No. 05-18

In the Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, PETITIONER

v.

PEARL MURPHY, ET VIR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record

WAN J. KIM
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DAVID B. SALMONS
Assistant to the Solicitor General

DAVID K. FLYNN
DENNIS J. DIMSEY
CONOR B. DUGAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

KENT D. TALBERT
Acting General Counsel
Department of Education
Washington, D.C. 20202

QUESTION PRESENTED

Whether the fee-shifting provision of the Individuals with Disabilities Education Act, 20 U.S.C. 1415(i)(3)(B), which provides that the court may "award reasonable attorneys' fees as part of the costs" to a prevailing party, authorizes an award of expert fees.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 6
Argument:
IDEA's fee-shifting provision does not authorize an award of expert fees 9
A. The plain meaning of IDEA's fee-shifting provision prohibits the award of expert fees 9
B. This Court's decisions compel the plain-meaning construction of IDEA's fee-shifting provision 13
C. The court of appeals erred in rejecting the plain reading of IDEA's fee-shifting provision 16
Conclusion 24

TABLE OF AUTHORITIES

Cases:

Bankston v. *Illinois*, 60 F.3d 1249 (7th Cir. 1995) 13
Barnes v. *Gorman*, 536 U.S. 181 (2002) 13
Barnhill v. *Johnson*, 503 U.S. 393 (1992) 17
Board of Educ. v. *Rowley*, 458 U.S. 176 (1982) 1, 13
Buckhannon Bd. & Care Home, Inc. v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001) .. 22
Cedar Rapids Cmty. Sch. Dist. v. *Garret F.*, 526 U.S. 66 (1999) 1, 13
Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 20
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 9

Cases—Continued: Page

Crawford Fitting Co. v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) 6, 11, 14
Department of the Interior v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) 20
Davis v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989) 17
Goldring v. *District of Columbia*, 416 F.3d 70 (D.C. Cir. 2005) 15, 16, 17, 18, 21, 22
Gray v. *Phillips Petroleum Co.*, 971 F.2d 591 (10th Cir. 1992) 12
Holland v. *Valhi, Inc.*, 22 F.3d 968 (10th Cir. 1994) 13
Lamie v. *United States Tr.*, 540 U.S. 526 (2004) 7, 10
Murphy v. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002) 4
Neosho R-V Sch. Dist. v. *Clark*, 315 F.3d 1022 (8th Cir. 2003) 16, 17, 18
Park 'N Fly, Inc. v. *Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985) 10
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 13
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 17
Schaffer v. *Weast*, 126 S. Ct. 528 (2005) 1, 8, 13, 23
Smith v. *Robinson*, 468 U.S. 992 (1984) 19
T.D. v. *LaGrange Sch. Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003) 16, 17, 18
Tyler v. *Union Oil Co.*, 304 F.3d 379 (5th Cir. 2002) 13
United States v. *Albertini*, 472 U.S. 675 (1985) 9
West Va. Univ. Hosps., Inc. v. *Casey*, 499 U.S. 83 (1991) ..... *passim*

Constitution and statutes: Page

U.S. Const. Art. I, § 8, Cl. 1 (Spending Clause) 6, 13
Family and Medical Leave Act of 1993, 29 U.S.C. 2617 .. 21
Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248 21
Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 5
Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* 2
20 U.S.C. 1400(d)(1)(A) 2, 3
20 U.S.C. 1412(a)(1)(A) 2
20 U.S.C. 1412(a)(4) 2
20 U.S.C. 1415(b)(1) 11
20 U.S.C. 1415(b)(6) 2
20 U.S.C. 1415(f)(1) 2
20 U.S.C. 1415(h)(1) 2
20 U.S.C. 1415(i)(2)(A) 2
20 U.S.C. 1415(i)(3)(B) (1997) 9
20 U.S.C. 1415(i)(3)(B) 1, 3, 4, 6, 9, 10, 11
20 U.S.C. 1415(i)(3)(F) 10, 11
20 U.S.C. 1415(j) 4
20 U.S.C. 1417 1
Individuals with Disabilities Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 ..... 3, 23
§ 615, 118 Stat. 2724 (to be codified at 20 U.S.C. 1415(i)(3)(B)) 3
28 U.S.C. 1821 ..... 6, 12, 14, 15
28 U.S.C. 1920 ..... 6, 11, 12, 14, 15
28 U.S.C. 1920(3) 12, 14

Statutes—Continued: Page

42 U.S.C. 1988 (1988) 14
42 U.S.C. 1988 ..... 4, 5, 7, 9, 14, 15
42 U.S.C. 1988(b) (1988) 9

Miscellaneous:

132 Cong. Rec. (1986):
p. 16,823 19
p. 16,825 19
p. 17,600 19
H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. (1986) 5, 17, 19
H.R. Rep. No. 8(i), 103d Cong., 1st Sess. (1993) 21
H.R. Rep. No. 488, 103d Cong., 2d Sess. (1994) 21
H.R. 3809, 108th Cong., 2d Sess. (2004) 22
S. 2088, 108th Cong., 2d Sess. (2004) 22

In the Supreme Court of the United States

No. 05-18

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION, PETITIONER

v.

PEARL MURPHY, ET VIR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1415(i)(3)(B), which allows the court to "award reasonable attorneys' fees as part of the costs" to the prevailing party in an IDEA action, authorizes an award of expert fees. The Department of Education administers IDEA, and has authority to promulgate regulations necessary to ensure compliance with the Act. See 20 U.S.C. 1417. The United States has participated as an amicus in numerous cases involving the construction of IDEA. See, *e.g., Schaffer* v. *Weast*, 126 S. Ct. 528 (2005); *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66 (1999); *Board of*

Educ. v. *Rowley*, 458 U.S. 176 (1982). At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, provides federal grants to States for assistance in the education of children with disabilities. Under IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education," which includes special education and related services necessary to meet the child's particular needs. 20 U.S.C. 1400(d)(1)(A), 1412(a)(1)(A). Local school systems are required to develop an individualized education program (IEP) for each child with a disability in accordance with statutory requirements. See 20 U.S.C. 1412(a)(4). If the parents are not satisfied with the IEP, they can file a complaint with the State or local educational agency, and they are entitled to "an impartial due process hearing" conducted "by the State educational agency or by the local educational agency." 20 U.S.C. 1415(b)(6) and (f)(1). Among other procedural safeguards at the hearing, IDEA grants parents the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1). A party aggrieved by a decision at the final state administrative stage has a right to "bring a civil action with respect to the complaint" in federal district court or "any State court of competent jurisdiction." 20 U.S.C. 1415(i)(2)(A).

Parents who prevail in an action brought under IDEA may be awarded attorneys' fees. IDEA's fee-shifting provision states:

> In any action or proceeding brought under this section, the court, in its discretion, may award *reasonable attorneys' fees as part of the costs* to the parents of a child with a disability who is the prevailing party.

20 U.S.C. 1415(i)(3)(B) (2000) (emphasis added). In practice, attorneys' fees have been awarded both when parents prevail before an administrative hearing and when they prevail in a civil action.[1]

2. Respondents are the parents of a child with a disability covered by IDEA. In 1999, after adminis-trative proceedings before a state agency, they commenced this action pro se in federal district court pursuant to IDEA, alleging that petitioner had failed to provide a "free appropriate public education" for their child, 20 U.S.C. 1400(d)(1)(A), and was therefore required to pay their child's private school tuition for certain school years. Pet. App. 2a-3a. Respondents prevailed in the district court, and the Second Circuit affirmed that judgment. *Id.* at 3a.[2]

---

[1] IDEA was reauthorized and amended in numerous respects in 2004. See Pub. L. No. 108-446, 118 Stat. 2647. The fee-shifting provision in the 2004 Act, however, is not materially different. It reads: "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorney's fees as part of the costs * * * to a prevailing party who is the parent of a child with a disability." Pub. L. No. 108-446, § 615, 118 Stat. 2724 (to be codified at 20 U.S.C. 1415(i)(3)(B)). Unless otherwise indicated, citations are to the statute as it existed prior to the 2004 amendments.

[2] In the initial appeal in this case, the United States filed an amicus brief in support of respondents addressing the application of IDEA's

The case returned to the district court and respondents sought fees and costs, pursuant to 20 U.S.C. 1415(i)(3)(B), including $29,350 in fees for the services of Marilyn Arons, an educational expert and consultant. Pet. App. 3a. The district court granted the fee request in part. *Id.* at 4a, 17a-43a. The court held that Arons's fees for "expert consulting services" were compensable under the Act from the time respondents requested an administrative due process hearing until they became "prevailing parties" in 2000 when the district court entered judgment in their favor. *Id.* at 4a-5a, 37a-38a. However, the court held that respondents "could not collect 'attorneys' fees' for [Arons] doing work similar to that of an attorney." *Id.* at 4a. The court thus distinguished between fees for expert consulting services, which it held are compensable under IDEA's fee-shifting provision, and fees for expert advocacy and representation services, which it held are not compensable. Applying that understanding, the court awarded respondents $8650 in expert fees for Arons's services. *Id.* at 5a-6a, 41a-43a.

3. Petitioner appealed, and the court of appeals affirmed. Pet. App. 1a-16a. The court acknowledged that, in *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83 (1991), this Court held that virtually identical fee-shifting language in the then-current version of 42 U.S.C. 1988 did not authorize awards of expert fees, because "there was no 'explicit statutory authority' indicating that Congress intended for that sort of

---

stay-put provision, 20 U.S.C. 1415(j), and petitioner's liability for tuition payments. The brief did not address the availability of attorney or expert fees, which were not at issue before the Second Circuit at the merits stage. U.S. Br., *Murphy* v. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002) (No. 00-7358).

fee-shifting." Pet. App. 9a (quoting *Casey*, 499 U.S. at 87). The court of appeals, however, concluded that Congress intended expert fees to be compensable under IDEA based on a statement in the House Conference Committee Report on IDEA's predecessor, the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796—namely, that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." Pet. App. 9a (quoting H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5 (1986)). The court of appeals also noted that this Court, in dicta in a footnote in *Casey*, described this statement in the committee report as "an apparent effort to *depart* from ordinary meaning and to define a term of art," and concluded that this Court thereby intended to distinguish IDEA from Section 1988 as construed in *Casey*. *Ibid.* (quoting *Casey*, 499 U.S. at 92 n.5).

The court of appeals also found it "instructive" that after *Casey*, Congress amended Section 1988 to allow recovery of expert fees in civil rights actions, but took no "similar action with respect to the IDEA." Pet. App. 10a. The court "believe[d] it reasonable to infer that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress had sufficiently indicated in the Conference Committee Report that prevailing parties could recover expert fees under the Act." *Ibid.* In addition, the court reasoned, awarding expert fees was consistent with IDEA's purpose of ensuring that all children with dis-

abilities obtain a free appropriate public education. *Id.* at 11a-12a.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that IDEA's fee-shifting provision authorizes an award of expert fees in addition to attorneys' fees.

A. IDEA's fee-shifting provision unambiguously answers the question presented by this case. The provision allows a court, "in its discretion," to "award reasonable attorneys' fees as part of the costs" to the prevailing party parents in an IDEA action. 20 U.S.C. 1415(i)(3)(B). The text nowhere mentions expert fees; rather, it explicitly states that only those fees generated by attorneys are recoverable under IDEA. Furthermore, the term "costs" cannot reasonably be construed to include "expert fees." The costs that can be taxed in the federal court system are statutorily defined in 28 U.S.C. 1920 and do not include general expert fees. The fact that IDEA is Spending Clause legislation also counsels against the court of appeals' reading of the Act, because, as this Court has repeatedly held, Spending Clause legislation may not be interpreted to impose unstated burdens on States that accept the federal monies to which strings are attached.

B. A plain-meaning construction of IDEA's fee-shifting provision is also compelled by this Court's decisions in *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), and *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83 (1991). In *Crawford*, this Court stated that "explicit statutory or contractual authorization" was required to allow a court to tax expenses beyond those listed in 28 U.S.C. 1821 and 1920. *Crawford*, 482 U.S. at 445. In *Casey,* this Court inter-

preted language in 42 U.S.C. 1988 virtually identical to that at issue here and held that neither the use of the phrase "attorney's fee" nor the use of the term "costs" provided the "explicit authorization" necessary to award expert fees to the prevailing party in civil rights litigation. As the Court explained, to hold otherwise would render "dozens of statutes" explicitly referring to *both* "attorney's fees" *and* "expert fees" an "inexplicable exercise in redundancy." *Casey*, 499 U.S. at 92. Because IDEA's fee-shifting language is virtually identical to the language at issue in *Casey*, it follows, *a fortiori*, that IDEA lacks the necessary "explicit statutory authorization" to award expert fees.

C. None of the secondary considerations on which the court of appeals relied provides any basis for departing from the statute's unambiguous text. As this Court has made clear, courts should not resort to committee reports to cloud clear statutory language. See *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004). The Second Circuit was therefore fundamentally mistaken in concluding that a statement in a committee report could trump IDEA's clear and unambiguous text.

Nor does the *Casey* footnote on which the Second Circuit relied call for any different result. That footnote did not endorse any particular reading of IDEA's fee-shifting provision, nor did it endorse the view that IDEA's legislative history could or did provide the requisite "explicit authorization" to award expert fees. It merely cited the committee report as evidence of an "apparent" attempt by some legislators to authorize an award of expert fees. 499 U.S. at 92 n.4. But that effort, while apparent, was unsuccessful. In *Casey* itself, this Court admonished that the "statutory text adopted by both Houses of Congress and submitted to the Presi-

dent" may not be "expanded * * * by the statements of * * * committees during the course of the enactment process." *Id.* at 98-99

Congress's refusal to amend IDEA's fee-shifting provision in the wake of *Casey* also does not support the court of appeals' construction. Congressional inaction provides no more basis to depart from the unambiguous text of IDEA than does a committee report. In any event, if anything, the fact that Congress has not amended IDEA in the wake of *Casey* to authorize the award of expert fees only underscores the conclusion that Congress has not sanctioned such fees. After *Casey*, Congress amended several other civil rights statutes to explicitly authorize the award of expert fees in addition to attorneys' fees. In addition, during this period, Congress amended IDEA—including its fee-shifting provision—multiple times in *other* respects. The legislative record therefore strongly supports the conclusion that Congress does not wish to authorize the award of expert fees in addition to attorneys' fees for IDEA.

The Second Circuit's reliance on the purposes of IDEA to justify its conclusion that expert fees are recoverable is similarly unavailing. Just as a court should not examine legislative history where the statutory language is clear, so too a court should not rely upon policy arguments where the meaning of the statute is plain. That is especially true here. As this Court recently noted in *Schaffer* v. *Weast*, 126 S. Ct. 528, 535 (2005), "Congress has * * * repeatedly amended the [IDEA] in order to reduce its administrative and litigation-related costs." The Second Circuit's decision, however, would *increase* litigation-related costs under IDEA and thus directly contravene Congress's intent.

ARGUMENT

IDEA'S FEE-SHIFTING PROVISION DOES NOT AUTHORIZE AN AWARD OF EXPERT FEES

In *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83 (1991), this Court held that expert fees were not authorized by the then-current fee-shifting provision of 42 U.S.C. 1988, which permitted the award of "a reasonable attorneys' fee as part of the costs." 42 U.S.C. 1988(b) (1988). The question presented in this case is whether a virtually identical fee-shifting provision in IDEA permits the award of expert fees. 20 U.S.C. 1415(i)(3)(B) (1997) ("In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party."). The Second Circuit answered that question in the affirmative. As explained below, that decision is contradicted by the text of IDEA, the record of statutory usage concerning fee-shifting provisions, and this Court's decisions, including, most notably, *Casey*.

A. The Plain Meaning Of IDEA's Fee-Shifting Provision Prohibits The Award Of Expert Fees

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what its says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). Accordingly, any construction of 20 U.S.C. 1415(i)(3)(B) "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *United States* v. *Albertini*, 472 U.S.

675, 680 (1985) (quoting *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). When that "language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004).

The text of IDEA unambiguously authorizes the award of *attorneys'* fees—not expert fees—to parents who prevail in IDEA litigation. Section 1415(i)(3)(B) provides that courts "may award reasonable attorneys' fees as part of the costs." 20 U.S.C. 1415(i)(3)(B). It nowhere mentions "expert fees." That omission is telling. First, at the time IDEA was enacted, "neither statutory nor judicial usage regarded the phrase 'attorney's fees' as embracing fees for experts' services." *Casey*, 499 U.S. at 97. Rather, the phrases "attorneys' fees" and "expert fees" described *different* categories of litigation expenses. Second, as this Court explained in *Casey*, Congress knows how to expressly authorize the award of *both* "attorney's fees" and "expert fees" when it wants to, and has done so in numerous other statutes. See *Casey*, 499 U.S. at 89 (noting that "[a]t least 34 statutes in 10 different titles of the United States Code explicitly shift attorney's fees *and* expert witness fees"); *id.* at 89-90 n.4 (listing statutory provisions). By using the phrase "attorneys' fees" in Section 1415(i)(3)(B), Congress therefore unambiguously directed that only a certain type of fees, namely, those generated by the work of an attorney, would be recoverable in an IDEA action.

That conclusion is bolstered by Section 1415(i)(3)(F)—entitled "Reduction in amount of attorneys' fees"—which directs a court to reduce "the amount of attorneys' fees awarded under this section" whenever

it finds certain specified facts that are explicitly directed to "attorneys" and "legal services." 20 U.S.C. 1415(i)(3)(F). There is no reference to "experts" or "expert services" in the provision, or anywhere else in the statute. If Congress had intended its reference to "attorneys' fees" in Section 1415(i)(3)(B) to authorize the reimbursement of both attorneys' fees and expert fees, there is no reason to believe that Congress would have gone to such great lengths in Section 1415(i)(3)(F) to specify the circumstances in which an award of *attorneys'* fees should be reduced but to have remained silent as to *expert* fees. Indeed, because only attorneys' fees and "legal services" are made subject to reductions under Section 1415(i)(3)(F), the court of appeals' rule would place expert fees in a favored position over the textually-specified attorneys' fees.[3]

Nor does Section 1415(i)(3)(B)'s reference to "costs" provide any support for the court of appeals' conclusion. The term "costs" in Section 1415(i)(3)(B) cannot be interpreted without regard to the immediately preceding phrase "attorneys' fees," and, in any event, "costs" cannot be read to include expert fees. The costs that a judge or clerk of "any court of the United States may tax" are statutorily defined in 28 U.S.C. 1920, and are strictly construed. See *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *Casey*, 499 U.S. at 86-87. The only recoverable costs that could potentially

---

[3] Moreover, Congress specifically considered the role of experts in IDEA disputes and provided in Section 1415(b)(1) that parents, regardless of whether they prevail in their challenge to the school's individual education program, may obtain an independent, expert educational evaluation of the child at public expense. 20 U.S.C. 1415(b)(1). That Congress did not further provide for the recovery of other expert fees is strong evidence that no such recovery was intended.

apply to an expert in an IDEA action are found in 28 U.S.C. 1920(3): "Fees and disbursements for printing and witnesses." But those fees are limited to those set out in 28 U.S.C. 1821, *i.e.*, travel expenses and a per diem of $40 for *witnesses*. The expert fees at issue in this case are for *consulting* services, not for appearance as a witness, and were not capped at $40 per diem. Because expert consulting fees are neither attorneys' fees nor costs, they cannot come within IDEA's authorization for recovering "attorneys' fees as part of the costs."[4]

Thus, if Congress intended in IDEA to depart from the statutory meaning of costs in Section 1920 to allow for the recovery of expert fees, it would have either defined costs to include expert and attorneys' fees or stated that "attorneys' fees" *and* "expert fees" could be awarded as part of the costs. Instead, Congress chose to include only the term "attorneys' fees." The plain meaning of IDEA's fee-shifting provision therefore precludes the award of expert fees to the prevailing party in an IDEA action. Congress said that courts could award only "attorneys' fees as part of the costs" in IDEA actions, and the strong presumption is that Congress meant what it said.[5]

---

[4] While the difference between expert *consulting* and *testifying* services may affect the availability of costs pursuant to 28 U.S.C. 1821 (insofar as Section 1821 authorizes a $40 per diem for *witnesses*), it does not affect the availability of expert fees under IDEA's fee-shifting provision, which authorizes *no* expert fees.

[5] Courts of appeals have interpreted almost identical language in other statutes to preclude the recovery of expert fees. For instance, various courts have held that the Age Discrimination in Employment Act (ADEA) and the Fair Labor Standards Act of 1938 (FLSA) preclude the recovery of expert fees. See, *e.g.*, *Gray* v. *Phillips Petroleum Co.*, 971 F.2d 591, 592, 594 (10th Cir. 1992) (holding that FLSA's language allowing court to grant "a reasonable attorney's fee

The conclusion that Congress did not intend "attorneys' fees" to include "expert fees" is further buttressed by the settled background principles against which IDEA must be construed. IDEA is Spending Clause legislation that conditions federal financial assistance on compliance with the Act's requirements. See *Schaffer*, 126 S. Ct. at 531-532; *Board of Educ.* v. *Rowley*, 458 U.S. 176, 190 n.11 & 204 n.26 (1982); *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 83 (1999) (Thomas, J., joined by Kennedy, J., dissenting) ("[b]ecause IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction") (internal citation omitted). Given this Court's repeated admonition that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)), there would be no basis to hold that, in the face of statutory and regulatory silence, IDEA nevertheless conditions federal funds on the requirement that States may be required to divert money from educational services to pay expert fees in addition to attorneys' fees.

B. This Court's Decisions Compel The Plain-Meaning Construction Of IDEA's Fee-Shifting Provision

A plain-meaning interpretation of the fee-shifting provision is compelled by this Court's decisions in *Crawford* and *Casey*. In *Crawford*, this Court addressed the question of the "power of federal courts to require a

---

* * * and costs of the action" did not allow recovery of expert fees); *Tyler* v. *Union Oil Co.*, 304 F.3d 379, 405 (5th Cir. 2002) (ADEA and FLSA); *Bankston* v. *Illinois*, 60 F.3d 1249, 1257 (7th Cir. 1995) (FLSA); *Holland* v. *Valhi, Inc.*, 22 F.3d 968, 979-980 (10th Cir. 1994) (ERISA).

losing party to pay the compensation of the winner's expert witnesses." 482 U.S. at 438. The Court noted that 28 U.S.C. 1920 embodied "Congress' considered choice as to the kinds of expenses that a federal court may tax" and that among the costs that could be taxed were "[f]ees and disbursements for printing and witnesses." 482 U.S. at 440. The witness fee specified in 28 U.S.C. 1920(3) was set out in 28 U.S.C. 1821 and, at that time, limited reimbursement to $30 per day. 482 U.S. at 441. The petitioners argued that Section 1920 did not "preclude taxation of costs above and beyond the items listed, and more particularly, amounts in excess of the § 1821(b) fee." *Ibid.* The Court rejected that view, stating that the petitioners' view would render Section 1920 "superfluous." *Ibid.* It held that "absent explicit statutory or contractual authorization for the taxation of expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Id.* at 445.

In *Casey*, the Court addressed the virtually identical fee-shifting language in the then-current version of 42 U.S.C. 1988. See 42 U.S.C. 1988 (1988) (authorizing the award of "a reasonable attorney's fee as part of the costs"). The Court explained that Sections 1920 and 1821 "define the full extent of a federal court's power to shift litigation costs absent express statutory authorization to go further." *Casey*, 499 U.S. at 86. Section 1920 is "an express limitation upon the types of costs which, absent other authority, may be shifted by federal courts." 499 U.S. at 87 (citing *Crawford*, *supra*). Because Section 1920 does not authorize "fees for services rendered by an expert employed by a party in a nontestimonial advisory capacity," such fees are not compensable absent "explicit statutory authority." *Ibid.*

And, with respect to testifying expert witnesses, "explicit statutory authority" is necessary to overcome Section 1821's limitation on fees for such experts. *Ibid.* Thus, the Court held, the term "costs" does not include fees for experts who do not testify, nor does it include fees for a testifying expert in excess of those provided by Section 1821. *Id.* at 87 & n.3.

The Court next rejected the notion that the term "attorney's fee" in Section 1988 provides the requisite "explicit statutory authority" for a district court to award both testimonial and nontestimonial expert fees. *Casey*, 499 U.S. at 87. The Court explained that "[t]he record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost." *Id.* at 88. If "attorney's fees" included expert fees, the Court reasoned, then "dozens of statutes referring to the two separately become an inexplicable exercise in redundancy." *Id.* at 92. In addition, when Congress enacted Section 1988, court cases showed that expert fees were not considered an element of attorneys' fees. *Ibid.* The Court also rejected petitioner's reliance on legislative history, and emphasized that where the statutory text "contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Id.* at 98-99.

Because the key language in IDEA's fee-shifting provision ("attorneys' fees as part of the costs") is identical to the statutory language at issue in *Casey*, *Casey* compels the conclusion that IDEA's fee-shifting provision does not authorize reimbursement for expert fees. See *Goldring* v. *District of Columbia*, 416 F.3d 70, 73

(D.C. Cir. 2005) ("[t]he correct decision does not seem to us to be difficult to reach, for the Supreme Court has stated in fairly unequivocal terms that language nearly identical to that used in section 1415 is unambiguous and, more to the point, does not allow a prevailing party to shift his expert fees"); *T.D.* v. *LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 482 (7th Cir. 2003) (finding that IDEA fee-shifting provision does not authorize award of expert witness fees, "particularly, in light of the fact that the Supreme Court in *Casey* found that the same words used in the former § 1988 ('reasonable attorney's fee as part of costs') did not provide the necessary explicit statutory authorization"); *Neosho R-V Sch. Dist.* v. *Clark*, 315 F.3d 1022, 1032-1033 (8th Cir. 2003) (noting that *Casey* "specifically indicated that the term 'costs' should be construed narrowly as not including expert witness fees").

C. The Court Of Appeals Erred In Rejecting The Plain Reading Of IDEA's Fee-Shifting Provision

In concluding that IDEA nevertheless authorizes the award of expert fees, the Second Circuit relied on legislative history, congressional inaction, and its view of the general purposes of IDEA. None of those secondary considerations, however, provides any basis for disregarding the plain meaning of the statute and clear import of this Court's decisions.

1. As noted above, a conference committee report accompanying the 1986 statute that added IDEA's fee-shifting provision stated that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the

* * * case." H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5 (1986). The Second Circuit concluded that this legislative history compelled the conclusion that IDEA's fee-shifting provision authorized the award of expert fees as well as attorneys' fees. For several reasons, the court's reliance on that legislative history was seriously misplaced.

Most fundamentally, recourse to legislative history to determine whether Congress intended to shift expert fees in IDEA "is simply unwarranted," *Goldring*, 416 F.3d at 74, because, as the Court held in *Casey*, the relevant text, "attorneys' fees as part of the costs," is clear and unambiguous. See *ibid.*; *LaGrange*, 349 F.3d at 483; *Neosho*, 315 F.3d at 1032. Courts should "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994). "Legislative history" is simply "irrelevant to the interpretation of an unambiguous statute." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989). And "appeals to statutory history are well taken only to resolve 'statutory ambiguity.'" *Barnhill* v. *Johnson*, 503 U.S. 393, 401 (1992). Because the statutory provision at issue here is not ambiguous, the Second Circuit erred in resorting to legislative history to depart from the plain meaning of the text that Congress enacted.[6]

---

[6] In *Casey*, this Court emphatically rejected a similar attempt to expand the meaning of the phrase "reasonable attorneys' fee as part of costs" by resort to a House Committee Report. As the Court observed, the "best evidence" of Congress's intent is "the statutory text adopted by both Houses of Congress and submitted to the President," and where, as here, that statutory language "has a clearly accepted meaning in both legislative and judicial practice," it cannot "be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." 499 U.S. at 98-99.

Moreover, as the District of Columbia, Seventh, and Eighth Circuits have all properly concluded, the fact that this Court referred to the above-mentioned committee report in a footnote in *Casey* does not justify the Second Circuit's reading of IDEA's fee-shifting provision. In that footnote, the Court responded in dicta to the argument that the committee report informed the proper construction of the phrase "attorney's fees" by stating that the report represented "an apparent effort to *depart* from ordinary meaning and to define a term of art." 499 U.S. at 92 n.5. The Court in no way opined that the effort was a successful one. Rather, other language in *Casey* affirms that the Court does "not permit [unambiguous statutory text] to be expanded or contracted by the statements of * * * committees during the course of the enactment process." *Id.* at 98-99. And, therefore, most courts reading *Casey* as a whole have concluded that "this 'apparent effort' to define a term of art in legislative history is an unsuccessful one." *Neosho*, 315 F.3d at 1032; accord *LaGrange*, 349 F.3d at 482; *Goldring*, 416 F.3d at 75. The bottom line remains that a statement in a committee report simply does not constitute the type of "explicit authority" required to allow an award of expert fees beyond the limitations of the general cost statutes. *Casey*, 499 U.S. at 86-87; *Neosho*, 315 F.3d at 1031.

The Second Circuit's effort to attach significance to the fact that Justice Scalia was the author of the *Casey* decision is also without merit. Pet. App. 10a-11a. The majority opinion in *Casey* was written for the Court, not a single Justice. Nothing in the footnote indicates that the Court considered the committee report's "apparent effort" to supplement the statutory text to have been a *successful* effort. To the contrary, the Court in *Casey*

made clear that it is improper even to look to legislative history where, as there and here, a statutory term is unambiguous. See 499 U.S. at 99-100. This case involves precisely the same statutory terms and therefore calls for the same result.[7]

---

[7] In any event, IDEA's legislative history is itself far more ambiguous than the Second Circuit recognized. First, the House Conference Committee Report at issue states that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert *witnesses* and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the * * * case." H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5 (1986) (emphasis added). Even if that report could somehow overcome the plain meaning of the statutory text, it appears to relate only to the services of expert *witnesses*, not expert consulting services of the type at issue here. Second, it appears that a primary aim in enacting the fee-shifting provision was responding to this Court's decision in *Smith* v. *Robinson*, 468 U.S. 992 (1984), which had held that prevailing parents could not recover *attorneys'* fees under the Education of the Handicapped Act or other civil rights statutes. See 132 Cong. Rec. 17,600 (1986) (statement of Rep. Beilenson) (noting that the section would "overturn the decision of the Supreme Court in the case of Smith versus Robinson," which had "rendered courts unable to award attorneys' fees to families who sue school districts which fail to provide appropriate educational opportunities for handicapped children"). The *Smith* case involved a claim for attorneys' fees and did not address the availability of expert fees. Third, in contrast to the committee report relied on by the court of appeals, there are numerous other statements in the legislative history that support the plain meaning of "attorneys' fees." See, *e.g.*, *ibid.* (statement of Rep. Beilenson) (stating that the Handicapped Children's Protection Act of 1986 (HCPA) "would restore the authority of courts to award fees for the services of attorneys—in addition to other costs awarded"); *ibid.* (statement of Rep. Quillen) (stating that the HCPA "authorize[s] the award of reasonable attorney fees to prevailing parties"); 132 Cong. Rec. at 16,823 (statement of Sen. Weicker) (stating that the HCPA allowed "the courts to award attorneys' fees to prevailing parents"); *id.* at 16,825 (statement of Sen. Hatch) (stating that HCPA "provides for the award of reasonable

2. The Second Circuit's reliance on Congress's inaction in the wake of *Casey* is similarly misplaced. The Second Circuit concluded that it was "reasonable to infer that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress had sufficiently indicated in the Conference Committee Report that prevailing parties could recover expert fees under the Act." Pet. App. 10a. The court therefore found it "instructive" that Congress amended Section 1988 and Title VII in response to the *Casey* decision in order to make expert fees compensable in civil rights actions, but "took no similar action with respect to the IDEA." *Ibid.* Congress's inaction provides no more authority to override unambiguous statutory text than does affirmative legislative history. In fact, it provides less. See *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 n.7 (2001) (noting that "as a general rule we are hesitant to construe statutes in light of legislative inaction"); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver*, N.A., 511 U.S. 164, 186-187 (1994) (warning against reliance on legislative inaction). And, in any event, the Second Circuit drew the *wrong* conclusion from the inaction on which it focused.

---

attorney's fees to prevailing parents"). If, in fact, Congress intended to deviate from normal usage and somehow expand the meaning of the phrase "attorneys' fees as part of the costs" to include expert fees, then it would be reasonable to expect these legislators to comment on that deviation. At most, this history reflects the very sort of imprecision and contradiction that gives rise to the settled rule that where statutory language is clear, legislative history provides no basis for overriding that text.

As the District of Columbia Circuit pointed out in *Goldring*, it is far more reasonable to infer from Congress's refusal to amend IDEA's fee-shifting provision following *Casey* that "Congress had no intention of allowing recovery of expert fees under the IDEA." 416 F.3d at 76. This is so because (1) at most, *Casey* stated that the committee report was only an "apparent effort" by the congressional committee to depart from the ordinary meaning of the statutory phrase "attorneys' fees as part of the costs"; (2) *Casey* did not include IDEA as an example of a statute that authorizes the shifting of both attorneys' fees and expert fees; and (3) "the version of section 1988 construed in *Casey* is nearly identical to section 1415." *Ibid*.

Moreover, in addition to Section 1988 and Title VII, Congress—in response to this Court's decision in *Casey*—has expressly authorized the award of expert fees (in addition to attorneys' fees) in the Family and Medical Leave Act of 1993, 29 U.S.C. 2617, see H.R. Rep. No. 8(i), 103d Cong., 1st Sess. 48 (1993), and Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 U.S.C. 248, see H.R. Rep. No. 488, 103d Cong., 2d Sess. 10 (1994). Congress amended IDEA's attorneys' fee provision in 1990 and 2004, but made no effort to include language authorizing expert fees under IDEA. These provisions provide further proof, if any were needed, that Congress knows how to authorize the award of expert fees to a prevailing party when it desires to do so. Accordingly, if any inference can be drawn from the fact that Congress has not amended IDEA in the wake of *Casey* to authorize awards for ex-

pert fees, it is that Congress does not wish to sanction such fee awards.[8]

3. The Second Circuit's reliance on IDEA's purpose of ensuring that all children with disabilities obtain a free appropriate public education is also misplaced. Pet. App. 11a-12a. As the District of Columbia Circuit explained, where, as here, the language of the statute is clear, such policy arguments are insufficient to overcome the express intent of Congress. *Goldring*, 416 F.3d at 76-77; see *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001) (holding that "[t]o disregard the clear legislative language and the holdings of our prior cases on the basis of * * * policy arguments would be" un-

---

[8] To the extent the Court is inclined to go down the path of drawing inferences from congressional inaction, it must also account for the fact that Congress, in 2004, considered but did not adopt a bill (the Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004) that would have amended IDEA and numerous other civil rights statutes to authorize an award of expert fees explicitly. See S. 2088, 108th Cong., 2d Sess. (2004); H.R. 3809, 108th Cong., 2d Sess. (2004). The bill explained that its purpose was, *inter alia*, "to allow recovery of expert fees by prevailing parties under civil rights fee-shifting statutes," and that this purpose was "made necessary by the decision of the Supreme Court in [*Casey*]." See S. 2088, *supra*, §§ 521, 522(1). Specifically, it would have provided that "Section 615(i)(3)(B) of the Individuals with Disabilities Education Act (20 U.S.C. 1415(i)(3)(B)) is amended by inserting '(including expert fees)' after 'attorney's fees.'" S. 2088, *supra*, § 523(e). If, as the Second Circuit posited below, Congress already allowed for the recovery of expert fees under IDEA's fee-shifting provision, then Congress would have had no need to include IDEA among the civil rights statutes to be amended by the bill. That bill expired at the end of the 108th Congress. Congress remains free to address this issue as it sees fit, but this Court should hold that IDEA, as currently written, does not allow for the award of expert fees.

warranted). In *Casey*, this Court rejected a similar argument "that the [remedial] purpose in enacting § 1988 must prevail over the ordinary meaning of the statutory terms." 499 U.S. at 98. As the Court put it, "Congress could easily have shifted 'attorney's fees and expert witness fees,' or 'reasonable litigation expenses,' as it did in contemporaneous statutes; it chose instead to enact more restrictive language, and we are bound by that language." *Id.* at 99. That conclusion is equally true here.

Indeed, in recently holding that parents who initiate due process hearings under IDEA bear the burden of proving their claims, this Court emphasized that "the touchstone of our inquiry is, of course, the statute," and found no reason to depart from the ordinary rule that the burden of proof falls on the party seeking relief. *Schaffer*, 126 S. Ct. at 534. So too, there is no reason to depart from ordinary rules of statutory interpretation here. That is particularly true given that one of the goals of IDEA, and a key objective of the 2004 Amendments to IDEA, is to reduce the litigation costs for schools under the Act so that funding could be dedicated to the delivery of educational services. See *id.* at 535 (discussing the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647). Holding that the Act authorizes the award of expert fees would have precisely the opposite effect.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
WAN J. KIM
Assistant Attorney General
GREGORY G. GARRE
Deputy Solicitor General
DAVID B. SALMONS
Assistant to the Solicitor General
DAVID K. FLYNN
DENNIS J. DIMSEY
CONOR B. DUGAN
Attorneys

KENT D. TALBERT
Acting General Counsel
Department of Education

FEBRUARY 2006