys in a free and informed manner regarding fee arrangements. *Ramos Colon v. Sec'y of Health and Human Servs.,* 850 F.2d 24, 26 (1st Cir. 1988).

There are two distinct features of § 406(b)'s fee cap. First, any fee awarded must be "reasonable." Second, fees may not under any circumstances exceed 25% of the past-due benefits awarded as a result of the suit. The "contingency" method of fee computation urged by the Wilborns (whereby a 25% contingent fee is presumptively reasonable) is not a plausible reading of the statute. The contingency method essentially writes the reasonableness requirement out of the statute. If Congress had intended that courts should enforce virtually every contract calling for a fee equal to 25% of the past-due benefits awarded, there would have been no reason for Congress to specify that § 406(b) fee awards must also be "reasonable."[6]

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[6] There is no serious dispute among the parties that virtually every attorney representing Title II disability claimants includes in his/her retainer agreement a provision calling for a fee equal to 25% of the past-due benefits awarded by the courts. Petitioners view this as evidence that the "market" has determined that a 25% contingent fee is the appropriate fee. To the contrary, *amici* view this as evidence that Congress got it right: virtually no disability claimants are in a position to bargain with attorneys regarding rates and therefore are in need of protection. Moreover, it often makes little sense to refer to "market treatment" of attorney fee issues arising under federal statutes. As the Court has recognized, the "market" exists here, as under similar federal statutes, only because Congress has created a cause of action for improper denial of Title II disability benefits and then has created a mechanism whereby up to 25% of past-due benefits can be set aside for

(continued…)

The Wilborns do not dispute that use of the lodestar method of fee computation -- which arrives at a fee by multiplying the hours that an attorney worked by the reasonable hourly rate, and then makes certain other adjustments as appropriate -- results in a "reasonable" fee being awarded to attorneys. Rather, they assert that in every case there will be a range of reasonable fees, that that range in most cases will include a fee based on 25% of the past-due benefits awarded, and that the courts should defer to the intent of the parties (as expressed in the retainer agreement) whenever such deference would still result in a reasonable fee. Pet. Br. 18-19.

There is no support in the statutory language for the Wilborns's argument. The statute speaks in terms of "the court" determining what should constitute a reasonable fee in any given case and makes no mention of the retainer agreement. To the contrary, in light of the purpose underlying adoption of § 406(b) -- Congress's belief that unequal bargaining power between attorneys and clients was leading to "inordinately large fees" being charged in some cases -- it is highly unlikely that Congress intended courts to defer to the terms of the retainer agreement in establishing a "reasonable" fee award under § 406(b).

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[6](...continued)
payment of fees directly to the attorney involved. *See City of Burlington v. Dague*, 505 U.S. 557, 564 (1992) ("'I see the judicial judgment as defining the market, not vice versa.'") (quoting *King v. Palmer,* 906 F.2d 762, 770 (D.C. Cir. 1990) (Williams, J., concurring), *vacated*, 950 F.2d 771 (D.C. Cir. 1991) (*en banc*), *cert. denied*, 505 U.S. 1229 (1992)).

Moreover, Congress made clear that it did not believe that retainer agreements providing for contingent fees in excess of 25% were the sole source of the "inordinately large fees" to which it objected. Rather, the Senate Report indicates that excessive fees were also a product of the "considerable delays" frequently encountered between the alleged onset of disability and the award of benefits; Congress feared that such delays could result in unreasonable fees being awarded if computation were based solely on a percentage of the past-due benefits awarded. S. Rep. No. 404, 89th Cong., 1st See., Pt. 1, at 122 (1965). Accordingly, a rule establishing 25% contingent fees as "presumptively reasonable" in § 406(b) cases is not consistent with congressional intent.

In numerous other contexts in which Congress has directed the courts to determine "reasonable" attorney fee awards, the Court has looked to the lodestar method in making that determination. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983) (fee awards in civil rights cases filed under 42 U.S.C. § 1988); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (fee awards under fee-shifting provisions of federal environmental statutes). There is no reason to interpret Congress's use of the word "reasonable" in § 406(b) in the radically different manner suggested by Petitioners.

II. THE LODESTAR METHOD IS THE FAIREST METHOD OF DETERMINING APPROPRIATE ATTORNEY FEES IN TITLE II CASES

The lodestar method of fee computation is preferable to the "contingency" method espoused by Petitioners because it ensures that all fee requests will be treated equally.

By basing compensation on the number of hours spent on a case, as well as the level of skill and training the attorney brings to the case, the lodestar method ensures that fee awards will be roughly equitable from case to case. The lodestar method provides an incentive for attorneys to devote more resources to cases where doing so is necessary to ensure that the claimants prevail, because they know that they will be compensated for doing so.

A unique feature of Title II litigation is the remarkable uniformity of attorney resources required of each such case. An attorney filing a Title II case does so on the basis of a pre-existing administrative record. No discovery or other time-consuming pre-trial activities are called for. Rather, the claimant's attorney generally files a boilerplate complaint, followed by a detailed motion for summary judgment (or its equivalent). As Petitioners concede, Title II cases typically consume somewhat less than 40 hours of attorney time. Pet. Br. 35 & n.41 (citing surveys from reported decisions).

Given relatively small and roughly uniform levels of attorney resources required by Title II cases, one would expect that the "reasonable" fees awarded under § 406(b) to be roughly uniform from case to case. The lodestar method of fee computation provides just such uniformity -- while at the same time allowing for variation in unique cases involving particularly complex issues (which demand more attorney time, or a more highly skilled attorney, or both).

In contrast, granting fees based on the presumption that the claimant's attorney should receive 25% of the past-due benefits award results in wildly inconsistent fee awards in similarly situated cases. The inconsistency arises because, as noted above, some Title II case can be delayed considerably from the alleged onset of disability to the time of award. Those cases encountering the greatest delays will produce the largest past-due benefits awards. Because delay could never be deemed a product of superior legal work, there is never a direct correlation between the attorney's performance and increased past-due benefits awards brought about by delay. Moreover, once a claimant is deemed disabled, his/her benefit level is largely pre-determined; there is rarely any way that good attorneys can increase benefit levels beyond establishing their clients' disabilities. Accordingly, the wide case-to-case disparity in past-due benefit awards is wholly unrelated to attorney performance. Use of the contingency method thus results in wide disparities in fee awards that have no rational basis.

The four cases that were before the Ninth Circuit well illustrate that phenomenon. The past-due benefit awards in those cases were as follows: Barbara Miller -- $30,100; Nancy Sandine – $56,000; Gary Gisbrecht – $28,400; and Donald Anderson -- $128,400. The number of attorney hours devoted to each case was roughly equal, but the "presumptively reasonable" fee derived using the contingency method espoused by Petitioners varies widely from case to case. The Wilborns's "presumptively reasonable" fee for their work on behalf of Donald Anderson was more than four-and-one-half times greater than the "presumptively

reasonable" fee for their work on behalf of Gary Gisbrecht.[7] Admittedly, in the *Anderson* case the Wilborns did not seek from the district court the full amount of the fee to which they would have been entitled under the contingency method. Pet. App. 12-16 (fee sought was $10,000, rather than $32,000). But the Wilborn's decision to abandon the contingency method in that case only serves to illustrate the deficiencies of that method. *Amici* submit that the Wilborns's submission of a drastically reduced fee request in the *Anderson* case indicates a recognition on their part that the lodestar method provides a much surer and fairer means of determining a "reasonable" fee award than does the contingency method. There certainly is room to argue regarding how the lodestar method is implemented in particular cases, but it is simply too late in the day to argue that the lodestar method is not the appropriate means by which the federal courts determine a "reasonable" fee.

The Wilborns complain that the lodestar method does not appropriately compensate attorneys for assuming the risk that they may never be paid for their work. But the risk they assume is not unique among lawyers. Except for those few attorneys who can demand advance payment, virtually all

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[7] The disparities in fees is particularly ironic, because the Wilborns cite Mr. Gisbrecht's case as a prime example of how a highly skilled attorney can increase the past-due benefits award even after a determination has been made that the claimant is disabled. *See* Pet. Br. 21 n.24 ("A skilled attorney may increase the amount of benefits . . ., as in *Gisbrecht*, by convincing the court that the period of disability lasted longer."). Yet despite the high degree of legal skill displayed by the Wilborns in Mr. Gisbrecht's case, the contingency method of fee awards still resulted in a far lower "presumptively reasonable" fee than in Mr. Anderson's case.

lawyers must assume a certain amount of risk of nonpayment. Accordingly, the risk of nonpayment to a certain extent can be (and presumably is) factored into the computation of a reasonable hourly fee. As the Court explained in *City of Burlington:*

> The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the case; and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar -- either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. . . . Taking account of it again through lodestar enhancement amounts to double counting.

City of Burlington, 505 U.S. at 562-63.

City of Burlington went on to explain why, in the context of fee awards under a fee-shifting statute, contingency based on the first factor also should not lead to an upward revision of the lodestar amount. *Id.* at 563. The Wilborns accurately point out, however, that *City of Burlington* is distinguishable in one meaningful respect: in a fee-shifting case, the fees are being paid by the opposing party, not (as here) by the party for whom the services were performed. Pet. Br. 45. There are good reasons not to require a losing party to pay enhanced fees to opposing counsel simply because the losing party's case was so strong that challenging the case entailed extra risk of non-payment; we do not usually punish a party for having a strong case. But in Title II cases, it may make sense to pay premium fees

to attorneys willing to take on especially risky cases; without the availability of such premiums, a disability-benefits claimant with a marginal claim might not be able to locate counsel. If, against all odds, an attorney is able to win such a case, the client has no cause to complain if he is asked to pay a high-than-usual fee out of his disability award. Accordingly, *City of Burlington* does not dictate that district courts may never take risk of nonpayment into account in determining a "reasonable" attorney fee under § 406(b).

However, the Ninth Circuit explicitly recognized that contingency enhancements to the lodestar amount *are* appropriate in those § 406(b) cases that are particularly risky. Pet. App. 8-10. The Ninth Circuit's approach is thus eminently fair to attorneys by ensuring that they are compensated for assuming risks of nonpayment that exceed the level of risk already built into hourly rates. In this case, the district courts declined to exercise the discretion granted to them by the Ninth Circuit to award contingency enhancements; but the issue of whether the district courts thereby abused their discretion in that regard is not now before the Court. Indeed, according to the Ninth Circuit, the Wilborns never argued that any of their four cases was particularly risky on an individual basis. *Id.* at 9 n.3.

The Wilborns claim that a majority of the Title II cases filed in federal court are unsuccessful; they argue that without the routine award of § 406(b) fees well in excess of an attorney's regular hourly rate, attorneys are not being fairly compensated for their work. But as the Ninth Circuit pointed out, it would be patently unfair to require prevailing Title II claimants -- whose claims were, presumably, far less risky at the outset than those of the typical unsuccessful

claimant -- to pay enhanced fees in order to subsidize the filing of other lawsuits that were more risky than their own. *Id.* at 9.

In sum, the lodestar method of computing fee awards -- which multiplies the number of hours that the attorney worked by the reasonable hourly rate, and then makes appropriate adjustments, including (on occasion) contingency enhancements -- is the fairest method available, from the standpoint of both clients and attorneys.[8]

III. PETITIONERS' RELIANCE ON *VENEGAS* IS MISPLACED

In support of their contention that courts determining § 406(b) fee awards should defer to the provisions contained in any retainer agreement, Petitioners rely on this Court's decision in *Venegas v. Mitchell*, 495 U.S. 82 (1990). That reliance is misplaced.

Venegas involved a civil rights claim brought under 42 U.S.C. § 1983 by a plaintiff who alleged that police had conspired to deny him a fair trial through the knowing

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[8] As the *amicus* brief supporting Petitioners points out (*Amicus* Br. 15 n.8), § 406(b) appears to permit attorneys to charge Title II clients an up-front fee at the time they take on a case; that fee would be subject to refund under § 406(b)(1)(A) in the event that a court awarded benefits. Such up-front fees would, of course, reduce the risk of nonpayment at least somewhat. Because Title II benefits are payable without regard to financial need, it is reasonable to assume that at least some claimants could afford to pay legal fees up front. There is no evidence in this record, however, that market conditions would permit attorneys to find clients willing to pay such fees.

presentation of perjured testimony. The plaintiff, Mr. Venegas, entered into a retainer agreement with his attorney that provided for a contingent fee equal to 40% of whatever amounts were recovered. After Mr. Venegas won a $2.08 million judgment, counsel obtained a $75,000 fee award under 42 U.S.C. § 1988, which provides for the recovery of attorney fees from the losing party in a civil rights action. Mr. Venegas thereafter sought to avoid having to pay 40% of his judgment to his attorney pursuant to the retainer agreement; he argued that the award of attorney fees under § 1988 should be in lieu of any award under the retainer agreement. The Court unanimously disagreed, and ordered Mr. Venegas to pay the contractually-agreed-upon fee. *Venegas,* 495 U.S. at 90.

Venegas provides no support for Petitioners. It was based on the Court's determination that Congress, when it adopted 42 U.S.C. § 1988, did not intend "to limit civil rights plaintiffs' freedom to contract with their attorneys." *Id.* at 87. In contrast to Congress's intent in adopting § 1988, it is undisputed that Congress adopted § 406(b) precisely because it wanted to limit the right of Title II plaintiffs to contract with their attorneys. Congress was concerned that due to unequal bargaining positions, Title II plaintiffs were agreeing to pay excessive fees. *See* S. Rep. No. 404, 89th Cong., 1st See., Pt. 1, at 122 (1965).

Under principles of contract law, courts ordinarily will hold contracting parties to their bargains. But Congress determined, with respect to attorney fees charged in suits seeking the award of Title II benefits, that fee should be awarded based on the courts' sense of reasonableness, not

based on the parties' intent. In light of that determination, *Venegas* is wholly inapplicable to this case.

IV. USE OF THE LODESTAR METHOD IS NOT OVERLY COMPLEX AND THUS DOES NOT CONSUME EXCESSIVE RESOURCES

The Wilborns argue that the contingency method of fee computation is superior because it is simpler to administer. They argue that if fees equal to 25% of past-due benefit awards are handed out as a matter of course, the process of determining fees would be greatly simplified and would consume far fewer judicial and attorney resources than the lodestar method. Pet. Br. 36-39.

Amici respectfully suggest that the Wilborns are exaggerating the difficulties of applying the lodestar method. It has been successfully used for many years, without imposing any undue burdens on the court system, in connection with the numerous federal statutes that permit a prevailing party to seek an award of "reasonable" attorney fees from the opposing party. It has also been used successfully in Title II cases in the many circuits, including the Ninth Circuit, that use the lodestar method in Title II cases. Given the near uniformity of legal effort required in typical Title II disability cases, it should not be overly difficult for the courts to determine a reasonable lodestar fee in the vast majority of cases.

Adopting a rule that a fee equal to 25% of the past-due benefits award is presumptively reasonable would, no doubt, be somewhat easier to administer than the lodestar method. But that rule turns a blind eye to the statutory language of

§ 406(b) and to Congress's mandate that the courts guard against excessive fees caused by lengthy delays from the alleged onset of disability to the date of judgment.

Moreover, the Wilborns are in no position to complain about any complications brought on by the Ninth Circuit's use of the lodestar method. In each of the three cases before the Court, the Wilborns applied for (and obtained) fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. EAJA fees are available to prevailing parties only where the court determines that the position of the United States was not "substantially justified" and that no special circumstances "make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Clearly, because a determination regarding whether the government's position in a Title II case was "substantially justified" requires a careful re-examination of the entire case, any fee award request under EAJA will be far more complicated than a fee request under § 406(b) decided pursuant to the lodestar method. Accordingly, had the Wilborns's number one goal been to keep the fee issue simple, they never should have filed EAJA requests. Apparently, filing EAJA petitions resulted in a slight net gain for the Wilborns.[9] But attorneys who believe it is worth their while to litigate the issue of whether the government's position was "substantially justified" should not be heard to complain about the relatively slight evidentiary burdens imposed on them by use of the lodestar method in § 406(b) fee proceedings.

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[9] The Wilborns received slightly more fees under § 406(b) than under EAJA in the *Miller* case and slightly less under § 406(b) in the *Gisbrecht* and *Sandine* cases.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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Dated: February 19, 2002