

# 08-2723-cv

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IN THE  
United States Court of Appeals  
FOR THE SECOND CIRCUIT

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SANDRA LOCHREN, SARAH A. MACDERMOTT, PATRICIA O'BRIEN,  
CHRISTINE BLAUVELT, MIRIAM RIERA, KELLY MENNELLA,  
*Plaintiffs-Appellants,*

DELILAH BUSTAMANTE, JENNIFER KENNEDY,  
*Intervenor-Plaintiffs,*

— v. —

COUNTY OF SUFFOLK,  
*Defendant-Appellee.*

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

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**PETITION OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NEW YORK  
UNIVERSITY SCHOOL OF LAW ET AL. FOR EN BANC REVIEW**

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## **GENERAL STATEMENT OF INTEREST**

*Amici* are 30 public interest organizations, legal services organizations, civil rights law firms and bar associations that rely on civil rights fee-shifting statutes either to enable them to provide representation to civil rights plaintiffs or to ensure that the people they serve are able to obtain representation in civil rights matters. A detailed description of the interest of each *amicus* is set forth as part of the Appendix to this brief. *Amici* submit this brief in support of the petition of Plaintiffs-Appellants for rehearing en banc.

*Amici* are concerned that the standards for out-of-district fees, adopted in this case and in *Simmons v. New York City Transit Authority*, 575 F.3d 170 (2d Cir. 2009), unfairly deprive victims of civil rights violations of access to civil rights expertise that is unavailable, or in short supply, where their case is venued. The standards also could weaken *amici*'s own ability to bring such cases and advance the public interest. This is manifestly contrary to Congress' intent in passing the fee-shifting statutes: to ensure that civil rights plaintiffs are able to find counsel to represent them.

*Amici*'s experience with civil rights fee-shifting statutes, and with the economics of civil rights law practice in the Eastern and Southern Districts of New York, enables them to provide the Court with additional perspectives not presented

by the parties' briefs and to illustrate the adverse consequences of the panel's decision.<sup>1</sup>

## **INDIVIDUAL STATEMENTS OF INTEREST**

### **Alterman & Boop LLP**

Alterman & Boop LLP is small civil rights law firm that has been in existence for approximately thirty-five years with offices in lower Manhattan, New York. If the *Lochren v. Suffolk County* holding stands our firm would be reluctant to take civil rights actions in the Eastern District because of the economics involved. Taking civil rights cases without adequate fee shifting is a very high risk indeed. We often are dissuaded from representing legitimate claims because of the economics and risk. Most of the cases must be brought on a contingency basis with little or no help on the fees and expenses involved. It is only fair that 42 U.S.C. Section 1988 treats civil rights attorneys as "private attorneys generals" who are entitled to receive market hourly rates for the important work that we do.

### **The Anti-Discrimination Center**

The Anti-Discrimination Center is a not-for-profit corporation whose purposes include preventing, combating, and remedying discrimination in housing, employment, and public accommodations. We have seen in our own work, in the

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<sup>1</sup> *Amici* note that Plaintiffs-Appellants' fee request encompasses the time spent on this case by attorney Rebekah Diller, when she was employed by the New York Civil Liberties Union. Ms. Diller is now an attorney at the Brennan Center for Justice, which represents *amici* in this matter.

work of our cooperating counsel, and in connection with private counsel to whom we have referred cases, that the availability of reasonable attorney's fees is essential to the vindication of the rights of individual victims of discrimination and to the ability to address structural barriers to equal opportunity. The Court's decision to restrict those fees is inconsistent with Congressional intent, and will unfairly insulate discriminators from the reach of federal civil rights laws.

**Asian American Legal Defense and Education Fund**

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF represents several clients in the United States District Court for the Eastern District of New York in cases involving fee-shifting statutes. AALDEF's offices are in the Southern District of New York, as are the offices of all of our New York City pro bono co-counsel. The decision in this case regarding the standard for determining the attorney's fees rates of Southern District attorneys, and in the earlier panel decision in *Simmons v. New York City Transit Authority*, threaten the enforcement of civil rights and labor laws as well as Constitutional claims in the Eastern District of New York.

## **Beldock Levine & Hoffman LLP**

Beldock Levine & Hoffman LLP is a private law firm in Manhattan with one of the New York City's premier civil rights practices. We regularly litigate cases involving employment discrimination and retaliation, police misconduct and First Amendment claims. We represent clients in the Eastern District of New York where venue is properly laid because of the relationship of the defendant or the case to Brooklyn, Queens, Staten Island, Nassau or Suffolk. For example, we have litigated cases against Eastern District employers such as SUNY Downstate and Stony Brook, North Shore and Kings County hospitals, Nassau County, and the New York City Department of Education and Police Department. We have litigated in the Southern District against similar and, in some cases, the same, entities and adversaries, including the New York City Office of the Corporation Counsel. Many of our clients who are least able to afford private counsel from their own resources but who have the greatest need for excellent legal representation reside in the Eastern District. Regardless of the district, our eight civil rights lawyers provide our clients with the same zealous experienced representation.

Our entitlement to legal fees for this representation often arises under fee-shifting statutes. Fair hourly rates in calculating and awarding such compensation are essential to our ability to keep our doors open to clients without drawing

distinctions between our clients based on the question of where their cases can be brought. A failure to grant relief on reconsideration will likely affect our determinations as to whether we can accept cases from Long Island or Staten Island, and in those cases where there is a choice of venue, may cause us to favor the Southern District over the Eastern District. The practice of civil rights law is already a financially challenging enterprise without the unnecessary distraction created by what is, in our practice, an arbitrary distinction.

**Brennan Center for Justice at New York University School of Law**

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Among its goals, the Brennan Center works to ensure that low-income people have access to effective, enduring, and unrestricted legal assistance in civil cases. The Brennan Center is also dedicated to protecting the rights of citizens to vote, including by litigating voting rights claims in the federal courts. If the panel's decision stands, the reduced compensation rates it requires would, as a practical matter, reduce the number of lawyers available to handle civil rights cases, and effectively prevent many individuals from vindicating their legal rights. The Brennan Center's own capacity to take on such cases would also be reduced. Because access to the courts and the vindication of citizens' voting rights

and other civil rights are goals essential to a democratic and just society, the Brennan Center joins the amicus brief.

**Brian L. Bromberg**

The Bromberg Law Office, P.C. is a small, private law office that litigates consumer-law cases primarily in the Eastern and Southern Districts of New York. Most of my cases are pending in the Eastern District of New York.

The decisions in *Lochren* and *Simmons* overlook the essential nature of New York City: Manhattan is Downtown for all five boroughs of New York City and for much of Long Island. Because my office is located in the Financial District, it takes me less time to travel by subway to the Brooklyn federal courthouse than to the Manhattan federal courthouse. Many of my clients live in Brooklyn, but work in Manhattan. They meet with me during their lunch break or before or after work. Clients from Staten Island and Queens also meet with me in my office. Even though many of their cases are pending in the Brooklyn federal courthouse, it is easier for them to meet with an attorney in Manhattan after work than to find a local lawyer who is willing to travel to the Brooklyn federal courthouse. In other words, if my office were located somewhere other than Manhattan, entire sections of the Eastern District -- that is, Queens and Staten Island -- would not be able to retain me in connection with their consumer-law matters.

I am the only attorney in New York State that regularly litigates Fair Debt Collection Practices Act (FDCPA) cases to class certification and settlement. Attorneys frequently bring me into cases pending in the EDNY Brooklyn and Central Islip Courthouses to litigate class issues under the FDCPA and other consumer-protection statutes. Large class action firms have too much overhead to be able to take on cases with statutory-damage caps and many small firms cannot afford the time and manpower necessary to effectively pursue these cases as class actions. If small Manhattan firms like mine are not fairly rewarded, they will not be able to afford to bring these actions. In order to ensure that the public interest is served and consumers are protected from unfair business practices, it is important to encourage Manhattan attorneys to take these cases and to fairly reward them for successful results. Unless I am able to bill the same rates in Central Islip that I bill in Manhattan, I will not be able to afford to continue representing consumers on Long Island. As a result, not only named plaintiffs, but thousands of class members, will go unrepresented. I will have to turn away these cases.

**Chittur & Associates, P.C.**

Chittur & Associates, P.C., is a Manhattan-based law firm. The firm is involved in civil rights litigation. The fee-shifting provisions of the civil rights statutes are extremely important when we evaluate whether to accept/prosecute a potential civil rights litigation. We are certainly committed to the advancement of

civil rights, but the economic realities of litigation can hardly be ignored. Most potential plaintiffs cannot afford to pay attorneys' fees and other litigation expenses on an ongoing basis, and our only realistic expectation is to be paid by the defendants if, as, and when we prevail. Judicial pronouncements on the criteria for fee awards are thus extremely significant from our perspective.

*Every* litigation, by definition, adds to our experience and will affect our reputation. However, we still need to pay for our grocery and other bills. Hence, if fee awards were to be made at rate lower than our normal billing rates, our ability to take or refer to civil rights cases would be affected very adversely.

The billing rates for attorneys in the Eastern District of New York are significantly less than those in Manhattan; obviously, because the overheads and other expenses are also lower. However, if we are to be bound to EDNY billing rates in view of this Court's pronouncements in *Lochren v. Suffolk County*, we would avoid taking civil rights cases in EDNY. Accordingly, we join the amicus in their request that these pronouncements be withdrawn.

### **Conover Law Offices**

Conover Law Offices is a small Manhattan-based civil rights law firm that has been in existence for ten years. The majority of clients who come to us seeking assistance are low wage earners who reside or work within both the Southern and Eastern Districts, many of whom have lost their jobs due to

discriminatory practices. As a result, most must seek contingency or partial contingency representation. As such cases are inherently risky, our firm's existence and ability to represent a wide range of wage earners is dependent on adequate statutory fee shifting to the prevailing party. As a practical matter, plaintiffs do not always prevail and many cases are settled prior to trial by voluntarily compromising fee recoveries. Therefore, it is imperative that for those cases that are fully litigated in which the plaintiff prevails, market rates for our attorney's time be recoverable in full. If the *Lochren v. Suffolk County* holding stands, we may be compelled to further restrict the cases we take in the Eastern District based, not on the merits, but on the economics of the practice. As employers based in both the Southern and Eastern District typically retain Manhattan based law firms with expertise in employment discrimination laws, it is only fair that employees be afforded a level playing field.

### **Eisenberg & Schnell LLP**

Eisenberg & Schnell LLP, located in lower Manhattan, focuses primarily in the area of employment law. We regularly litigate cases involving employment discrimination and retaliation, ERISA and the Equal Pay Act. We represent clients in the Eastern District of New York because of the relationship of the case to Brooklyn, Queens, Staten Island, Nassau or Suffolk. Many of our clients are unable to afford private counsel with their own resources. Many of these clients

residing within the Eastern District of New York seek counsel in Manhattan, as there is a limited pool of attorneys handling employment law cases with offices located within the Eastern District of New York.

Entitlement to attorney fees in these cases usually arises under fee-shifting statutes. Fair hourly rates in calculating and awarding such compensation are essential to our ability to maintain our business and represent clients without drawing distinctions based on where their cases can be brought. Consideration of whether we can be compensated in accord with our lodestar may lead us to limit our acceptance of cases from Brooklyn, Queens, Long Island or Staten Island. As the practice of employment law is already financially challenging without the unnecessary distraction created by what is, in our practice, an arbitrary distinction, we support reconsideration in this matter.

**Emery Celli Brinckerhoff & Abady LLP**

Emery Celli Brinckerhoff & Abady LLP (ECBA) is one of the largest private law firms in New York with a significant civil rights practice. With fourteen lawyers and full support staff, ECBA offers experienced civil rights representation with a high degree of success, as well as credibility within the civil rights bar and before the courts. At least half of ECBA's cases are brought under 42 U.S.C. § 1983 and other federal, civil rights fee-shifting statutes such Title VII,

Title VIII and FLSA. These cases include small damages actions as well as significant injunctive cases where the only relief sought is institutional reform.

ECBA has filed numerous actions in the E.D.N.Y. based on the location of events and/or residence of plaintiffs. Because the firm so frequently litigates Section 1983 claims, many of these cases are brought against the City of New York, and our adversaries at Corporation Counsel are the same in the E.D.N.Y. cases as in the S.D.N.Y.

ECBA relies on a steady recovery of its fees pursuant to awards under the fee shifting provisions of these statutes to pay salaries, health care benefits, rent, telephone and IT bills, and all the other many expenses associated with running a mid-sized law firm based in midtown Manhattan. Our firm's financial model crucially depends on ECBA's ability to be paid its hourly rates in all of our cases. Indeed, ECBA is also routinely hired by paying clients to litigate commercial and civil rights actions on an hourly basis. The firm could not possibly afford to bring civil rights cases on a heavily reduced hourly rate, as the *Lochren/Simmons* standard contemplates. If the *Lochren/Simmons* standard remains, ECBA will be much less likely to take civil rights cases that must be litigated in the E.D.N.Y., will be more likely to file cases against the City in the S.D.N.Y. based on the residence of the defendant, and certainly will not be able to take on small damages or injunctive cases which organizations and solo practitioners based in Brooklyn,

Queens, and Long Island have in the past sought our involvement in, as co-counsel. Indeed, we have on a number of occasions been asked to join counsel whose offices are based in the E.D.N.Y. to litigate civil rights cases, both because of ECBA's expertise and because the firm's size and structure allows us to incur the risks of paying costs which solo practitioners and small organizations have informed us they could not bear.

Absent reconsideration of this decision, ECBA will be unable to bring such actions in the E.D.N.Y. and will have to decline requests from organizations and solo practitioners or smaller firms to litigate cases in E.D.N.Y., and will likewise have to forego representing individuals with legitimate, meritorious civil rights claims that must be filed in the E.D.N.Y.

**Fair Housing Justice Center, Inc.**

The Fair Housing Justice Center, Inc. (FHJC) is a non-profit civil rights organization that serves the five boroughs of New York City, plus Suffolk, Nassau, Westchester, Dutchess, Rockland, Orange, and Putnam Counties. The mission of the FHJC is to challenge housing discrimination, promote open and inclusive communities, and strengthen fair housing law enforcement. Among other things, FHJC staff provides housing discrimination complaint intake counseling, investigative services, including fair housing testing, referrals to cooperating attorneys, and post-referral legal assistance to attorneys accepting FHJC clients.

FHJC is the only organization in New York City receiving federal funds under the U.S. Department of Housing & Urban Development's Fair Housing Initiative Program to provide fair housing enforcement services. FHJC provides all of its services free of charge.

FHJC does not provide direct legal representation and does not serve as co-counsel in legal proceedings. Instead, FHJC relies on a combination of experienced civil rights attorneys who accept cases on a fee shifting basis and pro bono partnerships with New York law firms. FHJC cooperating attorneys file suit in federal and state courts, as well as file administrative complaints with federal, state and local agencies.

Since FHJC opened in 2005, 22 Fair Housing Act cases have been filed in a federal court on behalf of an FHJC client by an FHJC cooperating attorney, with 13 cases (60%) in the Eastern District of New York and 9 cases (40%) in the Southern District of New York. In 11 of the Eastern District cases (85%), the plaintiff's counsel was based in the Southern District of New York. The primary reason for this reliance on attorneys located in the Southern District to litigate fair housing cases in the Eastern District is the lack of attorneys in the Eastern District with expertise in federal court litigation of housing discrimination cases.

If FHJC were unable to obtain qualified legal counsel for its clients from districts outside of the Eastern District of New York, it would be unable to assist

families discriminated against in housing because of their race, color, national origin, religion, sex, family status or disability

### **Housing Works, Inc.**

Housing Works, Inc. is New York's largest HIV/AIDS service provider. The Housing Works Legal Department, based in Manhattan, frequently represents clients who would otherwise not be able to secure representation in civil rights actions relating to HIV/AIDS, disability, etc., including cases in the Eastern District of New York, such as the landmark case of *Henrietta D. v. Bloomberg*, 81 F. Supp. 425 (E.D.N.Y. 2000), *aff'd*, 331 F.3d 261 (2d Cir. 2003). The ability to secure full fees is essential to funding Housing Works' litigation for underserved and underrepresented clients, all of whom are indigent.

### **Impact Fund**

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country. In its funding role, the Impact Fund reviews requests for grants to cover expenses of civil rights litigation and is frequently called upon to assist firms in finding financing, co-counsel, or other resources necessary to bring significant litigation. It also represents non-profit organizations in their fee litigation. The Impact Fund's experience attests to the fact that the growing expenses of impact litigation, and judicial reductions in the fees awarded to successful plaintiffs, have made it much

more difficult to attract counsel to public interest cases in many parts of the country. For many of the Impact Fund's grantees and co-counsel, the expense of litigation can make the difference in whether important public interest cases are filed.

**Janice Goodman**

Janice Goodman, of the Law Offices of Janice Goodman, is a sole practitioner who has dedicated her entire 37 year legal career to representing employees in employment related disputes, primarily claims of discrimination under the various federal laws. I have been recognized as an expert in the field of anti-discrimination litigation and have been certified to represent employees in major class actions as well as representing thousands of individual victims of discrimination, harassment and retaliation. The overwhelming majority of my clients, most of whom have been terminated from employment, cannot afford to pay hourly market rates for representation once litigation is begun. Indeed, most recently I agreed to rely on court awarded fees in representing several police officers in Suffolk County, where the primary claim was for injunctive relief. One local counsel was disqualified and no other local attorney would accept the case for less than an up-front retainer of \$15,000, which the client could not afford. Moreover, a traditional contingency arrangement is not suitable in many cases since a primary objective of the litigation may be changing policy, such as the

pregnancy policy in *Lochren* or where the employee is a low wage earner and the financial damages are limited. Therefore, I take most litigation relying on court awarded fees under the statutes, and for the main part have been awarded rates commensurate with my expertise and experience in the Southern District where my office is located. Because of this Court's decision in the earlier case of *Luciano v. Olsten Corp.* and the recent *Simmons/Lochren* cases, I have been dissuaded from taking cases in the Eastern District, particularly Nassau and Suffolk County. Unless reasonable fees are awarded at the attorney's usual rates, attorneys dedicated to vindicating the rights of discrimination victims will be hesitant to accept retention, and the number of attorneys with expertise and experience prepared to take on these matters will be limited. That will be particularly true where the worker is low wage or the goal is injunctive relief.

**Kraus & Zuchlewski LLP**

Kraus & Zuchlewski LLP (K&Z) is a nationally recognized boutique private law firm in New York City. It focuses on employment law, including a well regarded civil rights practice. With four lawyers and full support staff, K&Z offers experienced civil rights representation with a high degree of success, as well as credibility within the employment law bar and before the courts. Approximately 20% of K&Z's cases are brought under Title VII, the Age Discrimination in Employment Act and other federal civil rights fee-shifting statutes.

Our firm's financial stability depends upon K&Z's receiving its hourly rates in all of our cases, and clients routinely retain K&Z to litigate commercial, civil rights actions and employment disputes in court and arbitration on an hourly basis. The firm could not possibly afford to bring civil rights cases on a heavily reduced hourly rate, as the *Lochren/Simmons* standard contemplates.

K&Z carefully scrutinizes all cases where it must rely on fee shifting statutes to pay its expenses. In fact, given our review of the case law where courts routinely reduce attorneys' hourly rates, deduct hours spent on cases and reduce awards where the monetary recoveries are limited, we are reluctant to pursue many facially valid civil rights claims. If the *Lochren/Simmons* standard remains, K&Z will be much less likely to take even the most compelling civil rights cases that must be litigated in the E.D.N.Y., and it certainly will not be able to take on small damages cases or injunctive cases, where the firm must rely upon a future fee award.

**Lambda Legal Defense and Education Fund, Inc.**

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) is a national non-profit organization, headquartered in New York, committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals and transgender (LGBT) people and individuals living with HIV through impact litigation, education and public policy work. Founded in 1973, Lambda Legal has

represented plaintiffs in scores of cases throughout the Second Circuit by partnering with cooperating attorneys, private law firms and civil rights organizations that provide the resources to pursue complex civil rights litigation. Likewise, many members of Lambda Legal and of the communities it serves directly rely on such counsel to vindicate the civil rights Lambda Legal works to establish.

If the standard for out-of-forum fees adopted in this case and in *Simmons v. New York City Transit Authority* is upheld, the ability of counsel with the expertise and specialization necessary to represent LGBT individuals and people living with HIV will be significantly diminished. This will have a particularly detrimental effect on LGBT people and individuals living with HIV who reside in areas with fewer experienced civil rights counsel, unfairly depriving these communities of access to justice.

**Lansner Kubitschek Schaffer & Zuccardy**

The law firm of Lansner Kubitschek Schaffer & Zuccardy handles primarily lawsuits under 42 U.S.C. § 1983. David J. Lansner and Carolyn A. Kubitschek formed the firm of Lansner & Kubitschek in January, 1991, to create a firm of “private attorneys general” who would obtain legal redress for individuals involved in the child welfare area whose constitutional rights had been violated by government employees, from either unwarranted separation of the family or abuse

of children in foster care. One of their cases, *Nicholson v. Scoppetta*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002), on appeal 344 F.3d 154 (2d Cir. 2003), on questions 3 N.Y.3d 357 (2004), a class action lawsuit, stopped the City of New York from removing children from mothers who were victims of domestic violence, solely because the mothers had been battered, and set important procedural and substantive standards for government intervention in the lives of all parents and children. Other important cases include *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999) (on due process rights of parents and children in child welfare investigations), and *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994) (on due process rights of individuals who are listed on the register of suspected child abusers). They have also authored and co-authored numerous amicus briefs in the United States Supreme Court and United States Courts of Appeals, completely pro bono.

Lansner Kubitschek Schaffer & Zuccardy depends on \$1988 fees to survive, to pay rent and operating expenses, and to pay the salaries of its employees. Although expenses are payable every month, income arrives only when the case is over, and only if the client has won. April 25, 2007, the predecessor firm of Lansner & Kubitschek finally received the final installment of its fees in the case of *Nicholson v. Scoppetta*, an endeavor which had consumed much of the firm's time for seven years, since the firm filed it on April 17, 2000. In order to pay the firm's expenses during those years, David Lansner & Carolyn Kubitschek had to

take out a second mortgage on their home.

Lansner Kubitschek Schaffer & Zuccardy bring their civil rights cases in both the Southern and Eastern Districts of New York, and the firm represents a majority of plaintiffs in child welfare civil rights cases. (Very few firms will handles such cases.) The cases are against the same defendants: the City of New York and foster care agencies. The cases involve the same type and amount of work, regardless of which district the case is brought in. The attorneys defending the City and the foster care agencies are the same in both districts, and most have their offices in the Southern District. There is no rational basis for distinguishing between the value of work in the Southern District from that in the Eastern District, the courthouses of which are merely a short subway ride or walk across the Brooklyn Bridge.

Since the City of New York is a defendant in all of the civil rights cases which the firm brings and is located in both districts, the firm can choose which district to bring the case in. Awarding lower fees for cases in the Eastern District will simply push the firm to file all of its cases in the Southern District.

### **LatinoJustice PRLDEF**

LATINOJUSTICE PRLDEF, formerly known as the Puerto Rican Legal Defense & Education Fund, was founded in New York City in 1972. LatinoJustice is a national not for profit civil rights organization that has advocated for and

defended the constitutional rights and the equal protection of all Latinos under law. Our continuing mission is to promote the civic participation of the pan-Latino community, to cultivate Latino community leaders, and to bring impact litigation across the country addressing basic civil rights in the areas of education, employment, fair housing, immigrants' rights, language rights, redistricting and voting rights. During its 37-year history, LATINOJUSTICE PRLDEF has litigated numerous cases challenging multiple forms of discrimination in the courts comprising the Second Circuit. It joins this brief to ensure that Latino litigants have continued, unfettered access to quality legal counsel.

**League of Women Voters of New York State, Inc.**

League of Women Voters of New York State, Inc. (the League) is a nonpartisan not-for-profit organization that promotes the informed and active participation of individuals in government, works to increase public understanding of major public policy issues, and strives to influence public policy through education and advocacy in the courts and legislature. It is an affiliate of the League of Women Voters of the United States (the national League), which has been a trusted force for change and good government since its founding in 1920. The national League and its affiliates have a longstanding history of advocacy for voting rights, believing the right to vote to be a fundamental citizen right that must be guaranteed. The League occasionally finds it necessary to resort to the courts to

achieve its goals. As is the case with many good government organizations, the League has no attorneys on its staff and does not have sufficient funds to undertake litigation without the ability to engage pro bono counsel.

### **Legal Action Center**

The Legal Action Center (LAC) is a national public interest law firm, founded in 1972, that performs legal and policy work to fight discrimination against and promote the privacy rights of individuals with criminal records, alcohol/drug histories, and/or HIV/AIDS. We do all of our legal work through our headquarters in Manhattan. Through our legal services and litigation project, LAC represents individual New Yorkers who face discrimination or privacy violations based on a criminal record, addiction history, or HIV status. We help people obtain and maintain jobs, housing, and other services vital to leading a productive and healthy life in litigation brought throughout the New York City metropolitan area (both SDNY and EDNY). Individuals seek our representation because of our reputation and experience, built over decades, and because there are so few other attorneys with this expertise. Additionally, most of our clients cannot afford to hire an attorney, and few attorneys take these cases on a contingency fee basis. The question posed in this case is of vital concern to LAC's clients and others who face a dearth of legal resources to begin with, and an even greater shortage outside

of Manhattan. Through the amicus process, LAC can provide the experience and voice of its clients to the Court.

### **The Legal Aid Society of New York City**

Founded in 1876 with the core mission of providing free legal assistance to indigent New Yorkers, The Legal Aid Society is the nation's oldest and largest provider of legal services to indigent families and individuals. The Society joins in this brief because it believes the *Lochren* and *Simmons* standards, especially as applied to the Southern and Eastern Districts of New York, defy economic reality and common sense. The market for legal services in New York City is, and has been for years, a single legal market. For historical and cultural reasons that date back to the founding of this country, the locus of financial activity in New York City has been in Manhattan, and for that reason the leading law firms have located there. The line dividing the Southern and Eastern Districts is wholly arbitrary as far as the market for legal services is concerned. There is no basis in reality or common sense for treating Brooklyn, for example, as an "out of district" jurisdiction when analyzing the legal market. The Legal Aid Society itself illustrates this point. The Society has offices in all five boroughs of New York City. Its clients often live in the Eastern District but work or engage in transactions that raise legal issues in the Southern District, or *vice versa*. It defies logic to imagine that clients in Brooklyn who retain counsel in Manhattan are

shopping for counsel “out of district.” Moreover, since the Society is the only City-wide unrestricted provider of free legal services, clients often have no choice but to seek assistance from the Society rather than another legal services provider. The notion that a prevailing party should somehow have to “persuasively establish” that retaining the Society “would likely (not just possibly) produce a substantially better net result” than a local legal services provider is impractical and has no basis in the reality of the New York legal market or the language of federal civil rights attorney’s fee shifting statutes. We strongly urge the Court to reconsider the *Lochren* and *Simmons* standards.

**MFY Legal Services, Inc.**

MFY Legal Services, Inc. is a not-for-profit provider of free legal services to poor, elderly and disabled New York City residents. MFY provides representation in city, state and federal courts and in administrative forums. In federal court, MFY often asserts claims under fee shifting statutes providing for the enforcement of civil rights, such as the Fair Housing Act, the Americans with Disabilities Act, the Fair Debt Collection Practices Act (FDCPA) and the Fair Labor Standards Act. When faced with more complex matters arising under these and other fee shifting statutes, MFY recruits private law firms to co-counsel cases. While those firms are typically willing to charge MFY’s clients no up front fee, the prospect of reimbursement for fees at their usual rate can be an important factor in their

decision to take on cases on behalf of MFY's clients. Moreover, in a funding environment in which both private and public resources for civil legal services to the indigent are diminishing, the receipt of fee awards for its work on these cases at the prevailing rate in its home district is crucial to MFY's ability to continue to litigate fee-eligible cases.

### **Statement of Interest for The National Consumer Law Center**

The National Consumer Law Center is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. For over 40 years the NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. The NCLC staff provides a wide range of direct assistance to consumer law attorneys, including consultation on legal issues, co-counseling, expert testimony, legal research, continuing legal education, widely respected treatises, and technical support. NCLC gives priority to providing case assistance and training targeted at legal aid and pro bono attorneys representing low-income clients.

NCLC is a nonprofit corporation founded in 1969 at Boston College School of Law. Our staff of 23 attorneys combines over 200 cumulative years of specialized consumer law expertise. We address the legal problems faced daily by low-income and financially distressed families ranging from illicit contract terms and charges, home improvement frauds, repossessions, debt collection abuses, usury, mortgage equity scams, and bankruptcy to utility terminations, fuel assistance benefit programs, and utility rate structures, as well as many other issues of economic justice.

### **The National Employment Law Project**

The National Employment Law Project (NELP) is a non-profit organization with 40 years of experience advocating for the employment and labor rights of low-wage workers. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act and related state fair pay laws in federal and state courts. NELP relies on attorneys fees to support our litigation program. The more our fee awards are reduced, the fewer such cases we can bring. Low wage workers face serious barriers to enforcing their rights with administrative agencies, leaving the courts as one of their last options. Because attorneys willing to represent low-wage workers are scarce, workers need access to firms in Manhattan to prosecute their cases in the Eastern District of New York.

NELP works to ensure that *all* workers receive the basic workplace protections guaranteed in our nation's labor and employment laws; this work has given us the opportunity to learn about job conditions around the country and to appreciate the critical need for enforcement of wage and hour laws through private litigation due to the lack of public enforcement of these laws.

### **The National Employment Lawyers Association, New York**

The National Employment Lawyers Association, New York (NELA/NY) is the New York chapter of The National Employment Lawyers Association (NELA), a national bar association dedicated to the vindication of individual employees' rights. NELA is the nation's only professional organization comprised exclusively of lawyers who represent individual employees in employment discrimination, employee benefits and other issues arising out of the employment relationship.

NELA/NY, incorporated as a bar association under the laws of New York State, has over 330 members and is NELA's largest local chapter. Among NELA/NY's activities and services are the publication of a quarterly newsletter, continuing legal education through several conferences a year, and a referral service for employees seeking legal advice and/or representation. Through its various committees, NELA/NY also seeks to promote more effective legal protections for employees.

Of our members, 285 are based in Manhattan and 36 are based in the Eastern District of New York. Our members frequently appear in the federal courts in both the Southern and Eastern Districts of New York and rely, with varying degree, on the fee shifting statutes to make a living and cover the many costs associated with running a business. The decision to embark on federal litigation on behalf of an employee with a civil rights case is a difficult one that involves weighing risk even when a plaintiff's evidence is strong. For our members, the prospect of having our hourly rates significantly reduced when we prevail in a civil rights case is discouraging and may make members less likely to litigate some cases in the Eastern District. NELA/NY's experience with our legal referral service, which serves employees in the New York Metropolitan area, has shown us that employees in need of legal representation face many obstacles to securing representation. The rule established by *Simmons/Lochren* adds another obstacle for employees who happen to work in the Eastern District.

### **National Women's Law Center**

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the NWLC has worked to secure equal opportunity in education and in the workplace for women and girls through full enforcement of

constitutional and statutory rights. The award of reasonable attorneys' fees for attorneys from out-of district venues is important to the achievement of the NWLC's goals.

### **Neighborhood Economic Development Advocacy Project**

NEDAP's mission is to promote community economic justice and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. NEDAP employs multiple strategies to promote wealth creation and to combat high cost, discriminatory financial practices that adversely affect people living in low and moderate income neighborhoods and communities of color. Through its Consumer Law Project, NEDAP provides direct legal services to thousands of low income New Yorkers and advocates for systemic reform through litigation and policy advocacy. NEDAP relies on a network of local attorneys, including small civil rights law firms and solo practitioners, to provide legal services at no cost to our clients. These attorneys, who are mostly located in Manhattan, are able to provide these services to our clients only because fee-shifting consumer and civil rights statutes enable them to recover their fees if they prevail in the litigation. NEDAP is concerned that the standards for out-of-forum fees adopted in this case will prevent us from being able to secure pro bono counsel for our low-income clients who reside in Brooklyn, Queens, and Staten Island.

## **New York Lawyers for the Public Interest**

New York Lawyers for the Public Interest (NYLPI) is a nonprofit, civil rights law firm that strives for social justice. Created in 1976 to address unmet legal needs, NYLPI combines a pro bono clearinghouse with an in-house practice that focuses on issues of racial justice and disability rights. NYLPI has frequently litigated important civil rights cases in the Eastern District with Manhattan co-counsel. NYLPI joins as *amicus* because the panel's limitation on fees recoverable by Manhattan counsel litigating in the Eastern District will have a negative impact on our ability to pursue future civil rights cases.

## **Neufeld Scheck & Brustin, LLP**

Barry Scheck, Peter Neufeld and the late Johnnie L. Cochran, Jr., formed Neufeld Scheck & Brustin, LLP (NSB, formerly Cochran Neufeld & Scheck, LLP) to address individual and systemic civil rights violations in New York and nationwide. Our office is located within the Southern District of New York but we have traditionally brought a significant proportion of our cases in the Eastern District. The vast majority of NSB's practice is representing those who have been victims of police, prison and other forms of official misconduct, as well as those who have been wrongfully convicted, in 42 U.S.C. § 1983 federal civil rights lawsuits. Most of NSB's clients are indigent, and none pays hourly market rates for attorneys' fees. Instead, all of our cases are on a contingent-fee basis with the

understanding that, should we prevail at trial, we will be entitled to recover reasonable attorneys' fees pursuant to 42 U.S.C. § 1988. Taking these cases *pro bono* is not an option for us, since they comprise our entire practice. One Court that recently awarded us § 1988 fees in a wrongful conviction lawsuit in Los Angeles recognized that our attorneys' "experience, reputation and skill are all considerable" in the arena of civil rights litigation. *Atkins v. Miller*, No. CV-01-01574 (DDP), D.E. 457 at 9 (Slip op.) (C.D. Cal. Aug. 27, 2007). Nonetheless, we have recovered vastly different rates in the same kinds of cases, with the same attorneys, solely due to the differences in prevailing fee rates in the jurisdictions where the cases were filed. This disparity forces us to make difficult choices. We are committed to remedying the violation of our clients' constitutional rights. At the same time, however, it would be economically unfeasible for us to pursue even some of the most egregious civil rights cases in jurisdictions where we are unlikely to recover reasonable attorneys' fees.

**Vladeck, Waldman, Elias & Engelhard, P.C.**

Since its founding in 1949, Vladeck, Waldman, Elias & Engelhard, P.C. (the Vladeck Firm), has been nationally recognized as one of the preeminent firms in the fields of labor and employment law. The Vladeck Firm represents working people of all types, from senior executives and professionals to laborers and clerical employees. Most of the cases we litigate are brought pursuant to fee-

shifting civil rights and labor laws. Without the availability of market-rate attorneys' fees to prevailing plaintiffs, the Vladeck Firm would not be able to devote nearly its entire practice to representing employees and would have to turn away clients without significant means.

Although the Vladeck Firm is based in Manhattan and litigates extensively in the Southern District of New York, litigation in the Eastern District of New York, especially in the nearby Brooklyn courthouse, is a regular part of the firm's practice. If attorneys litigating in the Eastern District of New York cannot be compensated at the rates prevailing in the Southern District of New York except in extraordinary circumstances, it will be a strong disincentive to accept cases that must be litigated in the Eastern District of New York. The Vladeck Firm must meet the same overhead whether litigating in downtown Manhattan or just across the Brooklyn Bridge. The Vladeck Firm typically litigates against law firms with hundreds of attorneys and offices around the country, if not the world. However, the Court's recent approach, including consideration of what rates a "thrifty, hypothetical client" would accept, suggests that civil rights plaintiffs, absent a case of unusual complexity, must accept attorneys of basic competence, rather than seeking counsel with experience and expertise.

## **STATEMENT OF NEED FOR EN BANC REVIEW**

En banc review is necessary in this case to ensure the uniformity of this Court's decisions, because the virtually insurmountable standard the panel set forth for determining the fees available to out-of-district counsel in civil rights cases conflicts with the holdings of the Supreme Court and this Circuit. The standard requires that a party seeking to have his out-of-district counsel compensated at the rate that attorney usually charges must “persuasively establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result.” App. at A-3 (quoting *Simmons v. N.Y. City Transit Auth.*, 575 F.3d 170 (2d Cir. 2009)). This flouts the Supreme Court's instruction that fees be awarded at the rates charged for similar commercial cases, *Blum v. Stenson*, 465 U.S. 886, 895 (1984), and that plaintiffs must have access not just to any lawyer, but to one who could provide “effective access to the judicial process’ for persons with civil rights grievances.” *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Additionally, the standard places a far higher barrier in the way of civil rights plaintiffs seeking to retain out-of-district counsel than the standard adopted by a panel of this Circuit just a year ago, allowing an award of out-of-district fees to a plaintiff who “demonstrates that his or her retention of an out-of-district attorney was reasonable under the circumstances as they would be reckoned by a client paying the attorney’s bill.”

*Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 191 (2d Cir. 2008).

### **SUMMARY OF ARGUMENT**

*Amici* support Plaintiffs-Appellants' application for en banc review. Such review is needed to reexamine the standards recently adopted to determine the fees available to out-of-district counsel in civil rights cases in district courts in this Circuit. The standards for out-of-district fees, adopted in this case and in *Simmons v. New York City Transit Authority*, 575 F.3d 170 (2d Cir. 2009), unfairly bar victims of civil rights violations from accessing civil rights expertise that is unavailable, or in short supply, where their case is venued, contrary to the purposes of the civil rights fee shifting statutes. Indeed, the *Lochren/Simmons* standard imposes a burden on civil rights plaintiffs employing out-of-district counsel which is virtually impossible to meet, and which is indefensible even applying the hypothetical "thrifty" plaintiff standard outlined by a panel of this Court in *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, 522 F.3d 182 (2d Cir. 2008). For no reasonable person – even a thrifty one – would use the *Lochren/Simmons* standard to limit its choice of counsel to those that the person could "persuasively establish . . . would likely (not just possibly) produce a substantially better net result." *See App. at A-3.*

Compounding the impact of these decisions, the standard has been applied here to severely reduce the incentive of Manhattan counsel to take civil rights cases in the Eastern District of New York. It thus substantially limits, if not eliminates, the ability of victims of civil rights violations with claims arising in the Eastern District to have access to the larger and frequently more experienced pool of Manhattan counsel. Manhattan counsel are also more likely to be economically equipped to take on civil rights cases in which counsel will receive no fee at all if the plaintiff does not prevail. The application of the *Lochren/Simmons* standard in these circumstances abandons the common sense approach heretofore applied by Eastern District judges, who refused to apply presumptions about out-of-district fees in a mechanical way where (1) the out-of-district counsel was only walking distance or a subway ride away from the Eastern District courthouse, and (2) choice of Manhattan counsel is a natural one for all plaintiffs – commercial and civil rights – located in or confined by venue requirements to the Eastern District.

The virtually insurmountable *Lochren/Simmons* standard discriminates against civil rights plaintiffs and deprives them of fair access to out-of-district counsel. Its mechanical application to Manhattan counsel in Eastern District cases is especially indefensible and defies common sense. For these reasons, this Court should accept en banc review and restore a more practical standard for determining fees for out-of-district counsel, one that comports with Congress' intent in enacting

the civil rights fee shifting statutes: to provide incentives to counsel to provide victims of civil rights violations with adequate representation.

## ARGUMENT

### **I. En Banc Review Is Essential to Ensure That Courts in This Circuit Calculate Fee Awards for Out-of-District Counsel in a Manner That Effectuates Congress' Goal of Attracting a Sufficient Number of Competent Counsel to Civil Rights Cases.**

The goal of the federal civil rights fee shifting statutes is to ensure that civil rights plaintiffs can obtain competent counsel, without producing “windfalls” for attorneys. *Blum v. Stenson*, 465 U.S. 886, 893-94 (1984) (citing S. Rep. No. 94-1011, at 6 (1976), 1976 U.S.C.C.A.N. 5908, 5913).<sup>2</sup> In enacting the fee-shifting statutes, Congress concluded, based on testimony from “several hearings held over a period of years, . . . that fee awards are essential” if federal civil rights statutes are to be enforced. S. Rep. No. 94-1011, 1976 U.S.C.C.A.N. at 5913.

Specifically, Congress concluded that in order to address the pervasive lack of access to counsel for civil rights plaintiffs, it was necessary that fees be awarded at the rates charged for similar commercial cases. *Blum*, 465 U.S. at 895. And, Congress emphasized that it wanted plaintiffs to have access not just to any lawyer, but to one who could provide “‘effective access to the judicial process’ for persons

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<sup>2</sup> The Supreme Court has noted that the same motivation underlies all of the civil rights fee-shifting statutes, so that they should all be interpreted in the same manner. *Blum*, 465 U.S. at 893-94.

with civil rights grievances.” *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1558, at 1 (1976)). *See also Johnson v. Ga. Highway Exp., Inc.*, 488 F.2d 714, 719-20 (5th Cir. 1974) (characterizing the purpose of civil rights fee-shifting statutes as “to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition . . .”), *cited approvingly in Hensley*, 461 U.S. at 434 n.9.

This Circuit has recognized its obligation to heed the Congressional mandate “to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.” *Farbotko v. Clinton County of N.Y.*, 433 F.3d 204, 208 (2d Cir. 2005) (quoting *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982)). *See also Arbor Hill Concerned Citizens Neighborhood Ass’n*, 522 F.3d at 193 (urging district courts “where appropriate to employ out-of-district rates in calculating the fee due” because of the danger that “skilled lawyers from such other district will be dissuaded from taking meritorious cases in the district with lower rates”) (quoting *A.R. ex rel. R.V. v. Bd. of Educ. of N.Y.C.*, 407 F.3d 65, 81 & n.17 (2d Cir. 2005)); *Mid-Hudson Legal Servs., Inc. v. G & U, Inc.*, 578 F.2d 34, 37 (2d Cir. 1978) (warning that a civil rights attorneys’ fee provision “must be applied broadly to achieve its remedial purpose”). Thus, a fee computation mechanism is proper

only if it actually “attract[s] competent counsel to public interest litigation.”

*Farbotko*, 433 F.3d at 209.

Courts can devise a fee computation mechanism that does in fact attract competent counsel only if they take into account the realities of civil rights practice. The vast majority of civil rights cases are handled by small firms. 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, 768-69 (1988). These attorneys can only afford to take on risky, capital-intensive civil rights cases if they have enough reliably remunerative cases to allow them to meet payroll and pay for overhead expenses. Scott L. Cummings & Ann Southworth, *Between Profit & Principle: The Private Public Interest Firm*, in *Private Lawyers and the Public Interest: The Evolving Role of Pro Bono in the Legal Profession* 12 (Robert Granfield & Lynn Mather, eds., 2009), available at

<http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1047&context=uclalaw>.

Consequently, as *amici* attest, every time the courts add factors that reduce attorneys’ fee awards below the market rate, or that even increase the risk that fee awards will be reduced, they also limit the number of such cases that local attorneys can afford to handle. *See* discussion *supra*, pp. iv, vi-vii, ix, xiii-xiv, xxxiii.

It is against this background that the panel decisions in the instant case and in *Simmons* must be viewed. The decisions hold that if a plaintiff has retained out-of-district attorneys, he can obtain a fee award at the rate usually charged by those attorneys only if he can “persuasively establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result.” App. at A-3 (quoting *Simmons*, 575 F.3d at 175). This standard restricts access to the sort of expertise Congress wanted civil rights plaintiffs to have, and will even rob some civil rights plaintiffs of the only representation they can find.

First, there is no way for plaintiffs to make the showing demanded by the decisions. Must they, for example, bring in a statistician to opine on the degree of likelihood that a particular attorney would produce a particular result? Even attempting to meet the standard would be a pointless exercise.

Second, the standard will require civil rights plaintiffs to choose from a smaller pool of counsel, and so will deprive some plaintiffs of access to expertise or other qualities that a paying commercial client would insist on. The standard is contrary to both Congress’ intent that plaintiffs have access to lawyers paid the same rates as lawyers in commercial cases, and the instruction of a panel of this Circuit just one year ago that out-of-district rates can be awarded to a plaintiff who “demonstrates that his or her retention of an out-of-district attorney was reasonable

under the circumstances as they would be reckoned by a client paying the attorney's bill." *Arbor Hill Concerned Citizens Neighborhood Ass'n*, 522 F.3d at 191. In selecting counsel, paying clients, even those who are exceedingly thrifty, look not just at an attorney's hourly rate, but also at experience, past record, reputation and qualities of creativity, intelligence, judgment and commitment to the client's cause. Indeed, it may be cheaper in the end to retain a more experienced attorney with a higher hourly rate, because that attorney may be able to handle the case more efficiently. *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1149 (7th Cir. 1993). Thus, by requiring civil rights plaintiffs to persuasively demonstrate that the net result in choosing a particular lawyer is likely (not just possibly) to be better than choosing any competent lawyer who offers the lowest hourly rate, the *Lochren/Simmons* standard denigrates civil rights as less important than commercial interests and civil rights plaintiffs as entitled to less choice than commercial plaintiffs.

In the instant case, the standard led the Circuit panel to accept the District Court's casual dismissal of the expertise of plaintiffs' counsel as unnecessary in light of "the far more limited resources being marshaled by the defendant, who was represented by the Suffolk County Attorneys' Office," instead of considering, as it should have done, whether the expertise of plaintiffs' counsel was warranted in

light of the high volume of civil rights cases routinely litigated by the Suffolk County Attorney's Office or for any other reason.<sup>3</sup> App. at A-3.

The long-term effect of the *Lochren/Simmons* standard is that attorneys will refuse to handle cases from other forums, thus depriving civil rights victims of access to attorneys potentially available to help them secure their rights. As *amici* discuss above, the riskier a case is, the fewer such cases small firms can handle. Just as a plaintiff will have difficulty meeting the *Lochren/Simmons* standard, judges will have difficulty determining whether the standard has been met. How can a judge differentiate between those attorneys who a hypothetical non-lawyer client would think would “likely” produce a given result, and those who the client would think would “just possibly” produce that result? How can a judge discern whether that hypothetical non-lawyer would characterize a particular result as “substantially better,” or just “better,” than a different result? In response to such unanswerable questions, judges confronted with the same set of facts will reach a wide range of opinions. The resulting unpredictability will cause some civil rights counsel to avoid taking out-of-district cases, making it impossible for some plaintiffs to find representation, in direct contravention of Congress’ intention.

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<sup>3</sup> A Westlaw and LexisNexis search for civil rights cases in which the Suffolk County Attorney's Office was counsel from 2005 to the present identified 43 such cases. As the search turned up only those cases with decisions published on Westlaw and LexisNexis, that office was doubtless involved in many more such cases.

In contrast, prior to *Simmons* and *Lochren*, district courts in this Circuit applied common sense to determine whether out-of-district counsel should be awarded out-of-district rates. This was particularly evident in their approach to Southern District counsel appearing in Eastern District cases. Acknowledging the presumption that fees would be awarded at the market rate in the district where the case was venued, the district courts lessened that presumption when the choice was between Eastern District and Southern District rates. The district courts took note of the geographical realities of the two districts: the fact that they both encompass parts of the same city, their courthouses are a short walk from each other, and they are linked by multiple bridges, tunnels and subways. *See, e.g., Alveranga v. Winston*, 2007 WL 595069, \*7 n.16 (E.D.N.Y. Feb. 22, 2007); *Tokyo Elec. Ariz., Inc. v. Discreet Indus. Corp.*, 215 F.R.D. 60, 63 (E.D.N.Y. 2003); *New Leadership Comm. v. Davidson*, 23 F. Supp.2d 301, 304 (E.D.N.Y. 1998). The district courts also noted that the current district boundaries are historical relics, because they were drawn before the Brooklyn and Manhattan bridges were built, and when Brooklyn and Manhattan were separate cities. *New Leadership Comm.*, 23 F. Supp.2d at 304. Finally, they emphasized the need to ensure that the rates they set would not prevent civil rights victims outside of Manhattan from obtaining representation from attorneys in Manhattan when appropriate. *Id.* at 305.

**II. The Circuit Should Instruct the District Court to Re-Calculate Plaintiffs' Fees in a Non-Mechanical Manner Aimed at Increasing Access to Counsel, Consistent with the Purpose of the Civil Rights Fee-Shifting Statutes.**

*Amici* urge the Circuit to instruct the District Court on remand to reassess the appropriate hourly rate with the same spirit of common sense exercised by district courts prior to *Lochren* and *Simmons*. The District Court should take into account the geographical and historical factors mentioned above. It should also consider the high frequency with which Eastern District civil rights defendants turn to Manhattan counsel, which is a clear indication that Manhattan is part of the legal community serving the Eastern District and that in at least some instances, choosing Manhattan counsel is a “reasonable” choice for a paying client. *See* Pls.’ Pet. for Reh’g En Banc, p. 8. The Circuit should modify the standard so that it does not require civil rights victims to satisfy the unrealistic criteria that have been identified in the two recent decisions: 1) “persuasively establishing,” 2) that the selection of counsel “would likely (not just possibly)”, 3) produce a “substantially better net result.”

The District Court should also be directed to take into account the goal of increasing access to counsel in civil rights cases. The District Court should consider the fact, recognized by Congress, that there is a shortage of attorneys to handle civil rights cases, so that in any given case there is a high risk that the plaintiff will be unable to find local counsel. *See* discussion *supra*; ABA Report

on the Legal Needs of the Low-Income Public: Findings of the Comprehensive Legal Needs Study (1994), p. 42. Moreover, there are approximately ten times as many attorneys per capita in Manhattan as in Suffolk County, making it far more likely that Suffolk County plaintiffs will be able to find representation if they are able to seek attorneys in Manhattan as well as in Suffolk County. Jason Halpin, *Attorney Concentration by County*, N.Y.L.J. Magazine (Dec. 2008). And, as amici attest, there are some parts of the Second Circuit, including Suffolk County in particular, in which there are few or no attorneys with certain types of civil rights expertise. See discussion *supra* at ix, xv-xvi, xxiv-xxv, xxxi.

Finally, *Amici* urge this Court to reconsider the strong presumption that the relevant legal community is defined by the boundaries of the federal judicial district where the case is venued.<sup>4</sup> When Congress draws district lines, a number of factors are necessarily involved that are completely unrelated to the separate matter of what constitutes the relevant legal market. They include: judges' caseloads, the demands of judicial administration, and the fiscal impact on U.S. attorneys and court personnel. P.L. 98-620, H.R. Rep. No. 98-1062, pp. 2, 3 (Sep. 24, 1984). Additionally, many decades can pass before these district lines are redrawn, resulting in district lines that no longer reflect the demographic and

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<sup>4</sup> Indeed, as a panel of this Circuit has noted, sometimes using any strict geographic boundaries is sometimes "too simplistic." *Arbor Hill*, 522 F.3d at 192.

geographic realities of the communities they encompass. *See, e.g., New Leadership Comm.*, 23 F. Supp.2d at 304 (noting that the Eastern and Southern District lines were drawn more than 145 years ago); P.L. 95-408, H.R. Rep. No. 95-1554 (Sep. 7, 1978) (noting that because of “[t]he growth and developments of urban centers in [Wisconsin] since the last realignment,” seventy years earlier, two counties in separate districts were “essentially part of the East St. Louis Metropolitan area and have strong social, cultural and economic ties”). For these reasons, applying a strict same-district presumption to fee calculations places unwarranted obstacles in the way of plaintiffs seeking counsel in what is, in reality, their own community.

## CONCLUSION

*Amici* respectfully request that the Circuit take this case en banc, and remand it with an instruction to reassess whether to award out-of-district rates, taking into consideration: 1) the close relationship between the Eastern and Southern Districts, 2) the statutory mandate to increase the pool of attorneys available to represent civil rights plaintiffs, 3) the shortage of civil rights attorneys nationally, 4) the frequency with which civil rights defendants in the Eastern District retain Manhattan counsel, and 5) the fact that district lines often do not reflect the boundaries of the relevant legal market.

Respectfully submitted,

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September 17, 2009

\*Not admitted in this Circuit.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)". A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

1           At a stated term of the United States Court of Appeals  
2 for the Second Circuit, held at the Daniel Patrick Moynihan  
3 United States Courthouse, 500 Pearl Street, in the City of  
4 New York, on the 3<sup>rd</sup> day of September, two thousand nine.

5  
6 PRESENT: DENNIS JACOBS,  
7                               Chief Judge,  
8           AMALYA L. KEARSE,  
9           ROBERT D. SACK,  
10                              Circuit Judges.

11  
12 - - - - -X

13 Sandra Lochren, Sarah A. MacDermott,  
14 Patricia O'Brien, Christine Blauvelt,  
15 Miriam Riera, Kelly Mennella,  
16           Plaintiffs-Appellants,  
17  
18 Delilah Bustamante, Jennifer  
19 Kennedy,  
20           Intervenors-Plaintiffs,

21  
22                       -V.-                               08-2723-cv

23  
24 County Of Suffolk,  
25           Defendant-Appellee.  
26 - - - - -X  
27

1 **FOR PLAINTIFFS-APPELLANTS:** LEON FRIEDMAN, New York, New  
2 York.

3  
4 **FOR DEFENDANT-APPELLEE:** CHRISTOPHER P. TERMINI,  
5 Assistant County Attorney  
6 (Christopher M. Gatto, on the  
7 brief), for Christine Malafi,  
8 Suffolk County Attorney,  
9 Hauppauge, New York.

10  
11 Appeal from the United States District Court for the  
12 Eastern District of New York (Lindsay, M.J.).

13  
14 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
15 **AND DECREED** that the judgment of the district court is  
16 **VACATED** and **REMANDED** for further proceedings consistent with  
17 this order.

18  
19 Plaintiffs-appellants appeal from an order of the  
20 United States District Court for the Eastern District of New  
21 York ("Eastern District") awarding \$578,704.14 in attorneys'  
22 fees and costs. The underlying suit concerns women who are  
23 police officers, alleging discrimination by the Suffolk  
24 County Police Department ("Suffolk County") because of its  
25 failure to permit officers to obtain limited duty  
26 assignments during pregnancy. Plaintiffs were awarded  
27 damages at trial and subsequently secured a consent decree  
28 establishing a new policy for pregnant officers. At the  
29 conclusion of the case, plaintiffs requested upwards of \$1  
30 million in fees and costs, pursuant to 42 U.S.C. § 2000e-  
31 5(k); the district court's reduction of that amount is the  
32 sole issue on appeal. We assume the parties' familiarity  
33 with the underlying facts, the procedural history, and the  
34 issues presented for review.

35  
36 "We review the district court's award of attorney's  
37 fees for abuse of discretion . . . ." Farbotko v. Clinton  
38 County of N.Y., 433 F.3d 204, 208 (2d Cir. 2005). "[A]buse  
39 of discretion"--already one of the most deferential  
40 standards of review--takes on special significance when  
41 reviewing fee decisions based on our recognition that the  
42 district court, being intimately familiar with the case, is  
43 in a far better position to make such determinations than an  
44 appellate court." In re Nortel Networks Corp. Sec. Litig.,

1 539 F.3d 129, 134 (2d Cir. 2008) (other internal quotation  
2 marks omitted). Nonetheless, “[a] district court  
3 necessarily abuses its discretion if it bases its ruling on  
4 an erroneous view of the law or on a clearly erroneous  
5 assessment of the record.” Farbotko, 433 F.3d at 208  
6 (alteration in original, quotation marks omitted).  
7

8 **[1]** Plaintiffs argue that the district court erred in  
9 awarding fees at Eastern District rates and that the court  
10 should have applied Southern District of New York (“Southern  
11 District”) rates for plaintiffs’ Manhattan attorneys.  
12

13 In Arbor Hill Concerned Citizens Neighborhood Ass’n v.  
14 County of Albany, 493 F.3d 110 (2d Cir. 2007), amended and  
15 superseded on other grounds by 522 F.3d 182 (2d Cir. 2008),  
16 we reaffirmed the presumption that a district court should  
17 award fees at the going rate in the district in which it  
18 sits, id. at 119. We held that a court may do otherwise  
19 only where “a reasonable, paying client would pay” more to  
20 hire an attorney from outside the district. Id. at 121. In  
21 Simmons v. New York City Transit Authority, --- F.3d ---,  
22 2009 WL 2357703, at \*4 (2d Cir. Aug. 3, 2009), we clarified  
23 our decision in Arbor Hill, and held that “[i]n order to  
24 overcome th[e] presumption [in favor of application of the  
25 forum rule], a litigant must persuasively establish that a  
26 reasonable client would have selected out-of-district  
27 counsel because doing so would likely (not just possibly)  
28 produce a substantially better net result.”  
29

30 In this case, the district court declined to award  
31 Southern District rates, finding that plaintiffs’ choice of  
32 counsel “was not justified given the simplicity of the  
33 issues in the case, the wealth of competent civil rights  
34 attorneys in [the Eastern District], the length of time the  
35 attorneys were given to prepare for the case, and the far  
36 more limited resources being marshaled by the defendant, who  
37 was represented by the Suffolk County Attorneys’ Office.”  
38 Lochren v. County of Suffolk, No. CV 01-3925(ARL), 2008 WL  
39 2039458, at \*4 (E.D.N.Y. May 9, 2008). The court found that  
40 Southern District rates “would simply have been too high for  
41 a thrifty, hypothetical client--at least in comparison to  
42 the rates charged by local attorneys.” Id. (internal  
43 quotation marks omitted). Plaintiffs have not overcome the  
44 presumption in favor of in-district rates, and the district  
45 court did not abuse its discretion in awarding fees at  
46 Eastern District rates.

1 [2] Plaintiffs next argue that the district court erred in  
2 failing to consider explicitly each of the twelve factors  
3 set forth by the Fifth Circuit in Johnson v. Georgia Highway  
4 Express, Inc., 488 F.2d 714 (5th Cir. 1974), abrogated on  
5 other grounds by Blanchard v. Bergeron, 489 U.S. 87, 92-93  
6 (1989).<sup>1</sup> In Arbor Hill, we explained that “[i]n determining  
7 what rate a paying client would be willing to pay, the  
8 district court should consider, among others, the Johnson  
9 factors; it should also bear in mind that a reasonable,  
10 paying client wishes to spend the minimum necessary to  
11 litigate the case effectively.” 493 F.3d at 117-18. Arbor  
12 Hill did not hold that district courts must recite and make  
13 separate findings as to all twelve Johnson factors. In this  
14 case, the district court weighed numerous factors, including  
15 the difficulty of the case, the novelty of the issues, and  
16 the timing demands imposed by the litigation. That analysis  
17 was sufficient.  
18

19 [3] The district court applied a 25% across-the-board  
20 reduction in fees because plaintiffs overstaffed the case,  
21 resulting in the needless duplication of work and retention

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<sup>1</sup> The Johnson factors are:

- (1) the time and labor required; (2) the novelty and difficulty of the questions;
- (3) the level of skill required to perform the legal service properly;
- (4) the preclusion of employment by the attorney due to acceptance of the case;
- (5) the attorney’s customary hourly rate;
- (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained;
- (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and
- (12) awards in similar cases.

Arbor Hill, 493 F.3d at 114 n.3 (citing Johnson, 488 F.2d at 717-19).

1 of unnecessary personnel. Plaintiffs argue that they  
2 exercised significant discretion in their fee request,  
3 carefully avoided duplication of tasks, and rigorously  
4 documented their hours to establish the unique role each  
5 attorney played in the litigation.  
6

7 The district court was in a better position to weigh  
8 the plaintiffs' specific contentions and the benefits (if  
9 any) of having multiple attorneys involved in the case.  
10 See, e.g., N.Y. State Ass'n for Retarded Children, Inc. v.  
11 Carey, 711 F.2d 1136, 1146 (2d Cir. 1983) ("[A] trial judge  
12 may decline to compensate hours spent by collaborating  
13 lawyers or may limit the hours allowed for specific tasks,  
14 but for the most part such decisions are best made by the  
15 district court on the basis of its own assessment of what is  
16 appropriate for the scope and complexity of the particular  
17 litigation."). The district court's factual findings are  
18 supported by the record, and its decision to reduce fees by  
19 25% was not an abuse of discretion.  
20

21 **[4]** Plaintiffs contend that the district court erred in  
22 failing to award fees at current rates. The Supreme Court  
23 held in Missouri v. Jenkins, 491 U.S. 274 (1989), that "[a]n  
24 adjustment for delay in payment is . . . an appropriate  
25 factor in the determination of what constitutes a reasonable  
26 attorney's fee," id. at 284, because "compensation received  
27 several years after the services were rendered--as it  
28 frequently is in complex civil rights litigation--is not  
29 equivalent to the same dollar amount received reasonably  
30 promptly as the legal services are performed," id. at 283.  
31 We have held that to "adjust[] for delay," id. at 284, the  
32 "rates used by the court should be 'current rather than  
33 historic hourly rates,'" Reiter v. MTA N.Y. City Transit  
34 Auth., 457 F.3d 224, 232 (2d Cir. 2006) (quoting Gierlinger  
35 v. Gleason, 160 F.3d 858, 882 (2d Cir. 1998) (other  
36 quotation marks omitted)); see also LeBlanc-Sternberg v.  
37 Fletcher, 143 F.3d 748, 764 (2d Cir. 1998) ("[C]urrent  
38 rates, rather than historical rates, should be applied in  
39 order to compensate for the delay in payment[.]").  
40

41 The district court calculated a fee based on rates in  
42 the Eastern District "[f]rom 2001, when this lawsuit began,  
43 to 2006, when the trial took place." Lochren, 2008 WL  
44 2039458, at \*5. This time period did not account for  
45 current rates as of 2008, the year of the fee award.  
46 Moreover, the court identified a span of five years, but

1 failed to explain whether it was awarding fees at the rate  
2 as of 2001, 2006, or some midpoint. This aspect of the  
3 court's decision was not consistent with our precedents.  
4 Accordingly, remand is necessary for the district court to  
5 determine and apply current rates in the Eastern District  
6 for attorneys with the experience level of those who worked  
7 on the case.

8  
9 Plaintiffs also argue that the district court erred in  
10 reducing fees to the middle of the Eastern District range  
11 for all attorneys. The court imposed this reduction because  
12 "many of the attorneys seeking reimbursement as partners and  
13 senior associates were just beginning their legal career[s]  
14 when this lawsuit began." Id. at \*5. Clearly, the 2008  
15 rate for a junior associate should have been applied to a  
16 lawyer who was a junior associate when the work was done.  
17 But it is a close question whether this reduction properly  
18 accounted for the experience levels described in the  
19 attorney affidavits. For example, Kathleen Peratis of Outen  
20 & Golden had 32 years of litigation experience when she  
21 worked on the case, and Leon Friedman had 47 years of  
22 litigation experience. On remand, the district court may  
23 wish to reconsider (or more thoroughly explain) its decision  
24 to award fees in the middle of the Eastern District range  
25 for certain attorneys.

26  
27 **[5]** Finally, the district court awarded plaintiffs  
28 \$7,822.13 in paralegal and technical services fees. When  
29 reduced by 25%, this should have resulted in the addition of  
30 \$5,866.60 to the total award of fees and costs. The  
31 district court made a mathematical error in neglecting to  
32 add this sum to plaintiffs' award. Similarly, the district  
33 court neglected to award fees for attorney Leon Friedman's  
34 preparation of reply papers for the attorneys' fees  
35 application. The district court should correct these  
36 omissions on remand.

37  
38 For the foregoing reasons, the judgment of the district  
39 court is **VACATED** and **REMANDED** for further proceedings  
40 consistent with this order.

41  
42 FOR THE COURT:  
43 CATHERINE O'HAGAN WOLFE, CLERK  
44

45  
46 By: \_\_\_\_\_

DECLARATION OF SERVICE

Mitali Nagrecha, pursuant to 28 U.S.C. § 1746, declares:

I am Pro Bono Counsel at the Brennan Center for Justice at New York University Law School in New York, New York. On September 17, 2009, I caused two copies of the foregoing petition to be served by mail and email on:

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I declare under penalty of perjury that the foregoing is true and correct.

Date: New York, New York  
September 17, 2009

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Mitali Nagrecha