No. 08-970

In the Supreme Court of the United States

SONNY PERDUE, GOVERNOR OF THE STATE OF GEORGIA, ET AL., PETITIONERS

v.

KENNY A., BY HIS NEXT FRIEND LINDA WINN, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The petition for a writ of certiorari was granted limited to the following question: "Can a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation?"

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INTEREST OF THE UNITED STATES

This case concerns whether a court, in determining an award for reasonable attorney's fees under a federal fee-shifting statute, may enhance the award above the lodestar amount based on the quality of representation and results obtained. The United States has a substantial interest in the resolution of this issue. The availability of adequate attorney's fees is important to ensure the pursuit of meritorious private actions that complement the government's own enforcement efforts. At the same time, the United States itself may be liable for attorney's fees under more than 100 statutes that allow prevailing parties to recover reasonable attorney's fees. The interpretation of a "reasonable" attorney's fee in 42

U.S.C. 1988(b), at issue in this case, is likely to govern the interpretation of those numerous other fee-shifting provisions. See, *e.g.*, *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

STATEMENT

1. In June 2002, respondents filed this class action against petitioners, the Governor of Georgia and various other state officials, on behalf of 3,000 children in foster care. The complaint alleged that petitioners violated federal and state constitutional and statutory provisions in their administration of the foster care system in two metropolitan Atlanta counties. Several of the federal law claims were brought under 42 U.S.C. 1983. The suit sought declaratory and injunctive relief, along with attorney's fees and expenses. Pet. App. 3a-5a. After discovery, denial of petitioners' motion for summary judgment, and four months of mediation, the parties entered into a consent decree—approved by the district court in October 2005—that resolved all pending issues, except the amount of attorney's fees owed respondents as the "prevailing party" under 42 U.S.C. 1988(b). *Id.* at 6a-8a.

Respondents thereafter filed an application requesting nearly $15 million ($14,342,860 to be exact) in attorney's fees for nearly 30,000 hours claimed to have been worked by their legal team. Pet. App. 104a-105a. Half of the amount requested ($7,171,430) represented the proposed "lodestar" amount, which is "the product of reasonable hours times a reasonable rate." *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (*Delaware Valley I*). That figure included payment for work by respondents' attorneys at hourly rates ranging from $215 to $495, and by paralegals and interns at hourly rates ranging from $75

to $150. Pet. App. 105a. Those rates, according to the attorney affidavits submitted by respondents themselves, were "fair, reasonable, and consistent with hourly rates in the Atlanta market for the price of legal services of comparable quality rendered in cases demanding similar skill, judgment and performance." J.A. 41 (Lowry Dec.), 56-57 (Bramlett Dec.). According to one of the lead trial counsel for respondents, a partner at a prestigious Atlanta litigation boutique, the rates requested "correctly reflect the hourly rates my law firm currently charges and collects from clients who hire us to perform legal services on a Standard Hourly Rate basis." J.A. 47 (Bramlett Dec.).

The other half of the amount requested (an additional $7,171,430) was sought as an enhancement of the fee award based on several grounds. See Resp. Dist. Ct. Br. in Support of Award of Atty's Fees & Expenses of Litig. 1-36. Respondents relied, in part, on the quality of representation provided by their counsel and the successful results that they achieved. *Id.* at 2-3, 29-31. In addition, respondents relied on the contention that the lodestar did not account for contingency risk in the case or delayed payment of attorney's fees and expenses. *Id.* at 3-9, 31-34. According to respondents, this latter set of factors meant that the proposed hourly rates were lower than true market rates for the services provided. J.A. 41 (Lowry Dec.), 57 (Bramlett Dec.).

Petitioners objected to the amount of fees requested. Petitioners argued that the number of hours claimed and some of the hourly rates proposed were excessive. Pet. App. 9a. They also argued that an enhancement for the quality of representation and the results obtained was not appropriate because those factors were already

taken into consideration in setting the lodestar amount. *Ibid.*

The district court partially sustained petitioners' objections to the number of hours claimed. It made a 15% across-the-board reduction to non-travel hours, which resulted in a monetary reduction of the lodestar to $6,012,803. Pet. App. 145a. The court based the reduction on "(1) the vague and noncompensable entries in counsel's billing records; (2) the excessive number of hours spent on pre-suit investigation and drafting the complaint and mandatory disclosures; (3) overstaffing at the preliminary injunction hearing; (4) the excessive number of hours spent on document production and analysis; (5) the excessive number of hours spent responding to a motion to compel and overstaffing of discovery and status conferences; (6) the excessive number of hours spent in intra- and inter-officer [sic] conferences and correspondence; (7) noncompensable time spent on expert witnesses and reports; (8) the excessive number of hours spent responding to the motion for summary judgment; and (9) the excessive number of hours spent on trial preparation." *Ibid.* (internal citations omitted).

The district court, however, rejected petitioners' objections to the hourly rates. It found that, in light of "the stellar performance of plaintiffs' counsel throughout this long and difficult case," the requested hourly rates—including a rate "near the high end of the Atlanta market" for one of the lead trial counsel—all were "fair and reasonable." Pet. App. 143a-144a.

The district court also rejected petitioners' objections to the requested fee enhancement. The court relied first on evidence of respondents' counsel's "extraordinary commitment of capital resources" to the case,

without any guarantee of fees or reimbursement. Pet. App. 151a. In particular, the court found:

> the evidence shows that the hourly rates used in the lodestar calculation do not take into account (1) the fact that class counsel were required to advance case expenses of $1.7 million over a three-year period with no ongoing reimbursement, (2) the fact that class counsel were not paid on an ongoing basis as the work was being performed, and (3) the fact that class counsel's ability to recover a fee and expense reimbursement were completely contingent on the outcome of the case.

Ibid.

The district court also found, based on its "personal observation of plaintiffs' counsel's performance throughout this litigation," that "the superb quality of their representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar." Pet. App. 151a; see *id.* at 151a-152a ("Quite simply, plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench."). Finally, the court stated that "the evidence establishes that plaintiffs' success in this case was truly exceptional." *Id.* at 152a.

For those reasons, the district court increased the $6,012,803 attorney's fee award by a multiplier of 1.75, resulting in an additional $4,509,602, which boosted the total fee award to $10,522,405. Pet. App. 154a-155a.

2. Both petitioners and respondents appealed.[1] The court of appeals affirmed the district court's fee award in a unanimous judgment with three separate opinions. Pet. App. 1a-93a.

Judge Carnes concluded that the panel was bound by prior circuit precedent holding that superior quality of representation coupled with superior results is a permissible basis for an enhancement of the lodestar amount. Pet. App. 57a-63a (citing *NAACP* v. *City of Evergreen*, 812 F.2d 1332 (11th Cir. 1987), and *Norman* v. *Housing Auth.*, 836 F.2d 1292 (11th Cir. 1988)). In Judge Carnes' view, however, *NAACP* and *Norman* appeared to conflict with this Court's precedent establishing a strong presumption that the lodestar reflects a reasonable attorney's fee. *Id.* at 61a-69a. Judge Carnes further reasoned that such enhancements constitute double counting and are unnecessary to further the statutory purpose of attracting capable counsel. *Id.* at 38a-57a.

Judge Wilson concluded that *NAACP* and *Norman* were not inconsistent with this Court's teachings, and found that record evidence of superior performance supported the district court's finding that the lodestar was insufficient to provide a reasonable attorney's fee in this case. Pet. App. 71a-93a. Judge Hill observed only that "[t]he enhancement by the district court is due to be

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[1] Respondents argued in their cross-appeal that the district court abused its discretion by not applying the "common fund" and "common benefit" doctrines to enhance the fee award. They also challenged the district court's ruling denying them $801,864 in expert witness expenses. The court of appeals affirmed the district court's rulings on those claims for the reasons explained in the district court's opinion. Pet. App. 14a; see *id.* at 106a-111a, 157a-159a. Respondents have not sought further review of the appeals court's decision on those issues.

affirmed because we are bound by the prior cases of our court." *Id.* at 93a.

In the separate opinions, the court of appeals also addressed the other set of factors—*i.e.*, contingency risk, delayed payment of attorney's fees, and counsel's advancement of expenses—on which the district court based the fee enhancement. The panel rejected the district court's reliance on the contingency-fee arrangement. Judge Carnes explained that "[e]nhancing a lodestar based on contingency is flatly forbidden by the [*City of Burlington* v. *Dague*, 505 U.S. 557 (1992)] decision." Pet. App. 35a. Judge Wilson agreed. *Id.* at 85a. Judge Carnes and Judge Wilson, however, disagreed as to whether the delayed payment of fees and expenses was a permissible basis for an enhancement. See *id.* at 33a-35a, 85a. Judge Hill expressed no position on those issues. See *id.* at 93a.

Notwithstanding its conclusion that the district court improperly relied on the contingency risk and its internal division on whether the district court properly relied on the delayed payment of fees and expenses, the court of appeals affirmed the full amount of the district court's award. Pet. App. 70a-71a. Judge Carnes explained that "our reading of the district court's opinion leaves us convinced that it would be pointless to remand to that court with instructions that it reconsider whether to give an enhancement, or the amount of one, free of those improper considerations. * * * So long as our *NAACP* and *Norman* decisions stand, the district court can, and would again on remand, reach the same result that we have before us and rest it on the basis of quality of representation and superior results." *Id.* at 70a.

3. The court of appeals denied rehearing en banc. Pet. App. 173a-216a.

In an opinion concurring in the denial of rehearing (Pet. App. 174a-180a), Judge Wilson reiterated the views stated in his panel opinion—*i.e.*, that "the Supreme Court has consistently indicated that, in the 'rare' and 'exceptional' case, the district court has the discretion to grant an enhancement." *Id.* at 177a. In a dissenting opinion (*id.* at 180a-202a), Judge Tjoflat concluded that an enhancement based on "exceptional" or "superior" results can never be appropriate in a class action seeking injunctive relief, especially where "a lodestar already reflect[s] an hourly rate prevailing at the top of the relevant market." *Id.* at 193a, 200a. Judge Carnes, in a separate dissenting opinion joined by Judges Tjoflat and Dubina (*id.* at 202a-216a), reiterated his views and noted that none of the Supreme Court precedents cited by Judge Wilson had upheld a fee enhancement based on the quality of representation or the results obtained.

SUMMARY OF ARGUMENT

Federal fee-shifting statutes do not authorize enhancement above the lodestar amount based on the quality of representation or the results obtained for a simple reason—because both factors are already incorporated into the lodestar calculation. The rule adopted by the Eleventh Circuit would result in impermissible double counting. Accordingly, the district court's award of a 75% performance bonus—a $4.5 million increase over the $6 million lodestar amount—should be reversed.

A. This Court has instructed that most factors relevant to the determination of a reasonable attorney's fee, including the quality of representation and the results obtained, are presumed to be reflected in the calculation

of the lodestar and therefore cannot serve as independent bases for enhancing the fee award beyond the lodestar amount. See *City of Burlington* v. *Dague*, 505 U.S. 557, 562-563 (1992); *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564-565 (1986). Notwithstanding dicta in some cases that enhancements based on the quality of representation and results obtained "may" be justified in "rare" and "exceptional" cases, this Court has *never* upheld a fee enhancement based on those criteria.

B. This Court should hold that the lodestar presumption is conclusive with respect to the quality of representation and results obtained because any enhancement on those grounds would amount to double counting. The reasonable hourly rates for the particular attorneys handling a case already reflect their experience, qualifications, and abilities. Rates set near the top of the prevailing market contemplate high quality representation and optimal results, and so those factors warrant no further enhancement in a case like this one. Respondents' counsel themselves acknowledge that their proposed rates were "reasonable" in light of rates charged by counsel "of comparable quality rendered in cases demanding similar skill, judgment and performance." J.A. 41 (Lowry Dec.), 56-57 (Bramlett Dec.). That other factors (contingency risk and delayed payment) may have placed them in a different position than attorneys in the private market is beside the point: those are not permissible grounds for enhancement and, in any event, are beyond the scope of the question presented.

C. Enhancements based on the quality of representation or the results obtained are not necessary to satisfy the aim of fee-shifting statutes. Congress de-

signed these statutes to enable private parties to attract competent counsel to help vindicate important federal rights, but Congress also cautioned that attorney's fee awards should not produce windfalls. Discretionary, performance-based enhancements of lodestar fee awards that already reflect market rates—especially where, as here, the rates used are near the top of the prevailing market—are unnecessary to attract counsel and result in such a windfall. In the rare case in which representation of an unpopular or otherwise highly controversial client causes counsel to suffer professional or financial harm, the lodestar amount may be insufficient and an enhancement appropriate. But no such special circumstances are present in this case, and the lodestar is the reasonable measure of compensation.

ARGUMENT

FEE-SHIFTING STATUTES THAT PERMIT AN AWARD OF "REASONABLE" ATTORNEY'S FEES DO NOT AUTHORIZE ENHANCEMENT ABOVE THE LODESTAR AMOUNT BASED ON QUALITY OF REPRESENTATION OR RESULTS OBTAINED BECAUSE BOTH FACTORS ARE ACCOUNTED FOR IN DETERMINING THE LODESTAR

Under the "American Rule," a "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser"—at least "without legislative guidance." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975); see *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (American Rule governs "absent explicit statutory authority."). Congress has provided that guidance through numerous federal statutes authorizing an award of a reasonable attorney's fee to a prevailing party to encourage private citizens to vindicate

important public rights.[2] *E.g.*, 42 U.S.C. 1988(b) ("In any action or proceeding to enforce [enumerated civil rights laws], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."); see *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986) ("There are over 100 separate statutes providing for the award of attorney's fees."). Regardless of the underlying claim or context, "the benchmark for the awards under nearly all of these statutes is that the attorney's fee must be 'reasonable.'" *Ibid.* Like other fee-shifting statutes, however, Section 1988(b) is silent on what constitutes a "reasonable" attorney's fee.

As this Court's precedents indicate, the lodestar—the product of the reasonable hourly rate and the number of hours reasonably expended—is presumed to rep-

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[2] The statutes include, *inter alia*, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988(b); Equal Access to Justice Act, 28 U.S.C. 2412(b) and (d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k); Clean Air Act, 42 U.S.C. 7413(b), 7604(d), 7607(f), 7622(b)(2)(B); Consumer Product Safety Act, 15 U.S.C. 2060(c) and (f), 2072(a), 2073; Truth in Lending Act, 15 U.S.C. 1640(a)(3); Clayton Act, 15 U.S.C. 15; Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928(a); Copyright Act, 17 U.S.C. 505; Trademark Act of 1946, 15 U.S.C. 1117; Endangered Species Act of 1973, 16 U.S.C. 1540; National Historic Preservation Act, 16 U.S.C. 470w; Toxic Substances Control Act, 15 U.S.C. 2618(d), 2619(c); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1275(e); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1734; Clean Water Act, 33 U.S.C. 1365(d); Act to Prevent Pollution from Ships, 33 U.S.C. 1910(d); Safe Drinking Water Act, 42 U.S.C. 300j-8(d); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415; Energy Policy and Conservation Act, 42 U.S.C. 6305(d); and Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4654(a). See Pet. App. 217a-223a (listing over 80 statutes).

resent a reasonable attorney's fee. Because the quality of representation and results obtained are both reflected in the lodestar calculation, no enhancement based on those factors is necessary to make a lodestar award reasonable or to fulfill the statutory purpose of attracting competent counsel. The facts of this case, in which the district court accepted respondents' proffered high-end market rates for counsel of high-end quality and accordingly awarded a lodestar of over $6 million, well illustrate the redundancy of any enhancement of attorney's fees based on the quality and success of representation.

A. This Court Has Established A Strong Presumption That The Lodestar Calculation Yields A Reasonable Attorney's Fee And Has Never Upheld An Enhancement Based On Attorney Performance

Over the past quarter century, this Court has articulated the standards for determining the amount of a reasonable attorney's fee award under Section 1988(b)—with an ever-increasing emphasis on the lodestar calculation as providing the correct amount, exclusive of any additional quality or results-related enhancements.

In 1983, the Court addressed "whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims." *Hensley* v. *Eckerhart*, 461 U.S. 424, 426 (1983). The Court in *Hensley* identified the "lodestar," *i.e.*, the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," as the "most useful starting point" for determining a reasonable attorney's fee award. *Id.* at 433. The Court commented that the lodestar could be adjusted upward or downward on the basis of other considerations, including the "results obtained" and other factors set forth in *Johnson* v. *Georgia Highway Ex-*

press, Inc., 488 F.2d 714 (5th Cir. 1974), but cautioned district courts to keep in mind that "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate."[3] *Hensley*, 461 U.S. at 434 n.9; see *id.* at 435 ("in some cases of exceptional success an enhanced award may be justified"). *Hensley* itself presented only the question of when a *downward* departure was appropriate based on limited success, not the converse. *Id.* at 436-440.

The next year, in *Blum* v. *Stenson*, 465 U.S. 886 (1984), the Court attached even more significance to the lodestar calculation and limited the factors that a district court could consider in determining whether to enhance the lodestar amount. In *Blum*, the district court had awarded a 50% enhancement to the lodestar, based on "the complexity of the litigation, the novelty of the issues, the high quality of representation, the 'great benefit' to the class, and the 'riskiness' of the lawsuit." *Id.* at 898. This Court held that "[t]he reasons offered by

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[3] The legislative history to Section 1988(b) identifies *Johnson* as listing the "appropriate standards" to be considered in determining a reasonable attorney's fee award. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976). The *Johnson* factors are (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved 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. 488 F.2d at 717-719.

the District Court to support the upward adjustment do not withstand examination." *Ibid.* The Court explained:

> The novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel. * * * There may be cases, of course, where the experience and special skill of the attorney will require the expenditure of fewer hours than counsel normally would be expected to spend on a particularly novel or complex issue. In those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates. Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award.

Id. at 898-899.

The Court also explained that the quality of representation "generally is reflected in the reasonable hourly rate," and that "[i]t, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Blum*, 465 U.S. at 899 (citing *Hensley*, 461 U.S. at 435). The Court elaborated that "[b]ecause acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award"—even when the results obtained benefit a large class of people. *Id.* at 900 & n.16. Applying those principles to the record before it, the Court concluded that no enhancement above the lodestar amount

was necessary to provide reasonable compensation. *Id.* at 900-902.

Two years later, in *Delaware Valley I*, *supra*, the Court further restricted whatever room remained to enhance an attorney's fee award above the lodestar amount based on quality and results of representation. In characterizing its holding in *Blum*, the Court explained:

> *Blum* also limited the factors which a district court may consider in determining whether to make adjustments to the lodestar amount. Expanding on our earlier finding in *Hensley* that many of the *Johnson* factors "are subsumed within the initial calculation" of the lodestar, we specifically held in *Blum* that the * * * "quality of representation" and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award.

Delaware Valley I, 478 U.S. at 564-565 (citing *Blum*, 465 U.S. at 898-900).

Although acknowledging the possibility of an enhancement in "rare" and "exceptional" cases, the Court in *Delaware Valley I* emphasized that "[a] strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee-shifting statute." 478 U.S. at 565. The Court reasoned that federal fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client."

Ibid. The Court explained that if a plaintiff is able to retain counsel "based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied." *Ibid.*

Applying those principles, the Court again rejected a district court's enhancement of a fee award for exceptional quality of representation and results obtained. *Delaware Valley I*, 478 U.S. at 566-568. The Court noted that the district court's elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive "is not supportive of the court's later conclusion that the remaining hours represented work of 'superior quality.'" *Id.* at 567.

In its last case concerning fee enhancements, *City of Burlington* v. *Dague*, 505 U.S. 557 (1992), the Court addressed the question, left open in *Delaware Valley I*,[4] whether a contingency-fee arrangement may serve as a basis for enhancement of an attorney's fee award because the attorneys "assumed the risk of receiving no payment at all for their services." *Id.* at 559. The Court "note[d] at the outset that an enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar." *Id.* at 562. The Court explained that the difficulty of establishing the merits of a claim "is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so."

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[4] The Court in *Delaware Valley I* ordered reargument on the question whether an attorney's fee award may be enhanced based on the risk of loss. 478 U.S. at 568. That question was addressed in an ensuing decision, *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*), but the Court did not garner a majority to resolve the issue conclusively.

Ibid. Taking account of this factor again through lodestar enhancement amounts to "double counting." *Id.* at 563.

The Court in *Dague* further explained that it was impermissible to increase the award based on risk of loss because the fee-shifting statute was designed to compensate a "prevailing plaintiff" for successful claims, not to subsidize the litigation of unsuccessful ones. 505 U.S. at 565. Because a contingency-based enhancement is not "necessary to the determination of a reasonable fee," the Court concluded that such an enhancement "is not permitted under the fee-shifting statutes." *Id.* at 566-567.

In sum, this Court has steadily distanced itself from the notion that an enhancement above the lodestar amount may be based on quality of representation or results obtained, even in "exceptional" cases. The Court's analysis in *Delaware Valley I* and *Dague* in particular focused on the way the lodestar calculation already incorporates considerations that lower courts had mistakenly viewed as justifying a premium. And this Court has *never* upheld an enhancement to an attorney's fee award based on these criteria. Accordingly, any suggestion that such enhancements are possible has always been dicta. In its actual holdings, the Court has perceived enhancements for quality and results as superfluous in light of the basic lodestar calculation.

B. No Enhancement To The Lodestar Is Justified Based On The "Quality Of Representation" Or The "Results Obtained" Because Both Factors Are Already Reflected In The Lodestar Calculation

As demonstrated above, the lodestar figure has "become the guiding light" of this Court's "fee-shifting ju-

risprudence." *Dague*, 505 U.S. at 562. The lodestar "is more than a mere 'rough guess' or initial approximation of the final award to [be] made." *Delaware Valley I*, 478 U.S. at 564. Instead, when "'the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product *is presumed* to be the reasonable fee' to which counsel is entitled," and "the 'quality of representation,' and the 'results obtained' * * * thus cannot serve as independent bases for increasing the basic fee award." *Ibid.* (quoting *Blum*, 465 U.S. at 897). Fee awards must be "reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, *by definition* will represent the reasonable worth of the services rendered in vindication of a plaintiff's * * * claim." *Blanchard* v. *Bergeron*, 489 U.S. 87, 96 (1989) (emphasis added).

This Court should hold what the logic of its precedents dictate and make conclusive the presumption that the lodestar (assuming its components are properly set) represents a reasonable attorney's fee, such that enhancements based on quality of representation or results obtained are not permissible. See *Dague*, 505 U.S. at 559-567 (stating that contingency cannot alter the presumption that the lodestar constitutes a reasonable fee). The correctness of that conclusion is most evident where, as here, the accepted hourly rates are already near the top of the market.[5]

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[5] As discussed below (pp. 30-31, *infra*), the government's position would not preclude an enhancement on the distinct ground that an attorney's representation of an unpopular or highly controversial client causes the attorney to suffer some ancillary harm that renders the lode-

1. An enhancement based on attorney performance would result in double counting

The quality of representation and results obtained are accounted for in the lodestar calculation. The reasonable hourly rates for the particular attorneys handling a case will reflect their experience, qualifications, and abilities. See *Blum*, 465 U.S. at 895-896 n.11 (defining "prevailing market rate" as the rate "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation"); Model Rules of Prof'l Conduct Rule 1.5(a)(7) (2007) (Model Rule) ("The factors to be considered in determining the reasonableness of a fee include * * * the experience, reputation, and ability of the lawyer or lawyers performing the services."). Rates at or near the top of the prevailing market contemplate that an attorney will provide high quality representation and produce optimal results. See *Pierce* v. *Underwood*, 487 U.S. 552, 573 (1988) ("the 'work and ability of counsel,' and 'the results obtained' * * * are little more than routine reasons why market rates are what they are") (citation omitted); *Delaware Valley I*, 478 U.S. at 565 ("when an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results"). A bonus on top of those rates for quality of representation or results obtained, therefore, would be "double counting." *Id.* at 566.

The risk of double counting in fee-shifting cases is particularly great because the hourly rates are determined *after* the requesting party has prevailed. A dis-

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star amount insufficient to provide adequate compensation or incentive to take on the representation.

trict court thus has the opportunity, when setting the reasonable hourly rate, to take into account not only the attorney's prior experience and qualifications, but also his performance in the very case at hand. That process allows even inexperienced or unheralded attorneys—whose hourly rates might otherwise be at the low end of the prevailing market—to obtain an hourly rate nearer to the high end of the market. By this means, the lodestar itself reflects exceptional skill or ability not only in the attorney's prior work, but in his handling of the case at issue. The circumstance articulated by the Court in *Blum* as possibly justifying an enhancement—where "the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged," 465 U.S. at 899—therefore simply does not arise when the lodestar rate has been properly determined.

Even if that hypothetical circumstance arose, it would not be a proper basis for an enhancement. To the extent a prevailing party's attorney commanded a relatively low market rate, that attorney by definition would not have received higher compensation had he spent his time litigating another case instead. And the attorney's success in that hypothetical case would justify an increase in his market rate for future cases—an important economic benefit itself. In any event, as discussed below (pp. 23-25, *infra*), the dicta from *Blum* is not relevant to this case: respondents' lead trial counsel were highly experienced and accomplished attorneys whose prevailing market rates already reflected those characteristics and the accompanying high expectations of their performance.

Similarly, to the extent a prevailing party's counsel persevered through particularly difficult litigation, the

greater number of hours deemed reasonable for purposes of the lodestar calculation will reflect those circumstances. See *Dague*, 505 U.S. at 562 (difficulty of establishing the merits of a claim "is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so"); *Blum*, 465 U.S. at 898 ("The novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel," and, to the extent "the experience and special skill of the attorney will require the expenditure of fewer hours," that "should be reflected in the reasonableness of the hourly rates."). Lodestar enhancement for success in the face of challenging obstacles thus also amounts to "double counting." *Dague*, 505 U.S. at 563.

Enhancements for improbable success also implicate the Court's concern (expressed in the context of considering the relevance of contingency risk to fees) about "encouraging nonmeritorious claims." *Dague*, 505 U.S. at 563. An attorney might be more likely to bring a marginal claim than he otherwise would—"an unlikely objective of the 'reasonable fees' provisions," *ibid.*—if he harbored the hope of an enhancement for "exceptional" success in the event he prevailed. And as the Court previously has recognized, the size of the class benefitting from success should not justify an enhancement either. See *Blum*, 465 U.S. at 900 n.16 ("Nor do we believe that the *number* of persons benefited is a consideration of significance in calculating fees under § 1988. * * * Presumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual.").

As compared with the method of simply setting the lodestar correctly, enhancements based on quality of representation or results obtained also lack clear, objective standards. The lodestar methodology was developed in part to provide greater regularity in the determination of a reasonable attorney's fee than could be achieved under the 12-factor analysis suggested by the Fifth Circuit's 1974 decision in *Johnson* (see note 3, *supra*). See *Delaware Valley I*, 478 U.S. at 562-563. This Court has explained that *Johnson*'s "major fault was that it gave very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Id.* at 563. The *Johnson* factors at issue in this case are no less subjective or acceptable when they are used to enhance, rather than to set in the first instance, the lodestar award. Indeed, the Court's development of the lodestar methodology to enhance clarity and objectivity in determining attorney's fees would be seriously compromised if lower courts felt free to superimpose on the lodestar calculation factors long excluded from it.[6]

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[6] The legislative history to Section 1988(b) approvingly cites, in addition to *Johnson*, three district court cases applying *Johnson* to determine fee awards. See S. Rep. No. 1011, *supra*, at 6. One of those three involved a downward adjustment, and the other two involved an enhancement. See *Swann* v. *Charlotte-Mecklenberg Bd. of Educ.*, 66 F.R.D. 483, 486 (W.D.N.C. 1975) (14% less than requested amount); *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 688 (N.D. Cal. 1974) (27% enhancement based on contingency risk, quality of representation, and results obtained); *Van Davis* v. *County of Los Angeles*, No. 73-63-WPG, 1974 WL 180, at *2-3 (C.D. Cal. 1974) (14% enhancement based on results obtained). This Court nonetheless has since precluded enhancements on one of the very bases—contingency—for the enhancement in *Stanford Daily*. See *Dague*, 505 U.S. at 566-567. This snippet of legis-

2. The lodestar in this case reflects a reasonable attorney's fee

a. Examination of the lodestar calculation in this case illustrates how quality of performance and results obtained are reflected in a district court's determination of reasonable hourly rates and billable hours.

The district court here apparently used hourly rates up to the high end of the relevant market for the type and quality of legal services performed. See Pet. App. 144a (district court's acceptance of lead trial counsel's hourly rate "near the high end of the Atlanta market"); *id.* at 200a ("the district court used hourly rates already at the top of the relevant market") (Tjoflat, J., dissenting from denial of rehearing en banc). Indeed, those hourly rates were the ones proposed by respondents themselves. *Id.* at 140a-144a. Respondents had two lead trial counsel. Both attorneys submitted affidavits stating that the rates were "fair, reasonable, and consistent with hourly rates in the Atlanta market for the price of legal services of comparable quality rendered in cases demanding similar skill, judgment and performance." J.A. 41 (Lowry Dec.), 56-57 (Bramlett Dec.). One of these attorneys, a respected partner at "[t]he state's premiere litigation boutique,"[7] explained that the rates requested "correctly reflect the hourly rates my law

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lative history does not support enhancements based on quality of representation or results obtained any more than it supported enhancements based on contingency. See *Delaware Valley II*, 483 U.S. at 724 ("[T]he legislative history is, at best, inconclusive in determining whether Congress endorsed the concept of increasing the lodestar amount to reflect the risk of not prevailing on the merits.") (White, J.).

[7] Bondurant, Mixson & Elmore, LLP, *Firm Overview* (2009) <http://www.atlantageorgiatriallawyers.com/bondurant_mixson_elmore_overview.html>

firm currently charges and collects from clients who hire us to perform legal services on a Standard Hourly Rate basis." J.A. 47 (Bramlett Dec.).

Similarly, the district court here recognized the sheer amount of work necessary to conduct this litigation. Respondents refer to the labor- and time-intensive investigation and the contentious and burdensome discovery process required to litigate this case. Br. in Opp. 2-3. But such factors are accounted for in the large number of billable hours—over 25,000 hours in total—that the district court used in the lodestar calculation. Pet. App. 144a-149a.[8]

Respondents have already conceded that "a *reasonable fee* cannot be enhanced; rather, an upward adjustment is only appropriate where the fee as initially calculated by the lodestar would otherwise be *unreasonable*." Br. in Opp. 26. But their own affidavits confirm that the hourly rates used for the lodestar calculation were "reasonable." J.A. 41 (Lowry Dec.), 56-57 (Bramlett Dec.). That reasonableness determination was expressly based on the market rate for legal services that they themselves thought were "of comparable quality rendered in cases demanding similar skill, judgment and performance." *Ibid.* And the district court accounted for the laborious nature of the case by accepting some 25,000 billable hours of work (but deeming additional hours

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[8] As noted above (pp. 3-4, *supra*), the district court reduced by 15% the total number of non-travel hours claimed by respondents because the hours claimed were excessive. Pet. App. 145a. But such a reduction cannot justify a lodestar enhancement. To the contrary, this Court has suggested that when a district court reduces the number of hours claimed for reasons such as given here, that reduction weighs *against* an enhancement for superior performance. See *Delaware Valley I*, 478 U.S. at 566-567.

excessive). Therefore, by respondents' own standard, no enhancement for quality of representation or results obtained would be appropriate in this case.

In sum, the district court impermissibly "double counted" the quality of representation and results obtained: once in accepting near top-of-the-market hourly rates and the vast majority of billable hours claimed by respondents, and again in adding a sum to reward counsel's commensurate top-of-the-market performance. Few lawyers, performing any kind of work on behalf of any kind of client, receive both top-of-the-line base pay and gigantic bonuses. The district court's 75% performance bonus—a $4.5 million increase over the $6 million lodestar amount—is unnecessary to make the attorney's fee award reasonable in this case.

b. According to respondents' attorney affidavits, the lodestar amount was less than what a private-fee arrangement might have produced not because of any failure to reward the quality of representation or results obtained, but rather because the hourly rates did not account for contingency risk and delayed payment of attorney's fees and expenses. J.A. 41 (Lowry Dec.), 57 (Bramlett Dec.). But whether those separate factors may support an enhancement appears to be outside the question presented in this case. See Pet. i ("Can a reasonable attorney's fee award under a federal fee-shifting statute ever be enhanced *based solely on quality of performance and results obtained* when these factors already are included in the lodestar calculation?") (emphasis added). Nor did respondents appear to raise those separate factors as independent support for the district court's judgment in their brief in opposition at the certiorari stage.

In any event, none of those factors would justify an enhancement. This Court has squarely held that "no contingency enhancement whatever is compatible with the fee-shifting statutes." *Dague*, 505 U.S. at 565. And the Court has implicitly rejected the notion that delayed payment of attorney's fees and delayed reimbursement for advanced expenses could justify an enhancement. These delays, after all, are common—the rule rather than the exception—in the type of class action at issue, and thus would require an enhancement in almost every such case. See Pet. App. 34a. That would mean the calculation of the lodestar would rarely end the inquiry on attorney's fees—an outcome this Court has found unacceptable. See *Dague*, 505 U.S. at 563. Moreover, the delay in payment is offset (at least in significant part) by use in the lodestar calculation of the hourly rates prevailing at the completion of a case, rather than the usually lower rates in effect at the time the work was done. See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987) (*Delaware II*) ("In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value."). Accordingly, assuming this Court decides that the enhancement cannot be supported solely on the basis of quality of representation and results obtained, the court of appeals judgment should be reversed.[9]

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[9] Respondents were denied reimbursement of expert fees by the courts below, pursuant to this Court's decision in *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83 (1991) (holding that Section 1988(b) does not permit recovery of expert fees). Pet. App. 14a; see note 1, *supra*. District courts should not be permitted, when awarding reasonable attorney's fees, to use an enhancement as a mechanism to

C. Enhancement Of The Lodestar Award For Quality Of Representation Or Results Obtained Is Not Necessary To Satisfy The Statutory Objectives

The purpose of federal fee-shifting statutes is to enable private parties to obtain legal representation in order to vindicate important rights under federal law. See, *e.g.*, S. Rep. No. 1011, *supra*, at 2 (The "purpose and effect" of Section 1988(b) is "to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866."); *Delaware Valley I*, 478 U.S. at 565 ("[T]he aim of [fee-shifting] statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws."); *Hensley*, 461 U.S. at 429 (Section 1988(b) was enacted "to ensure 'effective access to the judicial process' for persons with civil rights grievances.").

While Congress intended that "fees [be] adequate to attract competent counsel," it also cautioned that fee awards should "not produce windfalls to attorneys." S. Rep. No. 1011, *supra*, at 6; accord H.R. Rep. No. 1558, *supra*, at 9; see *Delaware Valley I*, 478 U.S. at 565 (fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client"). The statutory purpose is fully satisfied if plaintiffs, like the respondents in this case, are able to

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circumvent *Casey*'s limitation that the statutory term "attorney's fees" does not include expert fees, or to circumvent any other limitation on fees imposed by statute or decisions of this Court.

retain qualified counsel "based on the statutory assurance that he will be paid a 'reasonable fee.'" *Ibid.*[10]

1. As this Court has recognized, fee enhancement for quality of representation or results obtained is not necessary to attract counsel in fee-shifting cases. See *Delaware Valley I*, 478 U.S. at 566 ("[I]t is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance."). Even accepting a generous construction of this Court's past dicta, fee enhancements are allowable only in "rare" and "exceptional" cases. *Blum*, 465 U.S. at 898 The small chance that an attorney's post-retention performance will be deemed so "exceptional"—above and beyond the quality of service that market rates contemplate—is highly unlikely to factor into the attorney's *ex ante* decision whether to take a fee-shifting case.

Nothing in the record here, for example, indicates that Children's Rights, Inc.—a public interest law firm dedicated to improving child welfare systems through litigation (Pet. App. 54a)—had received an enhancement in a prior case or expected to receive an enhancement in this one. Likewise, nothing in the record indicates that the private firm factored in the remote possibility of an enhancement beyond the lodestar amount in deciding to

[10] The absence of express congressional authorization for quality-related enhancements is especially important when the fee-paying defendant is the federal government. Fee-shifting statutes represent a limited waiver of sovereign immunity, *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983), and, as such, must be strictly construed, *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986). Thus, in determining whether a "reasonable" attorney's fee may include an enhancement for the quality of representation or results obtained, courts should be guided by the statutory language and what Congress "clearly and unequivocally" intended. *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981).

bring this litigation. To the contrary, Children's Rights, Inc. and its private co-counsel have an impressive record of bringing such impact litigation without the promise of higher-than-market monetary rewards. J.A. 27-31 (Lowry Dec.); Pet. App. 53a-56a. It is right and necessary that lawyers of this demonstrated quality receive reasonable attorney's fees, including hourly fees at or near the top of the market, for bringing successful actions. But the possibility of an enhancement beyond those fees based on quality of representation or results obtained goes beyond what is needed to attract counsel in this or other similar cases. See *Delaware Valley I*, 478 U.S. at 567 ("Clearly, [plaintiff] was able to obtain counsel without any promise of reward for extraordinary performance.").

Nor is a performance-based enhancement necessary to encourage retained counsel's best efforts. An attorney who accepts a case arising under a fee-shifting statute is ethically obligated, as is any attorney in any case, to represent her client to the best of her legal ability. See, *e.g.*, Model Rule 1.1 ("A lawyer shall provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); Model Rule 1.3 cmt. (A lawyer should "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and "must * * * act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). Pursuant to these professional norms, lawyers every day provide best efforts for fees similar to what respondents' counsel would receive under the lodestar award, without any prospect of substantial monetary bonuses.

2. That enhancements based on quality of representation and results obtained are not necessary to fulfill the statutory objectives does not mean enhancements are never proper. In particular, enhancements may be necessary where (unlike here) the client or case is so unpopular or otherwise controversial that the attorney suffers professional or financial damage from the representation. In such a case, the lodestar amount may be unreasonable because it does not compensate the attorney for the extent of his loss. See *Delaware Valley I*, 478 U.S. at 565 (enhancement proper only in "rare and exceptional" cases) (citation omitted).

Judge Carnes acknowledged this possibility in referring to cases in which an attorney's "representation vindicates the federal rights of an unpopular client and as a result that attorney suffers a loss of standing in the community which damages his practice and income." Pet. App. 49a; see *id.* at 206a-207a n.2 (Carnes, J., dissenting from denial of rehearing en banc); see also *Guam Soc'y of Obstetricians & Gynecologists* v. *Ada*, 100 F.3d 691, 697-699 (9th Cir. 1996) (enhancement appropriate where representation "was deemed extremely undesirable in the community" and "local counsel faced unusual and trying personal and professional pressures," including death threats), cert. denied, 522 U.S. 949 (1997); cf. *NAACP* v. *Allen*, 340 F. Supp. 703, 710 (M.D. Ala. 1972) (noting, in support of attorney's fees award, that at that time "a lawyer representing black plaintiffs in an employment discrimination case, or in any civil rights litigation, is likely to suffer social, political and community ostracism"), aff'd in relevant part, 493 F.2d 614 (5th Cir. 1974). In that scenario, not encountered here, the lodestar amount likely would not provide adequate compensation because market rates do

not incorporate such dramatic harms to an attorney's practice and income. Accordingly, an enhancement may be necessary to fulfill the statutory purpose of ensuring access to counsel in such cases.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

42 U.S.C. 1988 provides in pertinent part:

Proceedings in vindication of civil rights

* * * * *

(b) Attorney's Fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert Fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.