

No. 08-970

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IN THE

**Supreme Court of the United States**

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SONNY PERDUE, Governor of the State of Georgia, *et al.*,

*Petitioners*

v.

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

*Respondents.*

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

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**BRIEF OF SMALL PRIVATE LAW FIRMS  
THAT RELY ON STATUTORY FEE AWARDS  
IN PUBLIC INTEREST LITIGATION  
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS**

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## INTEREST OF THE *AMICI CURIAE*

*Amici* are small private firms that represent plaintiffs in public interest or private attorney general litigation.<sup>1</sup> *Amici* are located and engage in such litigation throughout the nation, within seven of the United States Courts of Appeals. They litigate plaintiffs' claims under civil rights, civil liberties, employment, labor, benefits, education, fair housing, disability, consumer protection and environmental law. The litigation is often complex. Frequently it involves systemic reform of public and private institutions. Such institutional reform litigation typically generates no substantial damages or common fund.

Each of these *amici* and the many other such firms around the nation, rely on statutory fees awarded under more than 100 federal statutes to finance their firms. The disincentives that already reduce such fees below full market compensation in such cases have forced some of them to reduce their commitment to meritorious public interest cases in favor of other kinds of litigation in which they receive full market-driven compensation.

Often these *amici* partner with not-for-profit legal organizations and/or large law firms to prosecute their public interest lawsuits. This is especially true of their systemic institutional reform cases.

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<sup>1</sup> The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Several of these *amici* represent other lawyers and law firms in making statutory fee claims.

The *amici* directly included here are:

Andrus Anderson, LLP, located in San Francisco, California (Ninth Circuit).

Bonnett, Fairbourn, Friedman & Balint, P.C., located in Phoenix, Arizona (Ninth Circuit).

Law Offices of Matthew W. Dietz, P.L., located in Miami, Florida (Eleventh Circuit).

Diller Law firm, located in Wilkes-Barre, Pennsylvania (Third Circuit).

David Ferleger, located in Jenkintown, Pennsylvania (Third Circuit).

David M. Fish, located in New York, New York (Second Circuit).

Fox & Robertson, P.C., located in Denver, CO (Tenth Circuit).

Hadsell, Stormer, Keeny, Richardson & Renick, LLP, located in Pasadena, California (Ninth Circuit).

Peter Henner, located in Clarksville, New York (Second Circuit).

Killmer, Lane & Newman, LLP, located in Denver, Colorado (Tenth Circuit).

Miller O'Brien Cummins, PLLP, located  
in Minneapolis, Minnesota  
(Eighth Circuit).

Outten & Golden, LLP, located in New  
York, New York (Second Circuit).

Law Offices of Richard M. Pearl, located  
in Berkeley, California (Ninth Circuit).

Law Office of Beth Pepper, located in  
Baltimore, Maryland (Fourth Circuit).

Rosen, Bien & Galvan, LLP, located in  
San Francisco, California  
(Ninth Circuit).

Rosenthal & Greene, PC, located in  
Portland, Oregon (Ninth Circuit).

Rudy, Exelrod, Zieff & Lowe, LLP,  
located in San Francisco, California  
(Ninth Circuit).

Schneider, Wallace, Cottrell, Brayton,  
Konecky, located in San Francisco,  
California (Ninth Circuit).

Law Offices of Amitai Schwartz, located  
in Emeryville, California  
(Ninth Circuit).

## QUESTION PRESENTED

The Question Presented in this case is: Can an attorney's fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and results obtained.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' *amici* argue that lodestar awards never should be upwardly enhanced, except that the United States would allow for such enhancement when a case is extremely undesirable. Our brief, therefore, addresses the appropriateness of providing for upward enhancements in those few cases where the trial judge who decided the case, exercising sound discretion, has determined that such enhancement is appropriate.

The legislative history of Section 1988 makes clear that Congress intended for the courts to apply a private market for legal services based approach to determining reasonable attorney's fees.

Applying this Court's precedents, the district courts already make fee awards to prevailing plaintiffs that generally do not include compensation for much work for which clients pay fees for services in the private market. Thus, absent the possibility of upward enhancement, attorneys for prevailing civil rights plaintiffs almost invariably would be paid a "lodestar minus," namely less than the attorneys would be paid for comparable work in the private market for legal services.

Upward enhancement of the lodestar for unusually high quality of representation and outstanding results is entirely consistent with the market billing practices for fee paying clients in similarly complex federal litigation. A *per se* prohibition on upward adjustment to the lodestar flies in the face of the statute and Congressional purpose in enacting Section 1988.

The current prevalence of settlements in institutional reform litigation demonstrates that the potential for upwardly enhanced fee awards, which are seldom requested and seldom awarded, has not and will not inhibit settlement of institutional reform cases.

This Court should continue its long history of allowing the district courts to exercise their sound discretion, reviewed by the Courts of Appeals, to award upward enhancements in the statutory fees cases that warrant them.

## ARGUMENT

### I. THE LEGISLATIVE HISTORY OF SECTION 1988 MANDATES UPWARD ENHANCEMENTS OF STATUTORY FEE AWARDS

In enacting 42 U.S.C. § 1988 (“Section 1988”), Congress was concerned that “civil rights laws depend heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which [civil rights] laws contain.” S. Rep. No. 94-1011, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910;

H.R. Rep. No. 1558 (1976). Congress recognized that to attract “competent counsel,” attorney’s fees awarded under Section 1988 must 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. In other words, Congress was concerned that “[i]f federal fee-bearing litigation is less remunerative than private litigation, then the only attorneys who will take such cases will be underemployed lawyers—who likely will be less competent than the successful, busy lawyers who would shun federal fee-bearing litigation—and public interest lawyers, who, by any measure, are insufficiently numerous to handle all the cases for which other competent attorneys cannot be found.” Stanley M. Grossman, Comment, *Statutory Fee Shifting in Civil Rights Class Actions: Incentive or Liability?*, 39 Ariz. L. Rev. 587, 592 (1997); see also Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 Tex. L. Rev. 291, 309-310 (1990).

Congress explicitly identified the standards to be applied in determining a reasonable fee under Section 1988, endorsing the multi-factor market-based approach described in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), and “correctly applied” in *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). S. Rep. No. 94-1011 at 6; see also H. Rep. No. 94-1558, at 4 (citing *Johnson*).

In doing so, Congress “clearly defined the role that the marketplace should play in its fee-shifting scheme” by citing four cases where the judge “looked to the marketplace to establish a reasonable statutory fee and emphasized the need to place civil rights lawyers on a competitive footing with attorneys practicing in other complex but more traditional forms of practice.” Brand, *The Second Front in the Fight for Civil Rights*, 69 Tex. L. Rev. at 314-315.

Moreover, in citing to *Johnson*, Congress indirectly adopted the factors described in the American Bar Association’s (“ABA”) 1969 Model Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106 (1969), which *Johnson* relied on for its multi-factor approach. *See Johnson*, 488 F.2d at 719. Disciplinary Rule 2-106 was incorporated in substantially the same form into the current Model Rules of Professional Conduct, Rule 1.5 and has been adopted by every state with the exception of California (which adopted a similar 11 factor test in California Rule of Professional Conduct 4-200(b)). *See* ABA Website (summarizing state adoption of ABA Model Rules of Professional Conduct), *available at* [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html). Both the twelve factor test in *Johnson*<sup>2</sup> and the ABA factors<sup>3</sup> include criteria

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<sup>2</sup> The twelve factors cited in *Johnson* are: (1) the time and labor required; (2) the novelty and the difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of

used in the private market to make upward enhancements to attorney's fees.

Section 1988 and other public interest fees shifting statutes thus look to the private market for legal services that are billed and paid currently in making fee awards. To that end, this Court, for example, has mandated that the billing rates to be awarded to counsel for prevailing parties must be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). This Court also has directed that paralegal personnel's services are to be compensated on the basis of private market rates where consistent with the relevant market practice, not the cost based rates. *See Missouri v. Jenkins*, 491 U.S. 274, 286-88 (1989). And salaried attorneys working for non-profit organizations receive the same hourly rates they would receive if they were

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the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship; and (12) awards in similar cases. 488 F.2d at 717-19.

<sup>3</sup> The ABA Factors are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. ABA Model Rules of Professional Conduct, Rule 1.5(a).

working in private law firms. *See Blum*, 465 U.S. at 894-96.

As discussed below, absent the potential for upward enhancement, the lodestar amount inevitably leads to an award that reduces the amount of hours worked, *i.e.* “lodestar minus,” that is inconsistent with market practice. Prohibiting upward enhancement of the already reduced lodestar undermines the purposes of public interest fee shifting statutes. Such a prohibition almost invariably will lead to below market fee awards as compared to fees paid in equally complex federal litigation. “A fee award smaller than the basic lodestar would not pay for ‘all time reasonably expended,’ and could not, by definition, be ‘fully compensatory.’” Kyle R. Kravitz, Note, *Denying the Devil his Due: Contingency Fee Multipliers after City of Burlington v. Dague*, 38 Vill. L. Rev. 1661, 1685 (1993). The result is to put civil rights and other public interest or private attorney general plaintiffs at a competitive disadvantage in seeking counsel, a result that Congress forswore.

## II. LODESTAR AWARDS GENERALLY ARE BASED ON GREATER REDUCTIONS OF ACTUAL TIME INCURRED THAN THOSE MADE BY PRIVATE ATTORNEYS WHO BILL THEIR CLIENTS FEES FOR SERVICES

This Court has mandated that the starting point for determining a reasonable fee is the lodestar, which is the product of the “number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In practice, however, the

lodestar calculation has evolved to “emphasize[] reduction of the initial fee request in reasonableness analysis,” while limiting “the lower courts’ discretion to find pro-plaintiff, upward adjustments.” Layne Rouse, Note, *Battling for Attorneys’ Fees: The Subtle Influence of “Conservatism” in 42 U.S.C. § 1988*, 59 Baylor L. Rev. 973, 990-992 (2007). As a result, the process for determining a reasonable fee almost invariably includes a reduction of the time actually incurred. Without any potential upward enhancement, the resulting “lodestar minus” undermines Congress’ purpose in enacting Section 1988.

In presenting a fee request under Section 1988, and comparable public interest statutes, the fee applicant must exercise appropriate billing judgments to exclude time that is excessive or unnecessary. *Hensley*, 461 U.S. at 434 (applicant must “make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission”). This is precisely the type of billing judgment any competent private attorney exercises in presenting a bill to a private fees for services client. See WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* 90 (Carolina Academic Press 1996); see also JOHN W. TOOTHMAN & WILLIAM G. ROSS, *LEGAL FEES: LAW AND MANAGEMENT* 43-44 (Carolina Academic Press 2003); Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 Brandeis L.J. 199, 232-233 (2007); Kevin A. Kordana, Note, *Law Firms and Associate Careers: Tournament Theory Versus the Production-*

*Imperative Model*, 104 Yale L.J. 1907, 1915 (1995); Kevin Hopkins, *Law Firms, Technology, and The Double-Billing Dilemma*, 12 Geo. J. Legal Ethics 95, 98 (1988).

Indeed, “[b]illing partners have an ethical duty to discount wasted or unnecessary time by associates.” ROSS, *THE HONEST HOUR* at 90. Such billing judgment typically is accomplished through the billing attorney’s discrete reductions of time reflected on his or her pre-bill, as well as across-the-board percentage reductions to account for unnecessary time that is not specifically identified. *See, e.g., Hensley*, 461 U.S. at 434 (“In the private sector ‘billing judgment’ is an important factor in fee setting.”) (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (1980) (*en banc*)); TOOTHMAN AND ROSS, *LEGAL FEES* at 43-44 (Billing judgment “is most often accomplished by writing down the bill either line by line, which allows the client to understand the rationale for the write down and to confirm that the rationale was consistently applied, or as a lump sum at the foot of the bill.”).

Following counsel’s voluntary billing judgment reductions, the opposing party and the district court carefully scrutinize the fee application. To the extent that the attorney presenting a statutory fees claim to a district court fails adequately to reduce the requested fee, the district court will further reduce the lodestar. *See Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983) (“[T]he district court must carefully scrutinize the total number of hours reported to arrive at the number of hours that can reasonably be charged to the losing party, much as a senior partner

in a private firm would review the reports of subordinate attorneys when billing clients whose fee arrangement requires a detailed report of hours expended and work done.”); Alan Hirsch and Diane Sheehey, Federal Judicial Center, *Awarding Attorneys’ Fees and Managing Fee Litigation*, 26-27 (2005) (“[L]ower courts have reduced fee awards where there has been duplication of services; failure to pursue settlement prior to filing a straightforward suit; excessive total time billed considering the lack of difficulty of the case; excessive time billed for particular tasks; use of too many attorneys or too much conferencing; unnecessary work by a trial consultant deemed a ‘non-lawyer’ ...; publicity work; reading or reviewing of books not closely related to the case; performance of secretarial or clerical tasks by lawyers; and other assorted work deemed unnecessary.”) (internal citations omitted); *see also O’Connor v. Huard*, 117 F.3d 12, 18 (1st Cir. 1997) (affirming reduction of time “spent in excess of that reasonably required of a task, hours spent researching inapplicable areas of law, and hours inadequately explained or detailed”); *Trimper v. City of Norfolk*, 58 F.3d 68, 76 (4th Cir. 1995) (affirming reduction in hourly rate based on the relevant market and reduction to time based on excessive and unnecessary work); *Clarke v. Frank*, 960 F.2d 1146, 1153 (2d Cir. 1992) (upholding reduction for lack of difficulty/complexity); *Grendel’s Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984) (lack of “detailed contemporaneous time records” supports “a substantial reduction of any award or, in egregious cases, disallowance”).

Largely in contrast to the private market for service to fee paying clients, the federal statutory fee applicant also must exclude time spent on unsuccessful claims that do not share a common core of facts and law with the claims on which plaintiff has prevailed, or partially succeeded. *See Hensley*, 461 U.S. at 430-35. As a result, statutory fee applications often include significant voluntary reductions, both discrete and across-the-board, to the actual reasonable time incurred, exceeding the scope of billing judgment reductions exercised in presenting bills to fee paying clients. *See, e.g., Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053, 1055-56 (2d Cir. 1989) (25% voluntary reduction to a fee request to account for unrelated claims); *Popham v. Kennesaw*, 820 F.2d 1570, 1582 n.4 (11th Cir. 1987) (noting fee applicant's voluntary reduction for excessive time and limited success); *Case by Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1247 (10th Cir. 1998) (noting fee applicant had voluntarily reduced fee request by 5% to account for media related activities and an unsuccessful claim).

Moreover, except where the fee shifting statute specifically overrides 28 U.S.C. §§ 1821 and 1920, expert witness fees are not awarded as costs. *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991). “[E]xpert witness fees [often] form a large component of the total cost of litigation in the civil rights context.” Maria-Elena Cigarroa, *The Recoverability of Expert Witness Fees in Civil Rights Cases: The Post-Crawford Crisis*, 10 Rev. Litig. 185, 190 n.24 (1990) (collecting cases where expert witness fees constituted up to 47% of the attorney's fees, expenses, and costs). By *amici's* personal experience,

these unrecoverable expenses can amount to hundreds of thousands of dollars.

Defendants also have numerous tools to reduce plaintiffs' fees. *See City of Burlington v. Dague*, 505 U.S. 557 (1992) (no contingent risk multipliers); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (defendants can insist on fee waivers, including in non-damages cases); *Marek v. Chesney*, 473 U.S. 1 (1985) (Rule 68 offers, including lump sum monetary offers, can preclude fee claims); *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Res.*, 532 U.S. 598, 605 (2001) (attorney's fees may not be awarded for lawsuit that is "catalyst" prompting voluntary change in defendant's conduct; to recover attorney's fees there must be an "alteration in the legal relationships of the parties").

In addition to making discrete reductions, the district court is also permitted to exercise its discretion to reduce the fee award using across-the-board percentage reductions to the number of hours or final lodestar, particularly where it is faced with a voluminous fee request. *See e.g., Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1350 (11th Cir. 2008) (*per curiam*); *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008); *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983); *Daggett v. Kimmelman*, 811 F.2d 793, 797-98 (3d Cir. 1987); *Tomazzoli v. Sheedy*, 804 F.2d 93, 97-98 (7th Cir. 1986).

At the end of the day, the district court is armed with considerable, virtually unreviewable discretion to reduce the lodestar to be awarded. *Hensley*, 461 U.S. at 437 (deference is "appropriate

in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters").

In the instant case, for example, plaintiffs' counsel exercised billing judgment reduction before submitting their fee application. *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1273 (N.D. Ga. 2006). Based on its independent and careful review the district court then made an across-the-board fifteen percent reduction to the total number of non-travel related hours included in the initial lodestar to account for "vague and noncompensable" time entries, overstaffing, and excessive time spent on various pleadings, trial preparation, and witness reports. *Id.* at 1286-88. This reduction was affirmed by denial of Plaintiffs' cross appeal. *See Kenny A. v. Perdue*, 532 F.3d 1209, 1219 (11th Cir. 2008).

In total, the district court's across-the-board reduction to Plaintiffs' fee application reduced the lodestar amount from \$7,171,434.30 to \$6,012,802.90, a reduction of \$1,158,631.40. *Kenny A.*, 454 F. Supp. 2d at 1270, 1286. Such reductions are common in Section 1988 and other public interest cases. *See e.g., Hensley*, 461 U.S. at 438 n.13 (30% reduction to attorney's time); *Green v. Torres*, 361 F.3d 96, 97 (2d Cir. 2004) (*per curiam*) (affirming 20% across-the-board reduction for lack of success); *Harris v. Marhoefer*, 24 F.3d 16, 18-19 (9th Cir. 1994) (upholding 50% reduction for lack of success); *Jensen v. Clarke*, 94 F.3d 1191, 1203-04 (8th Cir. 1996) (affirming 10% reduction for lack of documentation and 15% for lack of success); *Foley v.*

*City of Lowell*, 948 F.2d 10, 18, 20 (1st Cir. 1991) (approving of 1/3 across-the-board reduction); *Spell v. McDaniel*, 824 F.2d 1380, 1403 n.17 (4th Cir. 1987) (approving of lodestar calculation that included 5% across-the-board reduction).

**III. UPWARD ENHANCEMENT IN APPROPRIATE CASES IS FULLY CONSISTENT WITH THE PRACTICES AND REALITIES OF THE PRIVATE MARKET FOR LEGAL SERVICES IN SIMILARLY COMPLEX FEDERAL LITIGATION**

**A. The Private Market Pays Enhanced Fees in the Form of “Premium Billing”**

Given the purposes of Section 1988 and similar statutes, precluding upward enhancement of lodestars is logically inconsistent with the decisions that mandate reduction of the lodestar beyond customary billing judgment reductions. As noted, in the private market, fees generally are not reduced for partial success, for work on lost claims, or by the cost of the clients’ expert witnesses. In addition, for example, attorneys and their clients in the private legal market sometimes enter into fee arrangements that provide for payment of an hourly rate with a bonus for a successful result. *See, e.g.*, Dianne K. Dailey, et al., *Alternative Billing Systems: Abandoning Time as a Measure of Value*, 27 The Brief 44 (1998) (describing “premium billing” used in “complex cases”: “When a good result is obtained for a client, the firm adds a surcharge to the amount initially determined by the firm’s hourly rate.”). This and similar practices are engaged in by many law firms that are included in the *American Lawyer* and

*National Law Journal's* lists of the largest firms in the nation.

Firms like those on the *American Lawyer* and *National Law Journal* lists of largest firms are major players in defining the billing practices within the markets for legal services in which they practice throughout the nation. Notably, law firms like these frequently partner with smaller firms such as *amici* and not-for-profit organizations to bring large institutional reform cases. See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. Rev. 1, 127-28 (2004) (noting institutional reform cases from across the country in which large law firms have partnered with public interest oriented legal organizations). The premium billing approach already embedded in the market should apply in Section 1988 fee matters equally to law firms large and small, for profit and not-for-profit. See *Blum*, 465 U.S. at 894-96.

Up to now this Court has tracked the practice of allowing such enhancements in some subset of cases in its statutory fees decisions. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (Upward adjustments to the lodestar are permissible in "certain 'rare' and 'exceptional' cases."); *Blum*, 465 U.S. at 897 ("[A]n enhanced award may be justified 'in some cases of exceptional success,' ... and there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high."); *Hensley*, 461 U.S. at 435 ("Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee ...

and indeed in some cases of exceptional success an enhanced award may be justified.”). There is no reason to preclude upward enhancement factors that pertain in the private market now.

**B. Upward Enhancements are Awarded in Many Other Types of Fee-Shifting Cases To Which Congress Sought Parity for Section 1988 Cases**

As noted, Congress intended that attorney’s fees awarded under Section 1988 should “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. Examination of market practices in federal litigation, including ERISA, securities, and antitrust cases similar in complexity to Section 1988 cases demonstrates that restricting district courts to the “lodestar minus” calculation fails to create parity for fee awards in Section 1988 civil rights and other public interest cases that do not yield large damage awards or common funds.

In these kinds of similarly complex cases where a common fund is recovered, most courts allow, and some require, that a percentage of the common fund be awarded as attorney’s fees. *See, e.g., Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (requiring percentage approach); *Camden I Condo. Ass’n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (requiring percentage approach); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991) (permitting the percentage approach). In these common fund cases, the district

court uses its familiarity with the case to determine a reasonable percentage of the common fund to award as attorney's fees. The percentage awarded varies widely, but generally ranges between twenty-five and thirty percent of the fund. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.121 (2004).

Some Circuits have “encourage[d] the practice of requiring documentation of hours as a ‘cross check’ on the reasonableness of the requested percentage.” *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (citation omitted). These “cross checks” demonstrate how an exclusively “lodestar minus” calculation undermines Congress’s goal of ensuring that civil rights attorneys are compensated under the same standards as attorneys in other complex federal litigation. For example, the lodestar cross-check uniformly allows for a multiplier. Courts have routinely recognized that where a lodestar analysis is employed to calculate attorney’s fees or is used to “cross check” a percentage of recovery calculation, counsel may be entitled to a multiplier to the lodestar calculation. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.122 (2004) (“The lodestar is ... useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate, using affidavits and other information provided by the fee applicant. The total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases.”); 4 NEWBERG ON CLASS ACTIONS § 14.6 (4th ed. 2009) (“multiples ranging from one to four are frequently

awarded in common fund cases when the lodestar method is applied.”).

In order to be comparable to private market fees for similarly complex litigation, federal statutory fee awards must include a potential for enhancement in extraordinary circumstances. And such enhancements must be permitted on more bases than the simple undesirability of the case at hand. *Contra* Brief for the United States as *Amicus Curiae* Supporting Petitioners at 30-31 (allowing that “enhancements may be necessary where ... the client or case is so unpopular or otherwise controversial that the attorney suffers professional or financial damage from the representation.”).

In particular, enhancement of attorney’s fees awards under section 1988 and similar statutes should not turn solely on whether sufficient damages or common funds are awarded to the plaintiffs. The value to society, for example, of institutional or systemic reform cases that do not generate damages or common funds surely is as great as those that do. *See* S. Rep. No. 94-1011, at 6 (fees awarded under Section 1988 should be comparable to antitrust cases and should “not be reduced because the rights involved may be nonpecuniary in nature.”); Bernard T. Shen, Comment, *From Jail Cell to Cellular Communication: Should the Rufo Standard Be Applied to Antitrust and Commercial Consent Decrees?*, 90 *Nw. U.L. Rev.* 1781, 1829 (1996) (“Our society places greater value and importance in fundamental rights, which are usually implicated in institutional reform decrees, than the pecuniary

interests involved in antitrust and commercial decrees.”).

**IV. UPWARD ENHANCEMENTS, WHICH ARE RARELY SOUGHT OR AWARDED, CREATE NO BARRIER TO SETTLEMENT OF INSTITUTIONAL REFORM LITIGATION**

**A. Upward Enhancements are Rarely Sought and Rarely Awarded**

Without citation, *amici* for Petitioners argue that continuing to allow for the possibility of enhancement under any basis will lead to extensive and burdensome fees litigation. *See* Brief for Ass’n County Comm’rs of Georgia as *Amicus Curiae* in Support of Petitioners at 16-18; Brief of Alabama, *et. al.* as *Amici Curiae* in Support of Petitioners at 16-18.<sup>4</sup>

Petitioners’ *amici* conveniently overlook the fact that many states permit upward enhancements of public interest attorney’s fees, often based on more criteria than presently permitted under federal law.

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<sup>4</sup> The only citation in support of this proposition is located in the Washington Legal Foundation’s brief. *See* Brief for Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners at 16-17 n.6. That citation refers to the declarations in support of Respondents’ motion for attorneys’ fees filed in the district court, and asserts that the Ralph Knowles declaration suggests that the “lower federal courts have routinely been granting lodestar enhancements to plaintiffs who successfully challenge the adequacy of government-run foster care systems.” *Id.* However, Mr. Knowles’ declaration discusses only multipliers awarded to “[s]uccessful class counsel in securities, antitrust, products liability, toxic torts, and consumer law class or mass actions brought under Rule 23.” *Jt. Append.* at 66-67.

See Michael Kao, Comment, *Calculating Lawyers' Fees: Theory and Reality*, 51 UCLA L. Rev. 825, 834-35 (2004). District courts perform apply these criteria in awarding fees under such state statutes. See *id.*; see also Section III.B, *supra* (enhancement decisions made in common fund cases).

The argument for a *per se* prohibition of upward enhancement ignores two additional important facts. First, for more than 30 years, prevailing plaintiffs have been permitted to seek enhancements to the lodestar amount in exceptional cases. See *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 565 (“upward adjustments of the lodestar figure are still permissible”); *Blum*, 465 U.S. at 899 (quality of representation “may justify an upward adjustment”); *Guam Soc’y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 697 (9th Cir. 1996) (rejecting argument that multiplier could never be applied after *Dague* and affirming a multiplier based on “the extreme undesirability of the case, the likelihood that no other attorney on island would have accepted the case, and the rare and exceptional nature of the case, particularly in the small island community of Guam”) (quoting district court). Even the United States agrees that a multiplier is appropriate in cases of an undesirable or unpopular client. Brief for the United States as *Amicus Curiae* Supporting Petitioners at 30.

Second, enhancements rarely are sought or granted. One study found that only one out of sixteen prevailing plaintiffs in civil rights cases terminated in federal court in California during 2000 and 2001 sought a multiplier. Kao, *Calculating Lawyers'*

*Fees*, 51 UCLA L. Rev. at 840 n.119. The court in the one case in which a multiplier was requested declined to grant one. *Id.* at 840. Even in California, which allows for multipliers on more bases (including contingent risk) than under federal law, only four out of thirteen prevailing plaintiffs in civil rights cases sought a multiplier during the same period. *Id.* at 840 n.119. The California courts awarded a multiplier in only two of those cases. *Id.* at 840.

**B. The Minimal Risk of Enhanced Attorney’s Fee Awards does not Threaten the Potential for Settlement of Institutional Reform Litigation**

Petitioner and Petitioners’ *amici* without evidence assert that allowing for enhancement of fees will “discourage broad-based settlements” of disputed claims. Defendants-Petitioner’s Brief on the Merits, June 22, 2009, at 14, 47-51; *see* Brief for National School Board Assoc. as *Amicus Curiae* in Support of Petitioner at 8-12; Brief of Alabama, *et. al.* as *Amici Curiae* in Support of Petitioners at 14-16; Brief for National Governors Assoc., *et. al.* as *Amici Curiae* at 3-7. This argument underestimates the many incentives to settlement of institutional reform cases.

While comprehensive statistics on consent decrees in institutional reform cases are not available, “commentators across the political spectrum agree that institutional reform consent decrees are prevalent.” Gerald N. Rosenberg, *The Politics of Consent: Party Incentives in Institutional Reform in Consent Decrees*, in CONSENT AND ITS DISCONTENTS: POLICY ISSUES IN CONSENT DECREES, 14 (Andrew Rachlin ed., 2006) [hereinafter *Politics of*

*Consent*], available at <http://www.princeton.edu/prior/publications/docs/consent.pdf>. For example, in 2003, consent decrees were in place in “prisons in 41 states and local jails in 50 states.” *Id.* at 15 (citing ROSS SANDLER AND DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT*, 4 (Yale Univ. Press 2003)). And a study in 2000 found that more than 600 school districts were under consent decrees. *Politics of Consent* at 15. Further, as of 2008, the U.S. Department of Justice’s Civil Rights Division was monitoring “the implementation of consent decrees, settlement agreements, memoranda of understanding, and court orders involving 101 facilities.” U.S. Department of Justice, *ACTIVITIES UNDER THE CIVIL RIGHTS OF INSTITUTIONAL PERSONS ACT FISCAL YEAR 2008*, at 2-3 (2009), available at [http://www.usdoj.gov/crt/split/documents/split\\_cripa08.pdf](http://www.usdoj.gov/crt/split/documents/split_cripa08.pdf).

Incentives for settlement of institutional reform cases are complex and numerous. *See Politics of Consent*; see also *Pierce v. Underwood*, 487 U.S. 552, 568 (1988) (noting that other factors such as a change in administration could lead to settlement); Brief for Alabama, *et. al.* as *Amici Curiae* in Support of Petitioners at 14 (acknowledging that settlement can be a win-win situation). In *Politics of Consent*, at least nine factors<sup>5</sup> were identified, which inter-

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<sup>5</sup> These factors include: (1) institutional defendants’ desire to “overcom[e] problems and correct[] mistakes;” (2) efficiency (savings in time and money); (3) the lack of a judicial determination of liability; (4) flexibility of consent decrees in fashioning a remedy; (5) “blame avoidance” and “credit claiming;” (6) protection from political reaction; (7) an excuse for

act to incent Defendants to settle institutional reform cases. *Politics of Consent* at 23-29. Of the factors identified, only one, efficiency, is directly implicated by the amount of attorney's fees awarded to prevailing plaintiffs. *Id.* at 24 (Settlement in institutional reform litigation saves "time and money" for both plaintiffs and defendants in institutional reform cases, "[d]evoting resources to fighting institutional reform litigation in cases where there is some risk of losing, is hard to defend.").

In the instant case the "State Defendants 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" before entering into a consent agreement. *Kenny A.*, 454 F. Supp. 2d at 1266. Petitioners' strategy "undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." *Id.* If the defendants had been concerned about the risk of a large fee award, why did they string out the litigation? Surely it would have been cheaper in every way had they made a reasonable settlement at an earlier stage of the litigation.

Moreover, plaintiffs' Section 1988 attorney's fees generally comprise only a small fraction of the cost of the reform provided for by the consent decree. For example, in the instant case, the benefit conferred to the Plaintiff class was estimated to be

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inaction; and (8) collusion and buck-passing; and (9) leveraging resources to support institutions outside the normal political process. *Politics of Consent* at 23-29.

\$168 million.<sup>6</sup> *See* Plaintiffs’ Brief in Support of Award of Attorneys’ Fees and Expenses of Litigation, D. Ct. Docket No. 495 at 4. The total fee awarded, including the enhancement, represents approximately six percent of the value of the benefit conferred to the class. The enhancement is worth less than three percent of the value conferred. Since enhancements in institutional reform cases are rarely sought and rarely awarded, it is difficult to imagine that the remote possibility of enhancement, which represents such a small fraction of the overall cost of resolving the case, would prevent settlement.

**C. The District Courts’ Exercise of Sound Discretion and Appellate Courts’ Review More than Adequately Protect Against Undue Upward Enhancements**

Any fear of undue upward enhancements is alleviated by the requirement that the district courts provide a “concise but clear explanation for its reasons for the fee award,” which similarly protects against unwarranted downward adjustments. *Hensley*, 461 U.S. at 437. The appellate courts, armed with the clear and concise explanation, are then able to review each award to ensure it applies appropriate criteria in the context of the case. *See, e.g., Robinson v. Equifax Info. Servs., LLC*, 560 F.3d

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<sup>6</sup> Without providing an alternative calculation, in the district court, Petitioner disputed Respondent’s valuation of the benefit achieved on behalf of the plaintiff class. State Defendants’ Brief in Opposition to Plaintiffs’ Application for Award of Attorneys’ Fees and Expenses of Litigation, D. Ct. Docket No. 510 at 11-12. However, even if Respondent’s valuation is cut in half, the enhancement awarded represents only 5% of the undoubtedly underestimated value of the benefit.

235, 243 (4th Cir. 2009) (“[B]ecause a district court has close and intimate knowledge of the efforts expended and the value of the services rendered, the fee award must not be overturned unless it is clearly wrong.”) (internal citation omitted).

District courts around the country regularly deny upward enhancement of lodestars and the Courts of Appeals regularly affirm these denials. *See e.g., Donlin v. Philips Lighting N. Am. Corp.*, 564 F.3d 207, 225 (3d Cir. 2009) (affirming denial of request for multiplier based on result under 42 U.S.C. § 2000e); *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 621-22 (6th Cir. 2007) (affirming denial of enhancement for exceptional success under False Claims Act, 31 U.S.C. § 3730(d)); *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 803 (5th Cir. 2006) (affirming denial of multiplier based on novelty, skill, preclusion of alternative employment, and undesirability under Fair Labor Standards Act, 29 U.S.C. § 216(b)); *Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994) (refusing to remand for reconsideration of enhancement for success).

Having overseen the litigation, the district court enjoys a “superior understanding of the litigation.” *Hensley*, 461 U.S. at 437. In short, it is “intimately familiar with the parties, the attorneys, and the complete course of the litigation.” *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1207 (10th Cir. 2008); *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 246 (3d Cir. 2007) (“District Judge presided over this massive case for over 4 years and was intimately familiar with its complexity, the lawyers involved, and the amount of work required

to prosecute it.”). In addition, each district court possesses superior familiarity with the actual practices in the private market in its forum, in which civil rights plaintiffs will be competing for competent counsel. This includes, at the most basic level, familiarity with the prevailing hourly rates on which the lodestar is based. *See Blum*, 465 U.S. at 895 n.11 (district court must assess the applicant’s evidence “that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation”). In short, the district court’s “superior understanding” positions it to assess equally whether downward or upward enhancement is appropriate.

Here the district court’s familiarity with the case and local market practices caused it to reduce the claimed lodestar by fifteen percent. *Kenny A.*, 454 F. Supp. 2d at 1286-88. At the same time, its familiarity with the case and its forum caused it to find that a 1.75 multiplier should be awarded because:

[P]laintiffs’ counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed in any other case during its 27 years on the bench.

...

[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.

*Kenny A.*, 454 F. Supp. 2d at 1289-90.

In other words, the district court rendered a concise but clear opinion, which then received appropriate appellate review by the Court of Appeals.<sup>7</sup> It follows that in this case, the Court should allow consideration of the superior performance and results factors in upward enhancement of the lodestar.

## CONCLUSION

Under Section 1988 and similar public interest federal statutes, attorney’s fees awards are governed “by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and [must] not be reduced because the rights involved may be nonpecuniary in nature.” S. Rep. No. 94-1011 at 6. A strict lodestar calculation essentially allowing only for reductions to the number of hours or rate claimed does not properly apply this standard, nor does it correctly reflect the practices in the private market for legal

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<sup>7</sup> Courts of Appeals, including the Eleventh Circuit, are not loath to vacate upward enhancements when it determines that a district court misapplied legal criteria. *See e.g., Gray v. Bostic*, 570 F.3d 1321 (11th Cir. 2009) (remanding fee award that included an enhanced lodestar amount for delay in payment of fees); *Hendrickson v. Branstad*, 934 F.2d 158, 163 (8th Cir. 1991) (reversing district court award of 25% enhancement for, *inter alia*, exceptional results and performance).

services in comparable matters as Congress intended. Moreover, the largely remote possibility of enhancements and the rare instances in which they are granted (resting in the sound discretion of the district court subject to appropriate review by the Courts of Appeals) do not inhibit settlement of large institutional reform cases. The public interest in encouraging competent attorneys to take on civil rights suits is too great to further disincentivize representation.

Respectfully submitted,

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August 26, 2009