

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 Courts of Appeals
for the Eleventh Circuit**

**BRIEF OF THE AMERICAN ASSOCIATION
FOR JUSTICE, PUBLIC JUSTICE, P.C.,
THE NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION, AND THE IMPACT FUND
AS AMICI CURIAE IN SUPPORT OF
RESPONDENTS**

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Association for Justice (“AAJ”), Public Justice, P.C., the National Employment Lawyers Association, and the Impact Fund respectfully submit this brief as *amici curiae*. Letters of consent of the parties have been filed with the Court.¹

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. An important part of AAJ’s mission is the education of attorneys to be the most effective advocates for their clients. AAJ views the prohibition of enhanced fee awards for exceptional representation as a threat to private enforcement of our civil rights laws.

Public Justice is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable. Public Justice specializes in precedent-setting and socially significant individual and class action litigation designed to advance civil rights and civil liberties, consumer and victims’ rights, workers’ rights, the preservation of the civil justice system, and the protection of the poor and powerless. Public Justice has litigated numerous cases under federal civil rights and other statutes that provide for the award of a reasonable attorney’s fee. We believe that district courts’ discretion to adjust fee awards for

¹ Pursuant to Rule 37.6, Amici disclose that no counsel for a party authored any part of this brief, nor did any person or entity other than Amici Curiae, their members, or counsel make a monetary contribution to its preparation.

superb performance and exceptional results is crucial to achieving the purposes of federal fee-shifting statutes and to ensuring that plaintiffs who proceed under those statutes obtain high-quality counsel.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys committed to working for those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism, ethics, and judicial integrity. As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts regarding the proper interpretation and application of Title VII and other anti-discrimination statutes, to ensure that the goals of those statutes are fully realized, including with respect to the proper allocation of attorney's fees.

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

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

SUMMARY OF THE ARGUMENT

1. The attorneys representing plaintiffs in this case rendered remarkable service for their clients and achieved extraordinary results. After uncovering the appalling conditions affecting children in Georgia's foster care program, the attorneys saw that compensation for individual child-victims was not enough. They sought fundamental changes to fix a broken bureaucracy so that the system would serve all Georgia's foster children. To that end, they obtained class action status for the children in Georgia's two largest counties, conducted extensive discovery into conditions there, and obtained compelling expert opinion regarding the steps needed to bring the system up to constitutional minimum standards.

The state defendants engaged in a strategy of resistance designed to defeat plaintiffs' action and preserve the status quo by wearing down their less-resourced opponents. Nevertheless, after three years of proceedings and mediation, the parties reached an accord. The consent decree mandates specific improvement in thirty-one areas and requires that progress be monitored and made public by an independent body.

The district court awarded attorney's fees to plaintiff class, starting with the reasonable hours

multiplied by the prevailing hourly rate. The court then adjusted that initial figure, taking into account the exceptional representation and results achieved in this case. Stating explicitly that those factors were not considered in arriving at the lodestar amount, the court multiplied the lodestar by 1.75 to arrive at a reasonable attorney's fee.

2. The district court's fee award in this case was well within its discretionary authority under 42 U.S.C. § 1988.

a. Congress intended to vest federal judges with authority to take into account the quality of representation and the results achieved. The plain meaning of "reasonable attorney's fee" in the context of representing individuals whose rights have been violated includes the notion that a better result warrants a higher fee. The overwhelming choice of retainer for such representation – the contingency fee – is based on precisely that premise.

Second, the fact that Congress authorized court-awarded fees only for prevailing plaintiffs reflects the intent to make results an important factor in fee awards.

Third, Congress could have expressly limited fees to the product of hours times the proper rate, as it did in other fee-shifting statutes enacted near the same time.

Finally, the legislative history cited an appellate decision and three district court cases as examples of proper fee calculations, all of which either awarded fees adjusted on the basis of representation and results or approved of such adjustments.

b. This Court, has consistently declined to limit attorney's fees to the lodestar amount and has emphasized the district court's discretion to adjust that amount. This Court established a strong presumption in favor of the lodestar amount, imposing the burden on the fee applicant to show that enhancement based on the quality of representation and results is justified. Plaintiffs in this case made the necessary showing, and the district judge made the requisite detailed findings.

c. This Court should not adopt the Solicitor General's suggestion that district courts be required to take into account performance and results in the particular case when setting the hourly rate for the lodestar, rather than apply a multiplier to the lodestar. In any event, the lodestar in this case did not include those factors, so that use of the multiplier was appropriate.

3. The public policy arguments raised against enhancement of the lodestar are not persuasive.

a. Congress did not limit a "reasonable attorney's fee" to compensation for the minimum effort required for a plaintiff to prevail. Congress intended civil rights lawsuits to enforce compliance with the civil rights laws and that fee awards enable plaintiffs to pursue a full measure of justice. That attorneys should be compensated for achieving exceptional results is what Congress intended for "private attorneys general."

b. The argument that court-awarded fees burden taxpayers and divert revenues from other worthwhile activities does not warrant immunity for state defendants. Violations by state actors are at

least as great a threat to citizens' civil rights as violations by private parties, and Congress intended fee awards in such cases to be paid by state governments.

c. There is no indication that fee enhancements – long approved by this Court and allowed in every federal circuit – hinder settlements. This case itself resulted in a consent decree. Prohibiting enhancement in all cases would eliminate a bargaining chip and make it more likely that defendants would persist in taking cases to trial. In any event, this policy argument, like those above, are most appropriately made to the legislature.

ARGUMENT

I. THE ATTORNEYS IN THIS CASE PROVIDED EXCEPTIONAL REPRESENTATION AND OBTAINED EXCEPTIONAL RESULTS FOR THE PREVAILING PLAINTIFF CLASS.

This case is celebrated as a textbook example of the effective use of tort law principles, not simply to obtain a remedy for a legal wrong, but to reform a broken government bureaucracy and make it work. *See* John T. Pardeck, *CHILDREN'S RIGHTS: POLICY AND PRACTICE* 161-62 (2d ed. 2006) (summarizing the preparation of this case).

The Complaint filed by the Children's Rights attorneys on June 6, 2002 charged Georgia's Department of Family and Children Services (DFCS) with failing the very children it is supposed to protect. Of immediate concern were the DeKalb and Fulton county emergency shelters, designed to provide short-term accommodations. Children

languished there for months in dirty, overcrowded conditions, lacking needed medical services and exposed to violence, sexual assault, prostitution, gang activity, and drugs. The district court found that plaintiffs had uncovered “terrible” and “dangerous” conditions at the shelters. *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1279 (2006). In lieu of an injunction, DFCS closed the shelters by February 13, 2003. *Id.* at 1267-681; *Kenny A. v. Perdue*, 218 F.R.D. 277, 284 n.2 (2003).

But the dangers that stalked Georgia’s foster children were not limited to those shelters. Later in 2003, both the Commissioner of the Georgia Department of Human Resources and the Director of the Division of Family and Children Services resigned in the wake of several recent tragic child deaths. Craig Schneider, *Child Welfare Chief Has Tough Job, DeKalb Office Under New Leadership*, ATLANTA J. & CONST., Oct. 29, 2003, at B1 (reporting on the controversy surrounding the DeKalb office, linked to recent child deaths, including a 2-year-old boy who was twice returned by DFCS to his home despite complaints of abuse and who was thereafter beaten to death by his stepfather); Craig Schneider, *Acting DHR Commissioner Named*, ATLANTA J. & CONST., Nov. 22, 2003, at D2, (reporting the appointments of new directors of the Department of Human Resources and DFCS).

The Children’s Rights advocates recognized that these dangers would not be significantly reduced by seeking compensation for individual victims. Thousands of lives would continue to be wasted because of massive systemic failures rooted in a severe lack of funding, widespread mismanagement, and crushing caseloads. In August of 2003, the

district court took a major step toward addressing those systemic issues by granting plaintiffs' motion for class action status and ordering the case to proceed to trial on behalf of all 3,000 foster children in Fulton and DeKalb Counties. 218 F.R.D. at 305.

Petitioners, as the district court recounted, "vigorously fought plaintiffs' claims for almost three years, filing both motions to dismiss and for summary judgment, as well as seeking repeatedly to limit plaintiffs' discovery efforts." 454 F. Supp. 2d at 1266. The court was forced to admonish Petitioners for relying on technical objections "in order to delay and hinder the discovery process." *Id.* at 1268. Petitioners' "strategy of resistance undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." *Id.*

Petitioners' strategy was one that is familiar to trial lawyers. The class of foster children, of course, were unable to hire counsel to assert their rights. Class counsel were not paid as they worked on the case and advanced some \$1.7 million of their own money to cover expenses. *Id.* at 1288. Petitioners aimed at prevailing simply by exhausting their less-resourced opponents.

For example, as the district court indicated, defendants greatly increased plaintiffs' expenses by delaying discovery and refusing to cooperate in a joint record review. *Id.* at 1277. Their motion for summary judgment included a 74-page memorandum, a 126-page statement of undisputed material facts, a 48-page statement of legislative facts, six separate affidavits, and three volumes of appendices containing expert reports and

voluminous additional documents. 454 F. Supp. 2d at 1281.

The suit ended after three years with a consent decree. The state agreed to undertake thirty-one separately detailed steps, including commitments to investigate reports of abuse or neglect, regular visits by caseworkers, licensing of foster homes, and prompt delivery of medical and dental care. Two child welfare specialists will serve as the court's independent accountability agents charged with the responsibility of measuring and reporting publicly on the state's progress and compliance with the decree. *Id.* at 1289-90. It was, as the court stated, sweeping and comprehensive relief for the class that was truly extraordinary. *Id.* The parties also agreed that the plaintiff class was entitled to an award of attorney fees under 42 U.S.C. § 1988. *Id.* at 1269.

The district court carefully employed the lodestar analysis. After arriving at the reasonable number of hours to be compensated, the court ascertained the appropriate hourly rate for the several categories of legal counsel, representing the prevailing market rate in the community for similar services by lawyers of comparable skills, experience, and reputation. *Id.* at 1284. The product of those two figures yielded the "lodestar" amount for this case.

District Judge Shoob further determined that this was "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.'" *Id.* at 1288, quoting *Blum v. Stenson*, 465 U.S. 886, 899 (1984); and *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

The court made explicit findings and explained in detail why the representation and results obtained by counsel were extraordinary and were not at all reflected in the hourly rates used to obtain the lodestar amount.

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. The foster children of Fulton and DeKalb Counties were indeed fortunate to have such unparalleled legal representation, and the Court would be remiss if it failed to compensate counsel for this extraordinary level of service to their clients.

Finally, the evidence establishes that plaintiffs' success in this case was truly exceptional. . . . [E]ven if plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief as "intricately detailed and comprehensive" as that contained in the Consent Decree.

454 F. Supp. 2d at 1289-90 (record citations omitted).

On that basis, the district court multiplied the initial lodestar amount by 1.75, which it deemed "the minimum enhancement of the lodestar necessary to reasonably compensate plaintiffs' counsel for their exceptional work and the exceptional result they achieved in this case." *Id.* at 1290.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN RECOGNIZING EXCEPTIONAL REPRESENTATION AND RESULTS BY APPLYING A MULTIPLIER TO THE LODESTAR AMOUNT WHERE THE LODESTAR CALCULATION DID NOT TAKE THOSE FACTORS INTO ACCOUNT.

The Question Presented in this case, especially as modified by Petitioners’ Brief on the Merits, is narrow and easily answered. Congress and this Court have made clear that the quality of representation and the results obtained by plaintiffs’ counsel are appropriate factors in determining a reasonable attorney’s fee under § 1988. As to the second part of Petitioners’ Question Presented – whether “these factors [are] already included in the lodestar calculation” – the district made specific and detailed findings that they were not.²

A. Congress Intended to Vest District Courts with Discretion to Enhance Attorney Fees to Account for the Quality of Representation and Results.

The Civil Rights Attorneys Fees Awards Act of 1976 provides:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of

² The Question Presented in the Petition, on which this Court granted certiorari, asked: “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)

Public Law 92-318 . . . , or title VI of the Civil Rights Act of 1964 . . . , *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.*

42 U.S.C § 1988 (emphasis added).

Congress enacted this provision to provide meaningful enforcement of the substantive provisions of the civil rights laws through private civil actions, “a policy that Congress considered of the highest priority.” *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978), quoting *Newman v. Piggie Park Enter. Inc.*, 390 U.S. 400, 402 (1963).

Petitioner makes much of the fact that the statute contains no mention of “enhancement” or of “multipliers” applied to the lodestar. Petitioners’ Br. 19. However, it is clear that Congress intended that a “reasonable attorney’s fee” take into account the quality of representation and the results obtained in the particular case, over and above the product of hourly rate times reasonable hours.

First, the plain meaning and common usage of “attorney’s fee” includes the notion of a greater fee for better results. For the type of legal service involved here, representing persons who have suffered legal injury and seek to vindicate their rights in court, attorneys are retained in the overwhelming number of cases on a contingency fee basis. Indeed, the contingent fee, in which the attorney receives a larger fee for obtaining a larger recovery for the client, is “the dominant system in the United States by which legal services are

financed by those seeking to assert a claim.” F. MacKinnon, CONTINGENT FEES FOR LEGAL SERVICES, 4 (1964). *See also* Herbert M. Kritzer, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 58-59 (1990) (empirical evidence indicating that the contingent fee is the overwhelming means used by individuals and small businesses seeking to obtain legal representation to assert claims).

Even many corporate clients of law firms that traditionally bill by the hour have moved to modify their retainer agreements to incentivize counsel by offering higher fees or bonuses for exceptional results. *See, e.g.*, Nathan Koppel & Ashby Jones, *Billable Hour Under Attack*, WALL ST. J., Aug. 24, 2009, at A1 (“[B]ig companies are fighting back against law firms’ longstanding practice of billing them by the hour.”); ABA Formal Op. 94-389 (Dec. 5, 1994); Richard C. Reed, *Value Billing: An Update from the ELP Section’s Task Force*, 14 LEGAL ECON., Sept. 1988, at 20 (reporting trend to compensate lawyers based on results, not hours).

Congress “intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases[,] and not be reduced because the rights involved may be nonpecuniary in nature.” S. Rep. No. 94-1011 at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913. [hereinafter “Sen. Rep.”].

A second indication is found in the statute’s plain text. Congress could have accomplished its purpose of providing access to the courts and encouraging private attorneys general by awarding fees to all plaintiffs or at least to all those with non-frivolous

claims. By limiting fee awards to “prevailing” plaintiffs, Congress recognized that results affect fees. As Chief Justice Burger later stated, “[Plaintiffs’] success is an important factor for calculating fee awards. Any system for awarding attorney’s fees that did not take account of the relationship between results and fees would fail to accomplish Congress’s goal of checking insubstantial litigation.” *Hensley*, 461 U.S. at 448 (Burger, C.J., concurring).

Third, it is clear that if Congress had wanted to limit fee awards to reasonable hours times the prevailing rate for similar services, it could have done so expressly. In fact, at about the same time Congress was adopting § 1988, it also enacted a fee-shifting provision in the Consumer Product Safety Commission Improvements Act of 1976 that expressly limited court-awarded attorney fees to the lodestar amount:

[A] reasonable attorney’s fee is a fee (1) which is based upon (A) the actual time expended by an attorney in providing advice and other legal services in connection with representing a person in an action brought under this section, . . . and (2) which is computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee.

15 U.S.C.A. § 2060(f). Nor is this the only example. Congress included fee provisions substantially identical to that quoted above in 15 U.S.C.A. § 2059(e)(4) (Supp. 1977) (Repealed by Pub. L. 97-35.,

Title XII, § 1210, Aug. 13, 1981, 95 Stat. 721); and in the Natural Gas Pipeline Safety Act Amendments of 1976, 49 U.S.C.A. § 1686e (Supp. 1977) (Repealed by Pub. L. 103-272, § 7(b), July 5, 1994, 108 Stat. 1389).

Congress would have similarly limited § 1988 if it had so intended.

Finally, and eliminating any doubt on this score, the Senate Report accompanying what would become § 1988 pointed to the Fifth Circuit's relatively recent decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), as articulating the "appropriate standards" for the reasonableness of attorney fees. The *Johnson* court enumerated 12 factors to be considered in arriving at a reasonable fee, which included the hours spent by the attorney and "the customary [hourly] fee for similar work in the community." 488 F.2d at 718. But the court also required judges to consider as separate factors "the results obtained" as well as "the attorney's work product, his preparation, and general ability before the court." *Id.* Thus an inexperienced attorney who performed extraordinarily well could receive a fee above his or her market rate and "not be penalized for only recently being admitted to the bar." *Id.* at 719.³

³ Significantly, the *Johnson* court stated, *id* at 720, that these factors reflected considerations it had approved in a civil rights class action in which the trial judge's views of counsel's abilities strongly resembled those of District Judge Shoob in this case:

[P]laintiffs' counsel marshalled an impressive array of facts, skillfully analyzed them, and presented them lucidly. . . It would be an

In addition, the Senate report held up three district court decisions as examples where the appropriate standards were “correctly applied.” Sen. Rep. at 6, 1976 U.S.C.C.A.N. 5908, 5913. All three indicate that Congress intended that the district courts recognize exceptional work and exceptional results by awarding higher fees.

In *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 688 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), the court increased the fee from the lodestar figure of \$37,500 to an award of \$47,500, stating, “the attorneys’ work, and the results which they obtained through their work merit an increase in the base figure upon which a reasonable attorneys’ fees award is computed.”

In *Davis v. County of Los Angeles*, 8 Emp. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974) counsel “achieved excellent results for the plaintiffs” and, based on the judge’s observations of counsel’s performance, “an award of fees above the normal hourly rates” was deemed appropriate.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975), the district court awarded \$175,000 in fees in a school desegregation case, taking into account not only the

injustice not to mention the legal ability displayed by plaintiffs’ lead counsel. As an advocate his skill in this case would rank him among the most able who have appeared before me in my three and a half years on the bench.

Clark v. American Marine Corp., 320 F. Supp. 709, 712 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971).

customary hourly rate in federal court, but also counsel's "exceptional" ability and "excellent" results. *Id.* at 484, 486.

As this Court observed, the approving reference to these cases in the legislative history confirms that Congress intended that "the level of a plaintiff's success is relevant to the amount of fees to be awarded" under § 1988. *Hensley*, at 430.

B. This Court Has Consistently Recognized the Trial Judge's Authority to Adjust Attorney's Fees to Account for the Quality of Representation and Results.

Federal courts soon found that the *Johnson* twelve-factor analysis gave too little actual guidance to trial judges. For that reason, when this Court first addressed the matter in *Hensley*, the Court adopted the "lodestar" approach first developed by the Third Circuit in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973), *appeal after remand*, 540 F.2d 102 (1976). The lodestar approach differed from and was more focused than the *Johnson* analysis. Nevertheless, the lodestar method also recognized that multiplying the attorney's reasonable hours by the reasonable hourly rate "does not end the court's inquiry into the value of the attorney's services." 487 F.2d at 168. Rather, the court instructed trial judges to "adjust" this lodestar amount to take into account the quality of the attorney's work and the results obtained. *Id.*

This Court in *Hensley* adopted *Lindy's* two-step analysis, paraphrasing directly from the Third

Circuit's discussion. The Court stated that the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate is the "most useful starting point for determining the amount of a reasonable fee." 461 U.S. at 433. However, that calculation "does not end the inquiry," and the court may adjust the initial lodestar figure up or down based on the "results obtained" in the case, which the Court termed a "particularly crucial" factor in adjusting the lodestar amount. *Id.* at 434.

The Court noted that the district court also may consider "other factors" identified in *Johnson*, but cautioned that many of those other factors "usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Id.* at 434 n.9. Obviously, the Court was stating that *Johnson* factors *other than the results obtained* are usually accounted for in the lodestar. The Court made this even clearer by citing *Copeland v. Marshall*, 641 F.2d 880, 890 (D.C. Cir. 1980) (en banc), where the court of appeals adopted the *Lindy* lodestar method. The court explained, "The 'lodestar' itself generally compensates lawyers adequately for their time. An upward adjustment for quality is appropriate only when the attorney performed exceptionally well, or obtained an exceptional result for the client." *Id.* at 894. While cautioning against redundant application of some *Johnson* factors, the court stated that "the amount or nature of recovery was not considered in setting the 'lodestar'" so that enhancement was appropriate. *Id.* The district court in this case followed that same course.

In *Blum v. Stenson*, 465 U.S. 886 (1984), this Court restated that the proper first step in

determining a reasonable attorney's fee is to multiply "the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Id.* at 888. That hourly rate, the Court held, is, as Congress intended, the prevailing market rate. *Id.* at 893-94 and nn. 9 & 10. Prevailing market rates by definition do not reflect the exceptional representation or results in the particular case at hand. The Court therefore expressly *rejected* the same argument resurrected by Petitioners in this case: "[W]e cannot agree with petitioner's argument that an 'upward adjustment' is never permissible." *Id.* at 897. Instead, the Court reaffirmed its position in *Hensley* that a reasonable fee may include enhancement for results obtained. *Id.*

The *Blum* Court emphasized that the fee applicant bears the burden of showing that enhancement is appropriate in the particular case. In the absence of specific evidence to the contrary, there is a strong presumption that the product of reasonable hours times a reasonable rate represents a "reasonable" fee. *Id.* at 898. Upward adjustment is justified "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.'" *Id.* at 899. The attorneys in *Blum* made no such showing, *id.*, but this is precisely the showing that plaintiffs made in this case and that Judge Shoob carefully set out in his opinion below.

The Court in *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*, 478 U.S. 546 (1986), again stated that there is a "strong presumption that the lodestar figure – the product of reasonable

hours times a reasonable rate – represents a ‘reasonable’ fee.” 478 U.S. at 565. Yet the Court also made clear that this is a rebuttable presumption, and “upward adjustments of the lodestar figure are still permissible . . . in certain ‘rare’ and ‘exceptional’ cases, supported by both ‘specific evidence’ on the record and detailed findings by the lower courts.” *Id.* at 565, quoting *Blum*, 465 U.S. at 898-901.

The Court made clear that it would have upheld the enhancement of attorney’s fees in the case before it if there had been an “indication as to why the lodestar did not provide a reasonable fee award reflecting the quality of representation,” *id.* at 567, and if the lower court had made detailed findings “as to why the quality of representation was not reflected in the product of the reasonable number of hours times the reasonable hourly rate.” *Id.* at 568. Because the district court made those findings in this case, the attorney fee award should be upheld.

This Court has consistently restated its adherence to the principle that a reasonable fee should take into account quality of representation and success. See *Marek v. Chesny*, 473 U.S. 1, 11 (1985). (“the most critical factor in determining a reasonable fee is the degree of success obtained.”) (internal quotes omitted); *Evans v. Jeff D.*, 475 U.S. 717, 737 n.26 (1986) (“[T]he product of reasonable hours times a reasonable rate does not end the inquiry,” and the district court has discretion to adjust a basic fee); *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) (proper approach is for the district court to arrive at an initial estimate and then “adjust this lodestar calculation by other factors”); *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (“[T]he degree of the plaintiff’s overall success goes to the reasonableness’

of a fee award under *Hensley.*”); *cf. City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) (enhancement of the lodestar to reflect the risk of loss disallowed because that factor is “already subsumed in the lodestar”).

Following this Court’s consistent position, every federal circuit has held that the initial lodestar calculation may be enhanced if enhancement is supported by specific evidence. In addition to the Third Circuit’s decision in *Lindy*, and the D.C. Circuit’s in *Copeland*, *see, e.g., Adams v. Zimmerman*, 73 F.3d 1164, 1178 (1st Cir. 1996) (recognizing upward adjustment to lodestar amount based on results obtained); *Green v. Torres*, 361 F.3d 96, 99 (2d Cir. 2004) (In “cases of exceptional success an enhanced award may be justified.”); *Johannssen v. District No. 1-Pac. Coast Dist., MEBA Pension Plan*, 292 F.3d 159, 181 (4th Cir. 2002) (“Grants of an enhancement are both discretionary and rare, and the applicant bears the burden of proof of an exceptional result.”); *Thompson v. Connick*, 553 F.3d 836, 868-69 (5th Cir. 2008), *aff’d by equally divided court en banc*, ___F.3d___ (5th Cir., Aug. 10, 2009) (upholding fee enhancement based on attorney’s extraordinary performance in the case); *Geier v. Sundquist*, 372 F.3d 784, 793-96 (6th Cir. 2004) (upward adjustment of lodestar for quality of representation permissible in rare and exceptional cases); *In re UNR Indus., Inc.*, 986 F.2d 207, 210 (7th Cir. 1993) (fee enhancement available where “counsel offers specific evidence 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.”); *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 532 (8th Cir.

1999) (upward adjustment for superior quality of service and results obtained “in certain rare and exceptional cases, supported by both specific evidence on the record and detailed findings by the lower courts.”); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1046 (9th Cir. 2000) (upward adjustment “is justified only in the rare case where there is specific evidence that the quality of service was superior in light of the hourly rates charged and the success was exceptional”); *Roe v. Cheyenne Mtn. Conf. Resort, Inc.*, 124 F.3d 1221, 1233 n.8 (10th Cir. 1997) (“The lodestar figure may be adjusted to suit the particular circumstances of the case, especially where the degree of success achieved is exceptional.”); *Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988) (enhancement permissible “if the results obtained are exceptional” and “there is specific evidence in the record to show that the quality of representation was superior to that which one would reasonably expect in light of the rates claimed.”) (internal quotations and citations omitted throughout).

Every federal court agrees that the “lodestar” is “a star that leads” the traveler. WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1329 (1981). Or, as this Court has frequently stated, it is “the guiding light of our fee-shifting jurisprudence.” *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992), *quoted in Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002). It is not, as Petitioners argue, always and in all cases the final destination. Nor has any court disagreed that the trial judge, who has the best vantage point for observing counsel’s performance and assessing the results achieved, ought to be accorded broad

discretion, based on specific evidence, to adjust the lodestar amount to arrive at a reasonable fee.

C. The District Court in this Case Properly Exercised Its Discretion in Recognizing Exceptional Quality of Representation and Results by Applying a Multiplier to the Lodestar Amount, Which Did Not Include Those Factors.

The trial court in this case adhered to the Court's instructions closely. District Judge Shoob recognized that, if quality of representation and results obtained "are already reflected in the lodestar amount" they may not serve as bases for enhancement. 454 F. Supp. 2d at 1288. He found, however, based on specific evidence submitted by plaintiffs' counsel, that "the quality of service rendered by class counsel, including their extraordinary commitment of capital resources, was far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect to receive for the rates used in the lodestar calculation." *Id.* The court also specifically found the superb quality of their representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar." *Id.* at 1288-89. In addition, the result obtained by counsel was not only exceptional; in the district court's view it was unique. "[T]he Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.* at 1290.

The panel opinion by Judge Carnes erroneously stated that the "stellar performance" of plaintiffs' counsel in this case had already been considered in

setting counsel's reasonable hourly rate, and was therefore built into the lodestar. *Kenny A. v. Perdue*, 532 F.3d 1209, 1226-27 (11th Cir. 2008). To the contrary, the district court was correctly applying Eleventh Circuit precedent holding that the best evidence of the prevailing market rate in the relevant legal community for similar services "is the applicant attorney's customary billing rate for fee-paying clients," although that information is not conclusive. 454 F. Supp. 2d at 1284, citing *Dillard v. City of Greensboro*, 213 F.3d 1347, 1354-55 (11th Cir. 2000). Observation of counsel's performance confirmed for the court that counsel's Standard Hourly Rate charged to fee-paying clients was within the range of rates prevailing in the Atlanta market. 454 F. Supp. 2d at 1285. *See also Duckworth v. Whisenant*, 97 F.3d 1393, 1396-97 (1996) (Based on "ample opportunity to assess the lawyering of this case," the court can determine whether the attorney's hourly rate is in line with market rates in the community "for similar services by lawyers of reasonably comparable skills.").

As the district court specifically stated, the court did not include either the quality of counsel's performance or the results obtained in setting the hourly rate for purposes of calculating the lodestar. 454 F. Supp. 2d at 1288-89. For this Court to reverse the fee award in this case would not eliminate "double counting." It would eliminate any discretion on the part of the district court to consider extraordinary representation and exceptional results

as factors in arriving at a reasonable fee, contrary to the intent of Congress and this Court's precedents.⁴

Significantly, the United States agrees with Respondents that a reasonable attorney's fee should take account of quality of the attorney's representation. However, the Solicitor General proposes that the district courts accomplish this by manipulating the hourly rate used to calculate the lodestar itself, rather than by applying a multiplier to the lodestar, as the court did in this case:

A district 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*. . . . 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

⁴ Indeed, it would eliminate the trial judge's discretion under numerous “other federal fee-shifting statutes,” since “our case law construing what is a ‘reasonable’ fee applies uniformly to all of them.” *City of Burlington v. Dague*, at 562. One scholar estimates, “[t]here are over 200 federal statutes . . . that provide for shifting of attorney's fees.” John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U.L. REV. 1567, 1588 (1993). See also the Appendix to the Eleventh Circuit's en banc opinion below, 547 F.3d 1319, 1337-39 (partial list of 80 statutes allowing award of reasonable attorney's fee to prevailing party).

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.*

Brief of United States 19-20. (emphasis supplied).

Because the district court in this case expressly stated that the lodestar rate was not determined in this fashion, the Solicitor General should not object to affirming the fee award at issue here.⁵

Amici strongly disagree with the suggestion that this Court “make conclusive the presumption that the lodestar (*assuming its components are properly set*) represents a reasonable attorney’s fee.” Br. of United States 18. (emphasis supplied).

The Solicitor General offers no persuasive reason why the trial court should be required to take the quality of the attorney’s representation into account when setting the lodestar rate. To do so would overturn this Court’s decision in *Blum*, that Congress intended the lodestar rate to reflect the

⁵ This analysis may have been influenced by the fact that the Brief of the United States addressed the Question Presented as it was originally phrased in the Petition, which assumed that “quality of performance and results obtained . . . already are included in the lodestar calculation.” Br. of the United States I.

The Solicitor General concedes that enhancement is appropriate when it is based on factors not accounted for in the lodestar amount. Br. of the United States 18-19 n.5, 30. That is precisely the case here.

prevailing market rate for similar legal services. 465 U.S. at 893-94. Instead, this Court should embrace the cautionary advice offered by Justice Brennan in *Hensley*:

If a district court has articulated a fair explanation for its fee award in a given case, the court of appeals should not reverse or remand the judgment unless the award is so low as to provide clearly inadequate compensation to the attorneys on the case or so high as to constitute an unmistakable windfall.

461 U.S. at 455 (Brennan, J., concurring in part).

III. ENHANCEMENT OF FEES TO REFLECT EXCEPTIONAL REPRESENTATION AND EXCEPTIONAL RESULTS DOES NOT OFFEND PUBLIC POLICY.

The fact that the district court determined the amount of a reasonable attorney's fee under § 1988 in this case precisely as intended by Congress, in the manner prescribed by this Court, and in accord with all other federal circuits should warrant affirmance. Nevertheless, Petitioners and several supporting amici argue that for public policy reasons this Court should mandate that the lodestar amount must never be augmented. *See* Pet'r. Br. 42-56; Brief of the States of Alabama, *et al.*, ["Br. of States"] 4-21; Brief of the National Governors Ass'n, *et al.* ["Br. of Governors"].

A. A Reasonable Court-Awarded Attorney's Fee Is Not Limited to

**Paying Counsel for Only Bare
Minimum Representation.**

Petitioners, along with amici representing others who may be involved in civil rights violations, ask this Court to take a narrow, minimalist view of the Civil Rights Attorney's Fees Awards Act. In Petitioners' view, "the entire purpose of the Act is to enable plaintiffs to attract competent counsel while avoiding windfalls." Pet'r Br. 60. *See also id.* at 20. Enhancement of fees for superior performance is not necessary to fulfill this purpose, because – it is postulated – there will always be attorneys who will take such cases for no more than the lodestar amount. *See* Br. of States 5-6; Br. of Governors 14-16. It is therefore "unreasonable" to compensate attorneys for more than the minimum effort required for plaintiff to prevail on his or her claim, so long as there is a competent attorney willing to represent plaintiffs on such terms. *Id.*

Consequently, Petitioners assert, any enhancement based on obtaining "sweeping relief" on a "comprehensive scale" with "far-reaching significance" is excessive. Pet'r. Br. 47-48. *See also* Br. of Governors 13 ("The purpose of the fee shifting statutes is to 'attract competent counsel.' It is not to motivate competent counsel, once retained, to perform exceptionally or attain exceptional results."); Br. of States 6: ("[M]onetary enhancements above-and-beyond what is necessary to ensure that competent counsel will represent a civil rights plaintiff constitute an unnecessary – and therefore unreasonable – windfall.").

Judge Carnes's opinion below went so far as to characterize the successful efforts by plaintiffs'

counsel to improve the lot of Georgia's foster children beyond the absolute minimum demanded by the due process clause as "analogous to relief on a meritless claim." *Kenny A. v. Perdue*, 532 F.3d 1209, 1230 (11th Cir. 2008):

Just as *Dague* instructs us that fee awards should not underwrite efforts to obtain relief where none is due under the law, neither should they underwrite efforts to receive more or better relief than that due under the law. . . . Just as encouraging non-meritorious claims cannot have been an objective of the fee-shifting provisions, neither can encouraging results that go beyond what the law allows have been an objective.

Id.

Congress has never taken such a crabbed and miserly view of the effective enforcement of the civil rights of Americans. The purpose of the Civil Rights Attorney's Fee Awards Act is not simply and solely to provide the victims of civil rights violations with access to competent attorneys, though that is an important function. The Act's broader objective is to safeguard the rights of all Americans by enabling ordinary citizens to enforce compliance with federal civil rights laws, including compliance by state officials. "In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. *Unless the judicial remedy is full and complete, it will remain a meaningless right.*" H.R. Rep. No. 94-1558 at 1 (1976) (emphasis added) [hereinafter "House Rep."].

Without the traditionally effective remedy of fee-shifting “our civil rights laws . . . become mere hollow pronouncements which the average citizen cannot enforce.” Sen. Rep. at 6, 1976 U.S.C.C.A.N. at 5913.

Civil rights lawsuits were not viewed by Congress as matter to be merely tolerated. They are “the chosen instrument of Congress to vindicate ‘a policy that Congress considered of the highest priority.’” *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978), quoting *Newman v. Piggie Park Enter. Inc.*, 390 U.S. 400, 402 (1963).

In Congress’s expansive view, ordinary citizens bringing suit not only vindicate their own rights, they act as “private attorneys general” to enforce the civil rights laws rather than rely on an expansive enforcement bureaucracy. Sen. Rep. at 4, 1976 U.S.C.C.A.N at 5911. Thus, the fee-shifting provision in § 1988 is “an integral part of the remedies necessary to obtain” compliance with civil rights laws. *Id.* at 5, 1976 U.S.C.C.A.N at 5913. Indeed, Congress expressly intended that attorney’s fees not be reduced to minimum levels simply because they involve nonpecuniary rights, but rather “the amount of fees awarded [should] be governed by the same standards which prevail in other types of equally complex Federal litigation.” *Id.* at 6, 1976 U.S.C.C.A.N at 5913.

Enhancement of attorney fees in those relatively rare cases of exceptional performance and results is fully consistent with the legislative purpose of providing fees to make available a judicial remedy that is “full and complete.” House Rep. at 1.

B. Attorney's Fee Awards Against State Actors Are Not Objectionable on Grounds That They Are Funded by State Taxpayers.

Amici representing potential state defendants in civil rights suits argue that enhancements of attorney's fees are unreasonable because, as a result, "[e]ither tax rates will increase, or funding for government programs will diminish," including programs that are the subject of the suits. Br. of States 12-13. *See also*, Br. of Governors 9 (fee award amounts to a "federal court ordered contribution from the taxpayers of Georgia to a non-profit organization" that "will, of necessity, reduce the amount of state funds available to address other public needs").

This argument, of course, is not limited to the enhancement of attorney's fees but may be leveled against fee-shifting altogether in any case where state actors have been held to have violated federal civil rights laws. It is an argument that Congress addressed and rejected in enacting § 1988. After extensive hearings that included testimony by state officials, the Senate Judiciary Committee explained:

[D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

Sen. Rep. at 5, 1976 U.S.C.C.A.N. at 5913 (footnotes omitted). Pleas for a special immunity to shield state governments from the full measure of court-awarded costs, including reasonable attorney's fees, should be addressed to the legislature, not this Court.

In any event, such an immunity would undermine the statute's purpose of enforcing full compliance with federal civil rights laws. As this case amply demonstrates violation of those rights by state actors may be more to be feared and more difficult to root out than private wrongdoing.

In fact, as this Court has suggested, the threat of an award of attorney fees under § 1988 may actually save money for state governments overall by deterring civil rights violations in the first place. *Hudson v. Michigan*, 547 U.S. 586, 597-98 (2006).

Complaints about the size of the fee award are particularly ill-fitting in this case. As noted in Part I, *supra*, the state defendants rejected opportunities to reduce costs and instead adopted a strategy that greatly and unnecessarily increased the attorney resources and time required to pursue this action. The district court pointed out that these tactics "undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." 454 F. Supp. 2d at 1268. In the end, the court stated, "the size of the [fee] award reflects State Defendants' strategy of resistance against efforts to reform a foster care system that even they ultimately admitted was badly in need of reform." *Id.* at 1296.

C. Enhancement of Attorney's Fees to Reflect Exceptional Representation or

Results Does Not Discourage Settlement.

Amici supporting Petitioners also argue that permitting the enhancement of the lodestar amount to arrive at a reasonable attorney's fee discourages settlements of civil rights actions. These assertions are little more than speculation. The Governors Association brief, for example, asserts that fear of costly and unpredictable enhancement of attorney fees "will make States less likely to enter into consent decrees and more likely to litigate cases to judgment." Br. of Governors 4.

The Governors offer no explanation why enhanced fees are any less predictable than the lodestar amount itself. At the conclusion of the civil action, if the parties have not reached agreement on fees, prevailing plaintiffs' counsel submits records of hours, proof of prevailing rates, and, in exceptional circumstances, request for application of a multiplier. Opposing counsel has the opportunity to object to or rebut the evidence, and the court makes its determination. That determination is generally not predictable with great precision, even without the application of a multiplier. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 735 (1986) (noting the "unpredictability of attorney's fees" awarded under § 1988).

The assertion that States will be more likely forgo settlement out of fear of fee enhancement and litigate to judgment is even less rational. If the State is certain to win at trial, it would not likely settle anyway. If the State insists upon going to trial and loses, it will have rendered itself liable to a far higher fee award due to the greater number of hours

expended and, perhaps, a higher hourly rate. In addition, it will have expended its own additional costs and attorney fees. And the court may still enhance the lodestar amount in the exceptional case.

The States' brief suggests that some States may be willing to enter into a consent decree, not because they have violated federal civil rights laws, but "simply to effectuate good public policy" or to "enhance public services while avoiding the costs of protracted litigation." Br. of States 14. Enhancement of fees under such circumstances is "a significant disincentive to a State otherwise amenable to settlement," *id.* at 14, and "penalize[s] States for acting reasonably (and often creatively) in the settlement process, rather than digging their heels into the litigation battlefield." *Id.* at 16.

As discussed earlier, that is simply not this case. In this case, the State defendants indeed dug in their heels and engaged in a "strategy of resistance" that prolonged this litigation and increased its costs. 454 F. Supp.2d at 1296.

Equally to the point, upward adjustment of the lodestar amount has been approved by this Court beginning with *Hensley* in 1983 and applied by every federal circuit. None of the critics of such enhancement have offered any evidence that it has prevented the settlement of any civil rights cases. Indeed, the parties in this case reached a settlement and entered into a consent decree that resolved the merits of the class claims.

Prohibiting enhancement of fees in all cases is actually more likely to hinder the settlement of civil rights cases. As this Court has recognized, court-

awarded attorney fees under § 1988 can be useful to plaintiffs and defendants as a “bargaining chip.” *Evans v. Jeff D.*, 475 U.S. 717, 731 n.20 (1986). Congress intended that attorney fees be a part of “the arsenal of remedies available to combat violations of civil rights.” *Id.* at 732. Consequently, “[t]o promote both settlement and civil rights,” this Court has recognized “the possibility of a tradeoff between merits relief and attorney’s fees.” *Id.* at 733.

Plaintiffs can, of course, waive enhancement of fees as well as the fees themselves. *Id.* at 737-38. To hold that enhancement of fees is never available under § 1988 would remove this bargaining chip and make it more difficult for plaintiffs to bring defendants to the bargaining table.

Neither Petitioners nor their supporting amici have advanced any compelling reason to prohibit the enhancement of fees in every case. To the extent their arguments are at all persuasive, they are most appropriately directed to Congress. Amici suggest that, because of the many variables that affect the reasonableness of attorney’s fees and the myriad of different circumstances in which they arise, Congress and this Court wisely trusted the wisdom and judgment of those who bear the responsibility of administering justice in civil rights cases.

As Justice Ginsburg pointed out regarding the scope of review of trial courts’ determinations of the reasonableness of attorney’s fees, “Judges of our district courts are accustomed to making reasonableness determinations in a wide variety of contexts, and their assessments in such matters, in the event of an appeal, ordinarily qualify for highly respectful review.” *Gisbrecht v. Barnhart*, at 808.

The district court in this case properly exercised that broad discretion.

CONCLUSION

For the above reasons, the decision below should be affirmed.

Respectfully submitted,

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