

No. 08-970

In The
Supreme Court of the United States

SONNY PERDUE, in his official capacity
as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

**PETITIONERS' REPLY BRIEF
ON THE MERITS**

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REPLY BRIEF FOR PETITIONERS

Respondents spend a significant portion of their brief arguing an issue that is not before this Court: whether an enhancement to the lodestar can ever be awarded *for any reason*. (See, e.g., Resp. Br. 13, 17-18, 21, 31, 40-41, 51.) However, the question presented and the corresponding argument made by Petitioners focus *solely* on whether an attorney's fee award can ever be enhanced for the factors of quality of representation and results obtained when these factors are already included in the lodestar. Because Respondents are understandably concerned that this Court's precedents are decidedly trending in the direction of answering this limited question in the negative, they attempt to alter the answer by improperly broadening the question presented and putting words into Petitioners' mouths.¹

¹ Time and again throughout their brief, Respondents berate "[P]etitioners' proposed ban on enhancements" in the apparent belief that by repeating this misrepresentation of Petitioners' position enough, they can make it so. (Resp. Br. 12-13, 16, 25, 40-41, 51.) Petitioners have not before and do not now argue for a "ban on enhancements" in all circumstances; their argument (and the subject of the Court's grant of *certiorari*) is that the two factors of results obtained and quality of representation cannot, on their own, support an enhancement to a fee award because those factors are subsumed within the lodestar. Indeed, the very pages from Petitioners' Brief that Respondents cite for their contention that Petitioners seek to preclude *all* enhancements in fact specifically limit the issue to results obtained and quality of representation, as stated in the
(continued on following page)

Respondents' arguments, like their attempt to reframe the issue in this case, lack merit. First, Respondents contend that Congress could not have intended to bar any type of enhancement to the lodestar from being awarded to prevailing parties in Section 1988 cases because there was no such thing as a lodestar when the statute was enacted and two of three cases cited by a committee of one chamber of Congress approved an increase to the base fee award. (Resp. Br. 19, 22.) This argument, if accepted, would mean that no less than four of this Court's decisions in this area have been wrongly decided. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (holding that the product of reasonable hours times reasonable rate, or what has become known as the "lodestar," presumably produces a reasonable fee within the meaning of Section 1988); *Blum v. Stenson*, 465 U.S. 886, 898 (1984) (concluding that neither complexity nor novelty of the issues is an appropriate factor for increasing the lodestar); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566 (1986) ("*Delaware Valley I*") (determining that enhancements for superior performance are unnecessary to serve the statutory purpose of enabling plaintiffs to secure legal assistance); *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992) (concluding that enhancing the lodestar for contingency is never permitted). While this Court has not held that

question presented. (Resp. Br. 16, 40-41, 51 (citing Pet. Br. 13, 42, 51-52).)

Congress intended to prohibit enhancements *in toto*, it has found that there is nothing in the legislative history mandating the use of enhancements for results obtained or quality of representation. Indeed, enhancement of a fee award for the very factors that are subsumed within an attorney's reasonable hourly rate and reflected in the number of hours expended flies in the face of Section 1988's purpose and is contrary to this Court's fee-shifting attorney's fees precedent over the past quarter century.

Second, Respondents contend that because enhancements are granted in common fund cases in commercial litigation, then they should likewise be permitted for results obtained and quality of representation in Section 1988 cases. (Resp. Br. 26-31.) Respondents are again attempting to argue a question not before this Court but also one that was squarely rejected by the District Court and affirmed by the Court of Appeals. (Pet. App. 14, 106-11.) This Court also has distinguished between the calculation of attorney's fees under the common fund doctrine and fee-shifting statutes.

Finally, Respondents urge this Court to minimize or discard the lodestar method of determining a reasonable attorney's fee in favor of alternative billing arrangements used by some lawyers in the current recession. However, the reality is that the use of a reasonable hourly rate multiplied by the reasonable hours expended on a case continues to compensate adequately civil rights attorneys such as Respondents' counsel for the quality of their

representation and the results obtained in current economic times.

◆

ARGUMENT

I. Nothing in the Language of 42 U.S.C. § 1988 Nor Its Legislative History Indicates That Congress Intended to Sanction an Enhancement to an Attorney’s Fee Award for Either Results Obtained or Quality of Representation, a Position Confirmed by This Court’s Decisions.

In their effort to recast the question presented, Respondents assert that Congress did not intend to foreclose all enhancements to an attorney’s fees award by its enactment of 42 U.S.C. § 1988. (Resp. Br. 17.) Nothing, however, suggests that Congress intended Section 1988 to authorize the multiplying of an otherwise reasonable attorney’s fee award by some indeterminate percentage based solely upon the excellence of counsel’s representation or the breadth of the results obtained in the litigation.

Section 1988 provides that a “reasonable attorney’s fee” may be allowed a prevailing party, but does not provide how that fee should be determined. Both the House and the Senate Reports agreed on two matters with respect to this determination: (1) at the time of the enactment of Section 1988, the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974),

had been utilized to determine the reasonableness of fee awards, and (2) a fee award should be sufficient *to attract competent counsel* without providing windfalls to attorneys. See H. Rep. No. 94-1558, at 8-9 (1976); S. Rep. No. 94-1011, at 6 (1976). Section 1988 neither provided for an enhanced award for attracting “competent-plus” counsel nor indicated that fees should be awarded on some sliding scale based on the quantum of relief awarded to a prevailing party. *Johnson* itself does not stand for or suggest that the quality of counsel’s representation or the results obtained should be the subject of a separate or additional award. “The [Title VII] statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation.” 488 F.2d at 719.

Not surprisingly, Respondents fixate on two cases cited in the Senate Report (but not in the House Report) as examples in which the *Johnson* factors were “correctly applied”: *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), and *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. June 5, 1974). (Resp. Br. 22-25, 32-34; see also S. Rep. No. 94-1011, at 6 (1976).) The court in *Stanford Daily* actually awarded an enhancement for three combined factors: contingency, quality of the attorney’s work, and results obtained, but the baseline amount in that case was computed using an “appropriate average hourly rate,” as contrasted with

a “reasonable” or “market” hourly rate. 64 F.R.D. at 685. The court in *Davis* awarded an amount above the “normal hourly rates” due to the excellent results achieved. 8 Empl. Prac. Dec. (CCH) ¶ 9444. Respondents, as well as many of their supporting *amici*,² conclude that the citation of these two cases in the Senate Report constitutes a clear indication of congressional approval for enhancement of attorney’s fee awards due to quality of representation and results obtained. (Resp. Br. 23.)

Several problems undermine Respondents’ conclusion. First, Respondents fail to discuss in any detail the third case cited in the Senate Report, *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975), where the court *reduced* a fee request that the district court specifically found was reasonable to a lower amount, despite the “excellent” results obtained and “exceptional” ability of plaintiffs’ counsel. 66 F.R.D. at 484, 486. Given the divergence of the rationales and conclusions reflected in the three cases cited in the Senate Report, the cases provide no definitive indication of the Senate’s intent. Moreover, given the fact that the Report of the House Committee on the

² See Small Private Law Firms *Amicus Curiae* Br. Supp. Resp. 6; NAACP Legal Defense & Educ. Fund, Inc. *Amicus Curiae* Br. Supp. Resp. 7, 25; Liberty Legal Inst., *et al.* *Amicus Curiae* Br. Supp. Resp. 12; New York State Bar Ass’n, *et al.* *Amicus Curiae* Br. Supp. Resp. 5 n.2; Amer. Ass’n for Justice, *et al.* *Amicus Curiae* Br. Supp. Resp. 16.

Judiciary fails to mention *any* of these three cases,³ it is highly questionable whether any significance can be placed on their citation in the Report of the Senate Committee on the Judiciary, particularly because it is not an authoritative expression of the intent of the Congress. See *Pierce v. Underwood*, 487 U.S. 552, 566 (1988) (“[I]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means.”), cited in *United States v. X-Citement Video*, 513 U.S. 64, 77 n.6 (1994); *United States v. Seeger*, 380 U.S. 163, 177 (1965) (“[A]n explicit statement of congressional intent deserves more weight than the parenthetical citation of a case [in a Senate Report] which might stand for a number of things.”).

What is clear from the legislative history is that Congress considered a reasonable fee to be one sufficient to attract competent counsel, but no more. It was certainly suggested that courts should employ the *Johnson* factors in making reasonable fee awards, that fees should reflect time reasonably expended on a matter, and that fee awards should not be reduced because the relief sought is non-pecuniary in nature. See H. Rep. No. 94-1558, at 8-9 (1976); S. Rep. No.

³ Indeed, the two cases cited in the House Report in support of using the *Johnson* factors make no mention of enhancements to a fee award for quality of representation or results obtained. See H. Rep. No. 94-1558, at 8 (citing *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974), and *U.S. Steel Corp. v. United States*, 519 F.2d 359 (3d Cir. 1975)).

94-1011, at 6 (1976). However, nothing in the statute or the legislative history instructs courts how to apply the *Johnson* factors so as to convert them to dollars in a reasonable fee award, nor is there anything to indicate that the determination of a reasonable fee should be enhanced based on factors of quality of representation or results obtained.⁴

Second, contrary to Respondents' assertion, this Court has never cited the Senate Report as authorization for an enhancement to the lodestar for superior work and results. (Resp. Br. 23-24.) In *Hensley*, the three cases referenced in the Senate Report were cited to support the proposition that "[t]he legislative history . . . does not provide a definitive answer as to the proper standard for setting a fee award where the plaintiff has achieved only limited success." 461 U.S. at 431. In *Blum*, the cases were cited to support the determination of hourly rates based upon prevailing market rates rather than a cost-based standard. 465 U.S. at 894-95. In *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986), the cases were cited to confirm congressional intent that reasonable fees can be awarded even though plaintiffs do not seek monetary damages. In *Blanchard v. Bergeron*, 489 U.S. 87, 91 (1989), the cases were cited only for confirmation of Congress'

⁴ In fact, this Court has instructed that the *Johnson* factors are generally subsumed in the lodestar calculation, typically as a determination of the reasonable hourly rate. See *Dague*, 505 U.S. at 562; *Delaware Valley I*, 478 U.S. at 564-66; *Blum*, 465 U.S. at 898-900; *Hensley*, 461 U.S. at 434 n.9.

intent that the *Johnson* factors provide guidance in assessing the reasonableness of a fee award.

Third, Respondents' contention that Congress authorized enhancements to fee awards based on individual *Johnson* factors contradicts this Court's prior decisions that have eliminated the use of certain *Johnson* factors to upgrade the lodestar, a contradiction which Respondents themselves recognize. (*Compare* Resp. Br. 21 (“[I]f the question presented is to be answered by reference to what the Congress that enacted Section 1988 intended, the [committee] reports supply the answer: upward enhancements are permitted.”), *with* Resp. Br. 37 (“As this Court has made clear, there are numerous factors, such as contingency, that are not valid bases for enhancements.”).) In *Blum*, this Court concluded that “[n]either complexity nor novelty of the issues [the second *Johnson* factor] . . . is an appropriate factor in determining whether to increase the basic fee award.” 465 U.S. at 898-99. In *Delaware Valley I*, this Court stated that “it is unnecessary to enhance the fee for superior performance [the eighth *Johnson* factor] in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.” 478 U.S. at 566. And, in *Dague*, this Court held that “enhancement for contingency [the sixth *Johnson* factor] is not permitted under the fee-shifting statute at issue.”⁵

⁵ An enhancement for contingency was permitted in *Stanford Daily*, a case that Respondents believe establishes Congress' intent to approve enhancements such as that awarded
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505 U.S. at 567. Under Respondents' view, all of these decisions would be contrary to congressional intent underlying Section 1988 and should presumably be rejected. In reality, these decisions are consistent with Section 1988's intent to attract competent counsel without unduly enriching them.

Finally, Respondents contend that Congress' later prohibition of enhancements to fee awards under the Individuals with Disabilities Education Act ("IDEA") and the failure of proposed legislation attempting to prohibit enhancements are proof positive that Congress intended for quality and results enhancements to be applied to reasonable fee awards under Section 1988. (Resp. Br. 18, 45-46.) This argument is taken nearly verbatim from a portion of a dissent authored by Justice Blackmun in *Dague* which disagreed with the majority's holding that contingency could never justify enhancement of the lodestar. *See* 505 U.S. 557, 570 n.4 (Blackmun, J., dissenting).

The view of a later Congress in enacting a statute like IDEA cannot control the interpretation of a term in an earlier enacted statute. "[L]ater laws that 'do not seek to clarify an earlier enacted general term' and 'do not depend for their effectiveness upon

by the District Court in this case (Resp. Br. 23-24), even though *Dague* later determined that an enhancement for contingency is prohibited under fee-shifting statutes such as Section 1988. 505 U.S. at 562, 567.

clarification, or a change in the meaning of an earlier statute,' are 'beside the point' in reading the first enactment." *Gutierrez v. Ada*, 528 U.S. 250, 257-58 (2000) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998)). This Court has long held that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963)). Thus, prohibiting the use of a bonus or multiplier for IDEA fee awards provides no indication of congressional intent with respect to the definition of the term "reasonable attorney's fee" in Section 1988. In addition, the IDEA report cited by Respondents does not purport to refer to Congress' interpretation of the intent underlying Section 1988, but indicates only that it does not intend to overrule any decisions of this Court with respect to the availability of bonuses or multipliers under other statutes such as Section 1988. (Resp. Br. 18, 45; *see also* H.R. Conf. Rep. No. 99-687, at 6 (1986).) As previously stated, this Court has disapproved the use of certain factors to justify enhancing the lodestar.

With respect to the fact that some members of Congress may have introduced legislation subsequent to the enactment of Section 1988 to limit the use of enhancements or multipliers, this Court has held that "failed legislative proposals 'are a particularly dangerous ground on which to rest an interpretation of a prior statute. . ..'" *United States v. Craft*, 535

U.S. 274, 287 (2002) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)). This is because a bill can be proposed for any number of reasons or rejected for any number of others. “Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit*, 496 U.S. at 650). Therefore, with respect to what Congress may have intended when it enacted Section 1988, no meaning should be read into any failed effort by one or more members of Congress to later amend Section 1988 to bar enhancements.

II. Cases Awarding Enhancements Under the Common Fund Doctrine Are Inapplicable and Raise an Issue Decided Below and Not Before the Court.

Respondents’ contention that the same standards that support enhancements to attorney’s fee awards in commercial litigation should apply to this case suffers from a number of flaws. First, all but one of the twenty cases that Respondents cite in support of their position are common fund or common benefit awards inapplicable to cases like this one that involve the shifting of attorney’s fees to government agencies. (Resp. Br. 26-31 (citing one non-common fund or non-common benefit case, *Wynn Oil Co. v. Purolator*

Chem. Corp., 391 F. Supp. 522 (M.D. Fla. 1974)).) *See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 264 n.39 (1975) (contrasting the concept of a private attorney general from common fund and common benefit cases); *see also Brzonkala v. Morrison*, 272 F.3d 688, 692 (4th Cir. 2001); *Linguist v. Bowen*, 839 F.2d 1321, 1326 (8th Cir. 1988); *In re Hill*, 775 F.2d 1037, 1041 (9th Cir. 1985); *Grace v. Burger*, 763 F.2d 457, 459 (D.C. Cir. 1985); *Jordan v. Heckler*, 744 F.2d 1397, 1400 (10th Cir. 1984); *Satoskar v. Indiana Real Estate Comm’n*, 517 F.2d 696, 697-98 (7th Cir. 1975). *See generally* Alan Hirsch & Diane Sheehy, *Awarding Attorneys’ Fees and Managing Fee Litigation* 66-67 (Fed. Judicial Ctr. 2d ed. 2005) (“[C]ourts generally reject claims for a common fund recovery out of the government treasury; the award will come at the expense of all taxpayers, not solely the beneficiaries of the lawsuit.”).

Second, Respondents’ argument that the common fund and common benefit doctrines should apply to this case was specifically addressed and rejected by both the District Court and the Court of Appeals in holdings not now before the Court. (Pet. App. 106-11 (“conclud[ing] that neither the common fund doctrine nor the common benefit doctrine is applicable to this case”); Pet. App. 14 (holding that the “district court resolved [this] issue[] correctly”).) There was no fund created by the parties’ settlement in this case, the common fund doctrine’s rationale does not apply to the fee-shifting that occurred, and this case is not

within the subset of cases for which common benefit recovery is allowed – suits by shareholders against their corporations and by union members against their unions. (See Pet. App. 108-09 (citing, *inter alia*, *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970)).)

Third, Respondents' position is not supported by this Court's precedent, and even they concede that "[a]s this Court has observed, the two contexts are not identical." (Resp. Br. 28-29.) In fact, this Court recognized this distinction before Section 1988 and has continued to recognize it both in common fund and fee-shifting cases. See *Blum*, 465 U.S. at 900 n.16; *Boeing*, 444 U.S. at 478 (stating that the *Alyeska* court "noted the features that distinguished our common-fund cases from cases where the shifting of fees was inappropriate"); *Alyeska*, 421 U.S. at 264 n.39. Most importantly, this Court has specifically explained that "[u]nlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects *the amount of attorney time reasonably expended on the litigation.*" *Blum*, 465 U.S. at 900 n.16 (emphasis added); cf. *Delaware Valley I*, 478 U.S. at 562 n.6 (noting the inapplicability in a fee-shifting case of common fund recovery awarded in "commercial litigation").

Respondents attempt to circumvent this distinction and equate the two types of fee awards by stating

that, even in common fund, percentage-of-recovery cases, some courts conduct a lodestar “crosscheck,” implying that enhancements for quality and results should therefore be allowed in fee-shifting cases. (Resp. Br. 29.) One of the cases cited by Respondents, however, contradicts this position by using the lodestar crosscheck for percentage-of-recovery awards not as the basis for an additional enhancement, but rather to determine whether the percentage award should be reduced. *See In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) (“The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award.”).

In their discussion of the lodestar in common fund cases, Respondents also argue that the Third Circuit’s *Lindy I* decision supports their position that “upward adjustments for, *inter alia*, ‘the quality of an attorney’s work’” have been “historically permitted.” (Resp. Br. 29-30 & n.4 (citing *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973)).) Respondents’ analysis, however, is suspect in light of later guidance from the Third Circuit, including a fee-shifting antitrust case which reversed and remanded an enhanced fee award with instructions that the district court consider quality of representation in setting the reasonable

hourly rate in the lodestar, rather than as an enhancement to the lodestar, as the district court initially had done. See *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1216-17 (3d Cir. 1978) (“[C]onsiderations going to the quality of plaintiff’s counsel should generally be made when setting the reasonable hourly rate, not at some point after the calculation of the lodestar.”);⁶ see also *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 337 (8th Cir. 1982) (holding that “the district court abused its discretion in awarding any bonus for risk or quality of representation” in an antitrust fee-shifting case); *Cent. Telecomms., Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 910-11 (W.D. Mo. 1985) (disallowing enhancement for quality of representation or risk in antitrust fee-shifting case).

Respondents’ attempt to use commercial litigation common fund cases as a barometer for how fee

⁶ Although *Baughman* stated that enhancements for quality of representation may be allowed in certain exceptional circumstances, a Third Circuit task force later recommended that such enhancements should never be permitted in fee-shifting cases. See *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 264-65 (1985) (“[T]he quality factor should be eliminated from consideration. This factor is superfluous since it reflects the type of performance expected of all attorneys and theoretically already has been taken into account by the district court in setting standardized rates. Moreover, assessing the quality factor involves too subjective an inquiry and is thought to be subject to potentially discriminatory application, thereby potentially undermining the legal community’s faith in the fee-setting process.”).

awards should be considered in civil rights cases is not properly before this Court and has been rejected in previous decisions.⁷ These awards are not the norm for most attorneys, much less necessary for clients to attract competent counsel in civil rights cases.

III. Adoption of Petitioners' Position Would Not Mandate a Reversal of *Blum*, But Adoption of Respondents' Arguments Would Seriously Undermine the Decisions in *Blum*, *Delaware Valley I*, and *Dague*.

Contrary to Respondents' pronouncement, there is no obligation to overrule *Blum* if this Court agrees with Petitioners that neither quality nor results can justify an enhancement to the lodestar. (Resp. Br. 45.) There are actually two holdings in *Blum*. The first, which is unrelated to the question presented in this case, is that "reasonable fees" under Section 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private counsel or a nonprofit legal services organization. 465 U.S. at 894-95. There is no dispute in this case that the

⁷ The declarations that Respondents provided to support a multiplier were based on the "common fund/common benefit approach," not fee-shifting statutes. (J.A. 66-67, 75, 80-81, 85-86, 90-91.) Moreover, as Judge Carnes explained, the declarants are not "disinterested," but rather are attorneys who themselves rely on court-awarded attorney's fees and, therefore, "have a financial interest" in encouraging the highest fee awards possible. (Pet. App. 44-45.)

District Court calculated the lodestar using prevailing market rates at the time of the entry of the Consent Decree. (Pet. App. 143 (stating that “the requested rates are consistent with prevailing market rates in Atlanta for comparable work”).) The second is that the 50% upward adjustment of the lodestar by the district court in that case was unjustified and an abuse of discretion. 465 U.S. at 901. While the Court in *Blum* rejected the argument that an upward adjustment to the lodestar is never appropriate for any reason, the Court did not hold that either results obtained or quality of representation could provide an independent basis for enhancing a fee award. *See id.* Moreover, any such contention otherwise appears to have been laid to rest in *Delaware Valley I*, in which this Court stated as follows:

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 “novelty [and] complexity of the issues,” “the special skill and experience of counsel,” the “quality of representation,” and the “results obtained” are presumably fully reflected in the lodestar amount and cannot serve as independent bases for increasing the basic fee award.* Although upward adjustments are still permissible, such modifications are proper only in certain “rare” and “exceptional” cases, supported by both

“specific evidence” on the record and detailed findings by the lower courts.

478 U.S. at 564-65 (internal citations omitted; emphasis added). Although the Court indicated that it was not barring enhancements to the lodestar *in toto*, it also was clear that the two factors used to enhance the lodestar in this case are impermissible bases for enhancements.

This is not the kind of case referenced in *Blum* where an upward adjustment is needed because “the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is . . . unreasonably low.” 465 U.S. at 897. The lodestar amount of \$6.1 million for nearly 25,000 hours of time defeats that potential concern. Neither is this a case in which the “special skill” of any attorney “require[d] the expenditure of fewer hours than counsel normally would be expected to spend,” because the almost 25,000 hours credited of the 30,000 hours claimed over the three-and-one-third year period of this case represented at least one timekeeper for Respondents working on the case every hour of every day of that period. *Id.* at 898; see also *Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983) (“In a case such as the one at bar, in which more than 9,000 hours were reported, we do not believe that any adjustment for extraordinary performance could be warranted.”).

Once again, Petitioners are not advocating a “ban on enhancements,” but only that results obtained and quality of representation cannot serve to justify an

increase in the lodestar amount because those factors, like complexity and novelty of the issues (*Blum*), superior performance (*Delaware Valley I*), and contingency (*Dague*) are subsumed within the lodestar. Respondents dismiss the authority of *Delaware Valley I* as a case which “simply reaffirmed *Blum*” and contend that Petitioners’ reference to statements in *Delaware Valley I* that clearly negate the use of results obtained and quality of representation to increase the lodestar is “out of context” and “self contradictory.” (Resp. Br. 47.)

In fact, as noted above, *Delaware Valley I* did not merely “reaffirm” *Blum*; it did much more. Indeed, this Court in *Delaware Valley I* stated that *Blum* “refined” *Hensley* by finding that the lodestar was “presumed” to be the reasonable fee to which counsel is entitled, and then went further to hold that there was a “strong presumption” that the lodestar figure constituted the “reasonable fee” to be awarded under Section 1988. 478 U.S. at 564-65. The Court then went on to discuss why “it is unnecessary to enhance the fee for superior performance,” because Section 1988 was neither “designed as a form of economic relief to improve the financial lot of attorneys” nor “intended to replicate exactly the fee an attorney could earn through a private fee arrangement.” *Id.* at 565. Finally, the Court recognized the obligation of an attorney “to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client’s interests,” thereby negating

any need to enhance the lodestar for those factors. *Id.* at 565-66.

Respondents also try to minimize the effect of *Dague*, which rejected contingency as a factor for enhancing the lodestar, because it is a factor “different in kind” from results obtained and quality of representation in that it exists in every case. (Resp. Br. 50-51.) The prohibition of certain enhancements imposed by *Dague* (contingency), just as in *Blum* (novelty and complexity) and *Delaware Valley I* (superior performance), however, undermines Respondents’ argument that Congress intended that enhancements be permitted for all of the *Johnson* factors. Of equal importance is that, in ruling out contingency as a factor which could increase the lodestar amount, *Dague* held that the relative merits of the claim “should play no part in the calculation of the award.” 505 U.S. at 563. It would be inconsistent to hold, on the one hand, that the merits of a claim should not be reflected in the fee award and, on the other hand, that obtaining particular relief after the merits have been determined can result in a larger fee award.⁸

⁸ In this case, the District Court ordered an enhancement for “results obtained” because it was “unaware” of any case in which such a “favorable result” was bestowed upon a plaintiff class. (Pet. App. 154.) Pretermitted the number of the consent decrees with various states that Children’s Rights contends to be “unprecedented” (Connecticut), “sweeping” (Michigan), “top-to-bottom reform” (Mississippi), and “system-wide reform” (Tennessee), see <http://www.childrensrights.org/reform-campaigns/legal-cases> (last visited Sept. 16, 2009), it is unfair to saddle one

(continued on following page)

IV. Respondents’ Policy Arguments in Favor of Enhancements for Quality of Representation and Results Obtained Lack Merit and Ignore Reality.

Although Respondents critique Petitioners for somehow arguing policy instead of law (Resp. Br. 57-58), Respondents would have this Court declare the lodestar a passé concept based on “the word on the street” that law firms are moving away from the billable hour model.⁹ (Resp. Br. 55-56.) It is absurd to suggest that this Court should somehow scrap the lodestar approach, “the guiding light of our fee-shifting jurisprudence,” *Dague*, 505 U.S. at 562, based on some recent reports that the economic times are causing some lawyers to consider alternative billing methods more so than previously.

In fact, the real “word on the street” supports the view that enhancements are not necessary to attract competent counsel to represent plaintiffs in cases

set of those defendants (the Governor of Georgia and the other Petitioners in this case) with paying an enhanced attorney’s fee award – after consenting to a broad remedy – based only on the subjective view of a particular district court that the relief is “better” than in other cases.

⁹ Other *amici* for Respondents also urge limitation of the lodestar method because of alternative billing arrangements now utilized by some firms and their clients. *See* Small Private Law Firms *Amicus Curiae* Br. Supp. Resp. 16; Law and Economics Scholars *Amicus Curiae* Br. Supp. Resp. 10; Lawyers’ Committee for Civil Rights Under Law, *et al.* *Amicus Curiae* Br. Supp. Resp. 8; New York State Bar Ass’n, *et al.* *Amicus Curiae* Br. Supp. Resp. 23.

involving fee-shifting statutes such as Section 1988. For one thing, law firms over the past year have been laying off attorneys, so neither firms nor lawyers are likely to turn down an opportunity to represent a client in a matter in which a successful lawyer can obtain a statutory fee based on time expended multiplied by regular hourly rates. See Jesse J. Holland, *Recession Causing Lawyer Layoffs at Big Firms*, Associated Press, Apr. 13, 2009, available at http://www.breitbart.com/article.php?id=D97HO0E80&show_article=1 (last visited Sept. 16, 2009). Indeed, given the lean economic times, the number of attorneys donating time for pro bono causes has increased. See Daphne Eviatar, *Pro Bono Hours Go Up in Down Economy*, *The American Lawyer*, Jan. 2, 2009, available at <http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202427138674> (last visited Sept. 16, 2009); Martin C. Daks, *Down Economy Spurs Pro Bono Work, Law Group Says*, *NJBiz*, July 29, 2009, available at <http://www.njbiz.com/article.asp?aID=78763> (last visited Sept. 16, 2009).¹⁰

Respondents' lead counsel, Children's Rights, has never hesitated in filing civil rights cases challenging

¹⁰ Notwithstanding the District Court's awarding more than \$10 million in attorney's fees in this case, Respondents' lead local counsel's representation in this case has been characterized as "pro bono work." Linton Johnson, *New President is a Georgia Lawyer by Choice*, 14 Ga. Bar. J. 44, 46 (Aug. 2008), available at <http://www.gabar.org/public/pdf/GBJ/aug08.pdf> (last visited Sept. 16, 2009).

the legality of states' child welfare programs nor had difficulty in obtaining local counsel to assist them in prosecuting those cases without the promise of an enhanced fee award for superior work or results. Indeed, Respondents admit that this is "the first such request [for an upward adjustment to the lodestar] that counsel for Children's Rights had ever made, despite their involvement in numerous similar suits." (Resp. Br. 9.) *See also Marisol A. v. Giuliani*, 111 F. Supp. 2d 381 (S.D.N.Y. 2000) (\$8 million attorney's fee request by Children's Rights, including no request for enhancement, reduced by district court to \$5.8 million for excessive billing); *LaShawn A. v. Barry*, No. 89-1754 (TFH), 1998 U.S. Dist. LEXIS 2137 (D.D.C. Feb. 18, 1998) (application of current rates is fair compensation for the wait that plaintiffs and their counsel have endured).¹¹ Other courts' lodestar awards without any multipliers for quality or results have provided Children's Rights' clients with more than the "competent counsel" intended by the enactment of Section 1988.

¹¹ Amicus Civil Rights Clinic at Howard University School of Law trumpets both *LaShawn A.* and *Marisol A.* as cases that provided system-wide relief and "exemplify the skill, diligence, and perseverance required by plaintiffs' counsel bringing successful child welfare reform cases. . . ." Civ. Rights Clinic at Howard Univ. Sch. of Law *Amicus Curiae* Br. Supp. Resp. 3, 24. It is noteworthy that in neither case did plaintiffs' counsel seek or receive an enhancement for results obtained or quality of representation. (*See* Resp. Br. 9.)

Respondents also decry the lodestar method as ignoring “the reality of a lawyer’s practice as one of creativity and imagination” and failing to take into account that hourly rates times hours worked do not reward “brilliant insights and timely maneuvers.” (Resp. Br. 54-55.) Based on this nebulous standard, district courts presumably would have to determine whether an otherwise experienced and well-respected attorney deserved more than his or her already top-of-the-market hourly rate because of some “brilliant insight,” or a younger lawyer with a lower hourly rate should be compensated more based on a “timely maneuver.”

The problem with multipliers for these reasons, like contingency, “is that there are no standards and the trial judge is cast adrift in a sea of judicial discretion. If the truth be known, the process of arriving at the precise multiplier is more a function of gestalt than cerebration.” *Black Gold, Ltd. v. Rockwool Indus.*, 529 F.Supp. 272, 279 (D. Colo. 1981). Furthermore, this “genius factor” actually “diminishes and eventually disappears as the number of hours expended on the case increases. A brilliant idea may shortcut one aspect of the case and save many hours, but in protracted litigation a lawyer is also likely to pursue blind alleys and expend many unproductive hours.” *Ramos*, 713 F.2d at 557. In this case, 38 timekeepers were compensated for nearly 25,000 hours of work over slightly more than a three-year period. There is no precedent for awarding an additional \$4.5 million on top of a prevailing market

rate because that rate somehow fails to compensate brilliance.

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.

Blum, 465 U.S. at 898 (emphasis added). If the reasonable hourly rate adequately accounts for the situation where the brilliance of counsel results in *fewer* hours expended on a case, then surely the expenditure of *larger* numbers of hours provides an even greater reason to deny an enhancement to the lodestar. Moreover, “the greater the number of attorneys involved on a side, the less likely it is that an extraordinary performance bonus is appropriate.” *Ramos*, 713 F.2d at 557.

Respondents also contend that fee agreements entered into “between highly sophisticated clients and counsel” do not always call for compensation to be paid based on hourly rates, citing to a single “sample engagement agreement” offered by Minnesota Lawyers Mutual Insurance Company. (Resp. Br. 55, 56 (citing “Sample Engagement Agreement,” *available at* <http://www.mlmins.com/Documents/SiteContent/f18ec30b-7e26-4c75-b887-7ece040256aa.pdf> (last visited Sept. 16, 2009)). Interestingly, page 2 of that sample agreement provides that the client

agrees to pay its attorneys based on a range of hourly rates, depending upon the position and tenure of the attorney in his or her firm. A subsequent paragraph on page 3 of the sample agreement states that while fees are primarily based upon time spent, they can also reflect other factors such as the result obtained and ability of the attorneys retained. That statement is clearly intended to explain why some of the quoted hourly rates may be higher than others. Lawyers who attempt to tack on an additional “success” or “quality” bonus to an agreement to bill clients based on hourly rates are likely to end up with an unpaid bill in addition to a client who takes its business elsewhere. Regardless, fee-shifting statutes such as Section 1988 were not “intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such 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.” *Delaware Valley I*, 478 U.S. at 565. As long as such an attorney is paid a fee that is reasonable, “the purpose behind the fee-shifting statute has been satisfied.” *Id.*

Respondents, as well as several of their *amici*,¹² complain that Petitioners are themselves to blame for

¹² See *Small Private Law Firms Amicus Curiae* Br. Supp. Resp. 25; *Liberty Legal Inst., et al. Amicus Curiae* Br. Supp. Resp. 17-20; *Amer. Ass’n for Justice, et al. Amicus Curiae* Br. Supp. Resp. 8.

the District Court's enhancement to the lodestar because Petitioners had the temerity to raise certain available defenses to Respondents' claims rather than capitulating at the outset or agreeing to Respondents' demands at an earlier phase of the litigation.¹³ Based on this view, an enhancement for quality and results can be tied directly to the intransigence of opposing counsel. However, any additional effort required by Respondents to respond to Petitioners' defenses is

¹³ Contrary to this position, Respondents admit that Petitioners' motion to dismiss was based on existing Eleventh Circuit precedent. (See Resp. Br. 3 (citing *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003)).) Moreover, the basis for Petitioners' motion for summary judgment was that the deliberate indifference standard should be applied pursuant to other existing Eleventh Circuit precedent, *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (*en banc*). It was not stubbornly litigious for Petitioners to argue that a particular legal standard applied based on existing precedent. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978) ("A fair adversary process presupposes both a vigorous prosecution and a vigorous defense.").

In addition, the "technical legal objections to discovery requests" made by Petitioners at the District Court (*see* Resp. Br. 4) were that Respondents continued to serve Petitioners with discovery requests after the discovery period had ended. (Order Extending Discovery Period [Dkt. 145].) After this objection was made, the District Court *sua sponte* granted Respondents extra time to engage in discovery. (Order Extending Discovery [Dkt. 145] ("Defendants are correct that, under the Court's local rules, the discovery period in this case expired on December 7, 2002. Nevertheless, in the interests of justice and notwithstanding plaintiffs' failure to seek a timely extension of the discovery period, the Court concludes that discovery should be extended for an additional four months.") (citation and footnote omitted).)

reflected in the lodestar in the number of additional hours expended, and enhanced recovery should not be allowed. *See Dague*, 505 U.S. at 562-63 (“[T]he higher number of hours expended to overcome the difficulty [of establishing the merits]” is “ordinarily reflected in the lodestar.”). Surely, the award of nearly 25,000 hours over the three-year litigation period compensates Respondents reasonably for any additional efforts necessary to address Petitioners’ defenses. “Taking account of it again through lodestar enhancement amounts to double counting.” *Id.* at 563.

Finally, Respondents bemoan the fact that a prohibition of enhancements for quality of representation and results obtained will leave an attorney with only the hope of recovering for the time expended using his or her standard hourly rate, which may then be reduced by a district court “based on the numerous bases for reducing an award or denying recovery altogether.” (Resp. Br. 58.) The fact that an attorney cannot recover for claims other than those the attorney prevails upon is mandated by Section 1988 itself. In addition, the unavailability of contingency-based enhancements and expert fee reimbursements under Section 1988 (Resp. Br. 36-37) does not justify a performance-based enhancement in order for prevailing parties to obtain through the back door what the law prohibits them from receiving through the front door. Finally, the fact that the district court may reduce the hours claimed as

excessive is not a reason to reward those lawyers with a bonus for a job well done.¹⁴

Respondents represented their clients well in accordance with the standards required of our profession. The lodestar award of \$6,012,802.90¹⁵ constitutes a reasonable fee awarded to a prevailing party in accordance with Section 1988. There is no legal or practical reason to enhance that lodestar amount for the quality of Respondents' counsel's representation or the results obtained.



¹⁴ Contrary to Respondents' objection (Resp. Br. 38 n.5), it is relevant that the District Court in this case applied a 15% across-the-board reduction for non-travel hours claimed due to excessive billing and vague entries (Pet. App. 145-46). This Court in *Delaware Valley I* found that an "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.'*" 478 U.S. at 566-67 (emphasis added).

¹⁵ The \$6 million fee award is consistent with prevailing market rates in Atlanta at the time of the entry of the Consent Decree, and Respondents also will collect over a 4% interest rate on that amount dating from October 2005, a significantly higher interest rate than that money would have earned in recent years. *See* 28 U.S.C. § 1961; Pet. App. 169-70 (denying Respondents' motion for an interim fee award during appeal and noting that Respondents "will be compensated for any delay in payment occasioned by the appeal, because interest will run on the full amount of the fee and expense award from October 27, 2005, the date of entry of the Consent Decree").

CONCLUSION

For the reasons set forth above and those set forth in Petitioners' initial Brief on the Merits, the decision of the United States Court of Appeals for the Eleventh Circuit affirming the award of a \$4.5 million enhancement to the lodestar should be reversed.

Respectfully submitted,

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