

No. 08-970

In The
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

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, or are these factors already included in the lodestar calculation?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is under review is as follows:

Defendants-Appellants and Petitioners: Sonny Perdue, in his official capacity as Governor of the State of Georgia; Georgia Department of Human Resources; B.J. Walker, in her official capacity as Commissioner of the Georgia Department of Human Resources; Fulton County Department of Family and Children Services; Dannette Smith, in her official capacity as Director of the Fulton County Department of Family and Children Services; DeKalb County Department of Family and Children Services; and Walker E. Solomon, II, in his official capacity as Director of the DeKalb County Department of Family and Children Services.

Plaintiffs-Appellees and Respondents: Kenny A., by his next friend Linda Winn; Kara B., by her next friend Linda Pace; Maya C., by her next friend Linda Pace; Phelicia D., by her next friend Theresa Roth; Sabrina E., by her next friend, Rebecca Silvey; Korrina E., by her next friend Rebecca Silvey; Tanya F., by her next friend Carol Huff; Priscilla G., by her next friend Roslyn M. Satchel; and Briana H., by her next friend Linda Pace, on their own behalf and on behalf of all others similarly situated.

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BRIEF FOR PETITIONERS

Governor Sonny Perdue and the other Petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit which affirmed the District Court's award of a \$4,509,602.18 enhancement to the lodestar amount of \$6,012,802.90 awarded as attorney's fees to Respondents.



OPINIONS BELOW

The fees opinion and order of the United States District Court for the Northern District of Georgia, dated October 3, 2006, is officially reported at 454 F. Supp. 2d 1260 (N.D. Ga. 2006). (Pet. App. at 94-172.)¹

The panel opinion of the United States Court of Appeals for the Eleventh Circuit, dated July 3, 2008, is officially reported at 532 F.3d 1209 (11th Cir. 2008). (Pet. App. at 1-93.)

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit denying further review, including the dissents thereto, dated November 5, 2008, is officially reported at 547 F.3d 1319 (11th Cir. 2008). (Pet. App. at 173-223.)



¹ "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari, which was filed on January 29, 2009.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on July 3, 2008. (Pet. App. at 1-93.) The order denying rehearing *en banc* was entered on November 5, 2008. (Pet. App. at 173-223.) The Petition for a Writ of Certiorari was filed on January 29, 2009, and granted as to Question 1 presented by the petition on April 6, 2009. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).



STATUTORY PROVISION INVOLVED

The relevant statutory provision involved is 42 U.S.C. § 1988(b), which states as follows:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be

held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.



STATEMENT OF THE CASE

On June 16, 2002, a class action complaint originally filed by Plaintiffs in the Superior Court of Fulton County, Georgia, was removed to the United States District Court for the Northern District of Georgia. (Dkt. 1.) The complaint, filed on behalf of 3,000 foster children against numerous State of Georgia officials, alleged both constitutional and statutory violations and sought injunctive relief to alter the State's administration of its foster care system in Fulton and DeKalb Counties, two counties in metropolitan Atlanta.² Plaintiffs were represented by attorneys from Children's Rights, Inc. ("CRI"), a self-described "national advocacy group working to reform failing child welfare systems on behalf of hundreds of thousands of abused and neglected children who depend on them for protection and care," <http://www.childrensrights.org/about/mission-and-methods> (last visited June 16, 2009), and the Atlanta law firm of Bondurant, Mixson & Elmore LLP. (Dkt. 1.)

² Plaintiffs also sued Fulton and DeKalb Counties for the alleged failure to provide foster children with adequate and effective legal representation. (Dkt. 1.) Those allegations were litigated between Plaintiffs and those counties separately and are not part of this appeal.

According to Plaintiffs' counsel's billing records, time-keepers spent more than 1,600 hours on pre-suit investigation and drafting the complaint and mandatory disclosures, even though CRI had filed numerous other complaints against state-run foster care systems prior to the Georgia litigation. (Dkt. 495-506); see <http://www.childrensrights.org/reform-campaigns/legal-cases> (last visited June 16, 2009).

The first stage of the litigation concerned Plaintiffs' efforts to enjoin the operation of two emergency children's shelters in Fulton and DeKalb Counties. Following a short period of expedited discovery, Plaintiffs filed a motion for preliminary injunction, and the District Court conducted a four-day hearing on the motion in November 2002. (Dkt. 50, 104, 108, 109, 110.) Although the District Court found some deficiencies in the operation of the shelters, it denied Plaintiffs' motion to enjoin the shelters' operation based on the State's representation that the shelters would be closed within a period of months and children would be sent to alternative emergency placements. (Dkt. 126.) That action in fact occurred, mooting Plaintiffs' claims with respect to the shelters. (Dkt. 157 & 160.) The billing records of Plaintiffs' counsel state that they expended nearly 1,800 hours preparing and litigating this preliminary injunction motion. (Dkt. 495-506.)

The litigation next proceeded into a period of discovery through February 2004 on the remainder of

the claims contained in the complaint.³ Plaintiffs' counsel's billing records reveal more than 16,000 hours expended on document production and analysis, preparing witnesses for and taking depositions, working on discovery motions, intra- and inter-office conferences, and preparing expert witnesses and reports during this time period. (Dkt. 495-506.)

Following the close of discovery, the State filed a motion for summary judgment, which was denied by the District Court. (Dkt. 243 & 410.) Plaintiffs' billing records show that fifteen separate timekeepers spent 1,721 hours preparing Plaintiffs' response to the State's motion for summary judgment, which was filed 45 days after the State's motion. (Dkt. 261, 495-506.)

A trial date was originally set for January 2005, but the District Court referred the case to mediation after the court's efforts to encourage the parties to settle the case on their own failed. (Dkt. 363, 364, 366, 380, 390.) To facilitate mediation, the District Court ultimately postponed the date for the trial on the merits indefinitely. (Dkt. 425 & 427.) Mediation proceeded over the course of four months, resulting in a consent decree approved by the District Court on October 27, 2005, which contained a comprehensive

³ The State filed a motion to dismiss, which was denied in substantial part by the District Court, and opposed Plaintiffs' motion for class certification, which was granted by the District Court. *Kenny A. v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003) (Dkt. 193).

agreement on all pending issues except the amount of attorney's fees and expenses to award to Plaintiffs as prevailing parties pursuant to 42 U.S.C. § 1988. (Dkt. 486 & 488.) Plaintiffs' counsel spent more than 2,100 hours working on mediation and settlement, 1,150 hours working on pretrial matters, and an additional 2,125 hours preparing for a trial that never took place. (Dkt. 495-506.)

On December 9, 2005, Plaintiffs' counsel filed their application for an award of attorney's fees and expenses, claiming that thirty-eight separate time-keepers expended nearly 30,000 hours on the case⁴ and seeking recovery of attorney's fees at their then-current hourly rates, which ranged from a high of

⁴ Given that the case was filed in June 2002 and a Consent Decree was entered in October 2005, the 30,000 hours of attorney and paralegal time expended in this case equates to one person working on this matter on behalf of Plaintiffs for more than 24 hours per day, every day, weekends and holidays included, for three-and-one-third years. *See, e.g., Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1281 (N.D. Ga. 2006) (“[T]he number of hours expended was unreasonable. One need only consider the fact that 1,720 hours is the equivalent of one attorney working full time for nearly an entire year to conclude that no response to a motion for summary judgment justifies such an expenditure of time.”); *id.* at 1277 (“At the same time, based on its experience in other complex, document intensive cases, the Court finds that more than 7,100 hours expended on document review, and analysis over the two-and-one-half years between the filing of the complaint and the commencement of mediation is unreasonable. That is the equivalent of more than one full-time employee reviewing and analyzing documents continuously for that entire time period.”).

\$495 to a low of \$215. (Dkt. 495.) This resulted in a purported lodestar (hours expended multiplied by hourly rate) of \$7,171,434.30, but Plaintiffs requested that the court grant them an enhancement of twice that purported lodestar, for a total fee award of \$14,342,868.60. (Dkt. 495.) The State opposed the application, asserting in part that the lodestar should be reduced due to excessive hours and that the enhancement was not authorized based on the existing precedent of this Court. (Dkt. 510.)

The District Court, after finding that many of Plaintiffs' counsel's entries were "vague," "noncompensable," "excessive," and "unreasonable," reduced Plaintiffs' lodestar through a 15% percent across-the-board reduction in hours claimed, resulting in a monetary reduction of more than \$1 million (\$6,012,802.90 awarded, as compared to \$7,171,434.30 requested by Plaintiffs). *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1274-77, 1279-81, 1283, 1286 (N.D. Ga. 2006). However, even after recognizing that "most of the factors relevant to calculating a reasonable fee are already reflected in the lodestar amount" and should not serve as grounds for increasing the lodestar, the District Court nevertheless adjusted the lodestar upward by a 1.75 multiplier, for a total fee award of \$10,522,405.08. *Id.* at 1288, 1290.

The District Court justified its \$4.5 million enhancement to the lodestar on three grounds. First, the District Court concluded that the quality of service 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,” even though the rates, which ranged from \$215 to \$495 per hour, were “consistent with the prevailing market rates in Atlanta for comparable work” and were the rates that Plaintiffs’ counsel submitted in their application. *Id.* at 1285, 1288. This conclusion was supported, according to the District Court, because: (1) class counsel were required to advance expenses of \$1.7 million over a three-year period, (2) class counsel were not paid on an ongoing basis while the work was being performed, and (3) class counsel’s ability to recover fees was contingent on the outcome of the case. *Id.* at 1288.

Second, the District Court found that the “superb quality” of class counsel’s representation “far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar.” *Id.* at 1288-89. In the District Court’s view, Plaintiffs’ counsel “brought a higher degree of skill, commitment, dedication, and professionalism” to the litigation than the District Court had observed “in any other case during its 27 years on the bench.” *Id.* at 1289.

Third, the District Court viewed Plaintiffs’ success, achieved only by the State’s agreement to settle the case through a consent decree following court-ordered mediation, as “truly exceptional” and providing “sweeping relief to the plaintiff class.” *Id.* The District Court observed that “[a]fter 58 years as a practicing attorney and federal judge, the 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.

A panel of the Court of Appeals for the Eleventh Circuit affirmed the decision of the District Court. *Kenny A. v. Perdue*, 532 F.3d 1209 (11th Cir. 2008). In recognizing this Court’s decisions “that bend[] decidedly against enhancements” of the lodestar, one of the panel members, Judge Carnes, concluded that “[t]he district court’s \$4.5 million enhancement to the \$6 million lodestar figure in the present case cannot be squared with the Supreme Court decisions.” *Id.* at 1221, 1225 (Carnes, J., concurring). According to Judge Carnes, none of the factors upon which the District Court relied (quality of service, contingency, and results obtained) justified the boosting of the attorney’s fee award. *Id.* at 1225-31.

Nevertheless, the panel as a whole concluded that it was “not free to decide the enhancement issue” based on the Eleventh Circuit’s earlier decisions in *NAACP v. Evergreen*, 812 F.2d 1332 (11th Cir. 1987), and *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292 (11th Cir. 1988), both of which “were issued after the Supreme Court last spoke on the subject of enhancements for quality of representation and superior results, which was in the *Delaware Valley I* case.” *Kenny A.*, 532 F.3d at 1236-37. In *NAACP* and *Norman*, the Eleventh Circuit vacated district court orders denying enhancements for superior results and issued remand instructions which left open the possibility that superior results coupled with

superior performance could serve as the basis for an enhancement to the lodestar. *See NAACP*, 812 F.2d at 1336-37; *Norman*, 836 F.2d at 1302, 1306. Judge Carnes concluded that the panel was bound to follow *NAACP* and *Norman* based on the prior panel precedent rule, notwithstanding his conclusion that those holdings were wrong and conflicted with this Court's relevant precedents.⁵ *Kenny A.*, 532 F.3d at 1238 (Carnes, J., concurring). Judge Carnes concluded by stating:

Of course, this Court sitting *en banc*, or the Supreme Court, can overrule any prior decisions of this Court. Unless and until this Court does overrule *NAACP* and *Norman*, we are constrained to let stand the \$4,500,000 enhancement to the lodestar amount that is included in the district court's judgment in this case.

Id. at 1242.

⁵ Judge Wilson agreed that the panel was bound by the prior panel precedents of *NAACP* and *Norman*, but believed that those precedents correctly held that enhancements of the lodestar amount should be permitted for results obtained and quality of representation. *Kenny A.*, 532 F.3d at 1242 (Wilson, J., concurring). Judge Hill also agreed that the panel was bound by these prior panel precedents and expressed his view that the opinions of Judges Carnes and Wilson were scholarly and "will be of interest to jurists who might wish to pursue the matter in further proceedings, should any arise." *Id.* at 1251 (Hill, J., concurring).

The subsequent petition for rehearing *en banc* was denied by a 9-3 vote. *Kenny A. v. Perdue*, 547 F.3d 1319 (11th Cir. 2008). Judge Carnes, joined by Judges Tjoflat and Dubina, authored a dissent from the denial of rehearing *en banc* for “the first time in sixteen years on the bench,” opining that this was “an important question of federal law that has not been, but should be, settled by [the Supreme] Court.” *Id.* at 1331 (Carnes, J., dissenting from the denial of rehearing *en banc*) (citing Sup. Ct. R. 10(c)). Judge Carnes stated that the question of “whether a district court can [] increase the award beyond that reasonable amount [reflected in the lodestar] based on its finding that the attorney’s performance was of superior quality and the results achieved were exceptional” is one that affects “at least one hundred federal fee-shifting statutes that allow the prevailing party to recover a reasonable attorney’s fee from the losing party.” *Id.* at 1331-32, 1337-39. Judge Carnes summed up the critical importance of this appeal as follows:

The record in this case and the facts and findings drawn from it present this important, unresolved issue as well as any case will and better than almost any other case can. It presents an opportunity for the Supreme Court to reach the issue it could not reach in *Blum* and *Delaware Valley*: Under the federal fee-shifting statutes can a reasonable attorney’s fee be enhanced based on extraordinary effort or results where some evidence and findings support the

enhancement, or are all of the factors that lead to the quality of the performance and the results obtained already covered in the lodestar calculation, as the opinions in *Delaware Valley* and *Dague* imply?

Id. at 1337.

Judge Tjoflat authored a separate dissent from the denial of rehearing *en banc*, reasoning in part that “it can never be appropriate to enhance the attorney’s fees in a case seeking injunctive relief on the basis of ‘exceptional’ or ‘superior’ results.” *Id.* at 1330 (Tjoflat, J., dissenting from the denial of rehearing *en banc*). Judge Tjoflat concluded, “I believe that a lodestar hourly rate that is already at the top of the relevant market is simply ineligible for an additional enhancement.” *Id.* at 1330-31. Judge Tjoflat also criticized the enhancement based on the district judge’s comparison to other cases over which he had presided as either testimony given *ex parte* and without notice to the State or judicial notice “no less troubling.” *Id.* at 1325-27 & n.7.



SUMMARY OF THE ARGUMENT

The statute involved in this case, 42 U.S.C. § 1988, provides that a “reasonable attorney’s fee” may be awarded to the prevailing party in certain civil rights actions, including cases brought pursuant to 42 U.S.C. § 1983, like the case at bar. The question presented is whether, after calculating the lodestar –

the reasonable number of hours worked on the case multiplied by reasonable hourly rates that reflect the skill and experience of the timekeepers – a district court then can award an enhancement that allows recovery of additional attorney’s fees based on results obtained from the litigation or quality of representation.

This Court should definitively hold that lodestar enhancements based on results obtained or quality of representation are never permitted in cases in which “a reasonable attorney’s fee” is sought pursuant to 42 U.S.C. § 1988. Neither the plain statutory language nor the legislative history permits any type of enhancement to an attorney’s fee award. In fact, awarding an enhancement on top of the lodestar amount would contradict the plain language of the statute and run counter to Congress’ stated intent of avoiding windfalls to attorneys who act as private attorneys general. This Court’s prior decisions regarding attorney’s fee awards under fee-shifting statutes – *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984); and *Hensley v. Eckerhart*, 461 U.S. 424 (1983) – support a conclusion that results obtained and quality of representation are already subsumed in the twelve “*Johnson* factors” that are used to analyze the reasonableness of an attorney’s fee award and therefore should not be used again to enhance the award after it is determined to be reasonable.

Specifically, an enhancement to the lodestar for results obtained would go beyond the fee-shifting statute's purpose of making the plaintiff's counsel whole for vindicating a civil right, discourage broad-based settlements of disputed claims, and give unbridled discretion to district judges to multiply an already reasonable attorney's fee based on a subjective determination that the remedy obtained was somehow more extraordinary than anticipated. Likewise, an enhancement based on quality of representation runs counter to an attorney's pre-existing duty to provide the best possible service to his or her client, disregards the fact that any increased difficulty in representing the client will be reflected in increased hours billed, and ignores the fact that any special skill exhibited by an attorney will be reflected in that attorney's hourly rate. An enhancement for quality of representation is particularly inappropriate where, as in this case, a large number of hours are eliminated from the lodestar as excessive.

In this case, the District Court's application of an indiscriminate multiplier to a fee award based on what the court deemed "excellent" or "exceptional" results and quality of legal representation is entirely inconsistent with the plain language of 42 U.S.C. § 1988, the corresponding legislative history, and this Court's precedent. Accordingly, this Court should reverse the decision of the Court of Appeals for the Eleventh Circuit, which upheld the District Court's

\$4.5 million enhancement to the lodestar based on results obtained and quality of representation.

ARGUMENT

The guiding principle of this Court’s jurisprudence for determining a reasonable attorney’s fee award to a prevailing party pursuant to a federal fee-shifting statute is that a district court must calculate the “lodestar” amount by multiplying the reasonable number of hours worked by attorneys and other appropriate timekeepers on the case by reasonable hourly rates that reflect the skill and experience of the individuals for whom the fee recovery is sought.⁶

⁶ Although the only fee-shifting statute applicable in this case is 42 U.S.C. § 1988, this Court has stated that the standards for the shifting of attorney’s fees pursuant to federal statutes “are generally applicable in all cases in which Congress has authorized an award of fees to a ‘prevailing party.’” *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); accord *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001); see also *Dague*, 505 U.S. at 562 (stating in a case involving the Solid Waste Disposal Act § 7002(e), 42 U.S.C. § 6972(e), and the Clean Water Act § 505(d), 33 U.S.C. § 1365(d), that the language of these statutes is “similar to that of many other federal fee-shifting statutes; our case law construing what is a ‘reasonable’ fee applies uniformly to all of them”) (citing *inter alia* 42 U.S.C. § 1988); *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 483 U.S. 711, 713 (1987) (“*Delaware Valley II*”) (“Last Term in [*Delaware Valley I*], we agreed with the Court of Appeals that in awarding attorney’s fees under § 304(d) [of the Clean Air Act, 42 U.S.C. § 7604(d)] the courts should follow the principles and case law

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See *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) (“[T]he ‘lodestar’ figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence.”), quoted in *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002); *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 563 (1986) (“*Delaware Valley I*”); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The question presented in this case is whether, after making the lodestar calculation of reasonable hours multiplied by reasonable rates, a district court can then increase the lodestar by an enhancement that allows recovery of additional attorney’s fees based on (1) results obtained from the litigation or (2) quality of representation.

Results obtained and quality of representation are factors that are subsumed in the lodestar calculation and reflected in the reasonable number of hours worked (which necessarily reflects the difficulty of the case) and a reasonable hourly rate (which reflects the attorney’s skill and experience). Consequently, Petitioners respectfully submit that these two factors cannot serve to justify an enhancement to the lodestar.

As this Court explained in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247

governing the award of such fees under 42 U.S.C. § 1988, which provides that in the actions specified in that section ‘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.’”).

(1975), the general rule in the United States is that each litigant bears its own attorney's fees and expenses, and the prevailing party cannot shift those fees and expenses to the opposing party.⁷ In *Alyeska*, this Court emphasized the broad application of this general rule absent contrary statutory law, refused to fashion a judicial exception to this general rule, and indicated that it is generally Congress' authority alone to decide under what circumstances the costs of litigation should be shifted from one party to the other.⁸ *Id.* at 262 (“[I]t is apparent that the circumstances under which attorneys’ fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.”).

⁷ This common law rule of each party bearing its own fees and expenses has been termed the “American Rule,” which is in contrast to the “English Rule” that reflects centuries-old statutory authorization in that country that, although subject to court discretion, “counsel fees are regularly allowed to the prevailing party.” *Alyeska*, 421 U.S. at 247 & n.18.

⁸ This Court in *Alyeska* noted its prior precedent recognizing three limited circumstances as appropriately within a court's inherent power to award a reasonable attorney's fee: (1) willful disobedience of a court order, (2) when the losing party acts in bad faith, and (3) as a part of a common fund or property preserved or recovered for the benefit of others. 421 U.S. at 257-58, *cited in Delaware Valley I*, 478 U.S. at 562. None of these circumstances are before this Court. *See Kenny A.*, 454 F. Supp. 2d at 1270-72, *aff'd*, 532 F.3d at 1219, 1232-33 (stating that the District Court “correctly concluded” that application of either the common fund doctrine or the common benefit doctrine “was not legally permissible or even possible”).

In response, Congress the next year passed the Civil Rights Attorney’s Fees Awards Act of 1976 (the “Act”), codified as amended at 42 U.S.C. § 1988, to provide for a “reasonable attorney’s fee” award to prevailing parties in civil rights cases. 42 U.S.C. § 1988(b); *see* S. Rep. No. 94-1011, at 4 (1976) (“[I]n *Alyeska*, the United States Supreme Court, while referring to the desirability of fees in a variety of circumstances, ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the ‘private attorney general’ theory. . . . This bill . . . is an appropriate response to the *Alyeska* decision.”).

I. The Statutory Language of 42 U.S.C. § 1988 Does Not Provide for an Enhancement to Attorney’s Fees for Either Results Obtained or Quality of Representation, and the Legislative History Likewise Does Not Support Such an Interpretation.

The federal fee-shifting statute created by the Act states, in pertinent part, that in any action to enforce a provision of 42 U.S.C. § 1983 (the statute underlying this litigation) and certain other federal statutes, “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. . . .”⁹ 42

⁹ In this case, Plaintiffs did not become prevailing parties by obtaining a judgment on the merits. *See Kenny A.*, 454 F. Supp. 2d at 1269 (referring to the settlement and entry of a
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U.S.C. § 1988(b) (emphasis added). The Act does not provide how the reasonable attorney’s fee shall be determined and, importantly, makes no mention of the use of “enhancements,” “multipliers,” or “bonuses” to fee awards. It certainly says nothing about an enhancement that would increase the fee award beyond the total dollar amount reflected in prevailing counsel’s own billing records submitted to the court, as occurred in this case. The statutory language simply provides that a “reasonable” fee shall be provided, and there is no indication from either the statute itself or the legislative history that any type of enhancement can be added to a fee award based on results obtained or quality of representation. In fact, the intent of Congress appears to contemplate that no enhancement in excess of an already determined reasonable fee can be awarded because such an increase would constitute a windfall to the prevailing party’s counsel.

To the extent that the legislative history is instructive, it indicates that the clear purpose of the

consent decree). Nevertheless, they are entitled to a “reasonable attorney’s fee” as provided in the statute because the parties settled the litigation, and the District Court entered a consent decree. This Court has held that a party that obtains a consent decree is a “prevailing party” for purposes of 42 U.S.C. § 1988. See *Maher v. Gagne*, 448 U.S. 122, 128-30 (1980), cited in *Buckhannon Bd. & Care Home*, 532 U.S. at 604 (“In addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney’s fees.”).

legislation which became the Act (S. 2278) was to attract competent counsel without providing windfalls to attorneys. *See* H. Rep. 94-1558, at 9 (1976) (“The application of these standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys.”); S. Rep. 94-1011, at 6 (1976) (noting the importance of attracting competent counsel without providing windfalls); 122 Cong. Rec. 35127 (1976) (statement of Sen. Jordan) (“This is not a bill that we could term a food-stamp bill for lawyers. It is not going to work that way.”); 122 Cong. Rec. 33314 (1976) (statement of Sen. Kennedy) (“If the proponents of this bill were interested in creating a relief fund for lawyers, they would surely have gone about it in a different fashion. No, this bill is not for the purpose of aiding lawyers.”). The intent to avoid windfalls is further underscored by the statement in the Senate Report that “citizens must have the opportunity to recover *what it costs them* to vindicate these rights in court,” and “counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, ‘for all time reasonably *expended* on a matter.’” S. Rep. 94-1011, at 2, 6 (1976) (emphasis added) (quoting *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. June 5, 1974)).

The House Report to the Act, in discussing “[r]easonable fees” as a “principal element” of the bill, states that “[t]he courts have enumerated a number

of factors in determining the reasonableness of awards under similarly worded attorney's fee provisions" including, "for example," *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), in which "the court listed twelve factors to be considered, including the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work, and the amount received in damages, if any."¹⁰ H. Rep. 94-1558, at 8 (1976). The report then

¹⁰ The particular fee-shifting statute at issue in *Johnson* was Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), as amended. 488 F.2d at 715-16. The twelve *Johnson* factors are as follows:

- (1) time and labor required;
- (2) novelty and difficulty of the questions;
- (3) skill requisite to perform the legal service properly;
- (4) preclusion of other employment by the attorney due to acceptance of the case;
- (5) customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) amount involved and results obtained;
- (9) experience, reputation, and ability of the attorneys;
- (10) "undesirability" of the case;
- (11) nature and length of the professional relationship with the client; and
- (12) awards in similar cases.

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immediately discounts at least one of the *Johnson* factors (the amount received in damages) by emphasizing that fee recovery ordinarily should be provided in civil and constitutional rights cases even if damages are not recovered, such as injunctive relief cases. *See id.* at 8-9; *Riverside v. Rivera*, 477 U.S. 561, 575-76 (1986). The Senate Report similarly references *Johnson* as providing examples of “appropriate standards,” and it – but not the House Report – then cites three district court decisions as correctly applying them. *See* S. Rep. 94-1011, at 6 (1976) (citing *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. June 5, 1974); and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975)).¹¹

See 488 F.2d at 717-19. The Fifth Circuit adopted these factors from the American Bar Association’s Code of Professional Responsibility. *See id.* at 719. (These factors, reordered as eight factors but generally stated similarly, are currently Rule 1.5(a) of the ABA’s Model Rules of Professional Conduct.)

¹¹ In *Stanford Daily*, the court found no grounds to reduce the 750 hours claimed by the plaintiffs’ counsel, found \$50 per hour to be a reasonable rate, and increased the base figure of \$37,500 by \$10,000 (or about 27%) due to “the contingent nature of compensation, the quality of the attorneys’ work, and the results obtained by the litigation.” 64 F.R.D. at 683, 685, 688.

In *Davis*, the court set the attorneys’ compensated rates between \$35-\$60 per hour, reduced the award by \$1,000 for “unnecessary duplication of effort,” and added a “result charge” of nearly \$7,200 to the roughly \$40,000 attorney’s fee award, or about an increase of 18%, because the plaintiffs’ counsel

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This Court has referenced the Senate Report's citation of the three district court cases in varying ways depending upon the specific issue before the Court, but has never stated that these cases are determinative of congressional intent with respect to whether fee awards can be increased above the lodestar depending upon one or more of the *Johnson* factors. See *Blanchard v. Bergeron*, 489 U.S. 87, 91-93 & n.6 (1989) (noting that the legislative history suggests a prior contingent fee arrangement "is but a single factor and not determinative"); *Delaware Valley II*, 483 U.S. at 724-25 ("[T]he legislative history is, at best, inconclusive in determining whether Congress endorsed the concept of increasing the lodestar amount to reflect the risk of not prevailing on the merits."); *Blum*, 465 U.S. at 893-95 & n.9 (commenting that the use of prevailing market rates to determine reasonable fees is consistent with the intent of Congress); *Hensley*, 461 U.S. at 430-32 & n.4 (stating that the legislative history "does not provide

"achieved excellent results for the plaintiffs and the represented class." 8 Empl. Prac. Dec. (CCH) ¶ 9444.

Swann lists nine "pertinent factors" in arriving at a reasonable attorney's fee, including the factors of "results obtained," which the court found were "excellent," and "[r]eputation, experience and ability of plaintiffs' counsel," which the court found were "exceptional." 66 F.R.D. at 484, 486. The amount awarded was 14% less than the amount requested by the plaintiffs, based on the court's explanation that it "prefer[red] to err on the conservative side in dealing with any fee question because" it did "not wish to contribute unnecessarily to the overpricing of litigation in this or any other court." *Id.* at 486.

a definitive answer as to the proper standard for setting a fee award where the plaintiff has achieved only limited success”).

Given Congress’ admonition against windfalls in both the House and Senate Reports, it would be incongruous to attribute much weight to the Senate Report’s citation of the three district court decisions because, read together, they are at best inconclusive as to whether the use of multipliers for results obtained and quality of representation was intended by Congress in any situation. *See generally United States v. Seeger*, 380 U.S. 163, 177 (1965) (questioning the value of a parenthetical citation in a Senate Report “which might stand for a number of things,” in contrast to “an explicit statement of congressional intent,” which would deserve more weight). Indeed, the explicit statement of congressional intent that the Act was passed to attract competent counsel *without providing windfalls to attorneys* surely deserves more weight than citations to cases issued between the date of the *Johnson* decision in January 1974 and passage of the Act in October 1976. *See* H. Rep. 94-1558, at 9 (1976); S. Rep. 94-1011, at 6 (1976).

Johnson included quality of representation and results obtained with other factors for consideration in arriving at a “reasonable” fee, but it did not suggest that this resulting fee be again multiplied by some unspecified percentage through another application of one or more of these same factors, nor did

the *Johnson* decision itself actually do so.¹² See 488 F.2d at 717-20. Such double counting would appear to result in the very “windfall” that Congress was expressly disavowing in its enactment of 42 U.S.C. § 1988. See *Dague*, 505 U.S. at 562-63; *Delaware Valley I*, 478 U.S. at 566; *Blum*, 465 U.S. at 899. In fact, *Johnson* was concerned with ensuring that the appropriate market rates were provided to counsel. 488 F.2d at 717 (stating that the hourly rates did not “match the minimum fee scale in Atlanta, Georgia,” and, although “the award was supposedly considered in light of the Atlanta community practices,” there was no differentiation made “between the experienced and the non-experienced attorneys”); see also *Blum*, 465 U.S. at 894 (“In all four of the cases cited by the Senate Report [including *Johnson*], fee awards were calculated according to prevailing market rates.”).

Moreover, one of the district court decisions cited in the Senate Report actually *reduced* the fee award notwithstanding the court’s express findings that the quality of representation was “exceptional” and that the results obtained were “excellent and constituted the total accomplishment of the aims of the suit.” *Swann*, 66 F.R.D. at 484, 486. Another of the district court decisions increased the base award, in part because of the case’s contingent nature, which this

¹² This Court has long held that the *Johnson* factors are generally subsumed in the lodestar. See *Delaware Valley I*, 478 U.S. at 564-65; *Blum*, 465 U.S. 898-900 & n.16; *Hensley*, 461 U.S. at 434 n.9.

Court later held to be improper in *Dague*, 505 U.S. at 567.¹³ See *Stanford Daily*, 64 F.R.D. at 684-86. Indeed, this statement from *Johnson* reflects the overall policy goal that Congress sought to implement with the Act:

[C]ourts must remember that they do not have a mandate under Section 706(k) to make the prevailing counsel rich. Concomitantly, the Section should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general. The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation.

488 F.2d at 719 (emphasis added).

The Court itself has addressed these cases in proper context by explaining how the methods for calculating a reasonable attorney's fee have changed over the years. Notwithstanding that by the early 1970s hourly billing had become widespread, "[t]he federal courts did not swiftly settle on hourly rates as the overriding criterion for attorney's fee awards." *Gisbrecht*, 535 U.S. at 801. In fact, the *Johnson*, *Stanford Daily*, *Davis*, and *Swann* decisions were

¹³ The dollar values of the enhancements awarded in *Stanford Daily* (\$10,000) and *Davis* (\$7,200) also pale in comparison to the enhancement that was awarded in this case (\$4.5 million).

issued in 1974-75, either before, or just as, the emphasis on a lodestar calculation of hours multiplied by hourly rates was beginning to gain a “firm foothold,” and the lodestar finally achieved dominance only after the Court’s 1983 decision in *Hensley*. *Gisbrecht*, 535 U.S. at 801. Since then, however, “the ‘lodestar’ figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence” and “holds sway in federal-court adjudication of disputes over the amount of fees properly shifted to the loser in the litigation.” *Id.* at 801-02 (quoting *Dague*, 505 U.S. at 562, and citing *Hensley*, 461 U.S. at 440 (Burger, C.J., concurring)).

Because the Act was passed in response to the Court’s decision in *Alyeska*, and based on the timing of that passage, the most reasonable interpretation is that the district court cases in the Senate Report were cited to emphasize that fee awards would again be available for civil rights actions in generally the same manner as in prior court decisions:

This bill . . . is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent.

* * *

This bill creates no startling new remedy – *it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys’ fees which had been going on for years prior to the Court’s May decision.*

S. Rep. No. 94-1011, at 4, 6 (1976) (emphasis added).

Ultimately, the Act simply provides for a “reasonable attorney’s fee,” and all one can discern from the legislative history is that Congress’ purpose in passing the Act was to provide for competent counsel without authorizing them to obtain a fee windfall. 42 U.S.C. § 1988(b); *see* H. Rep. 94-1558, at 9 (1976); S. Rep. 94-1011, at 6 (1976). The legislative intent of attracting competent counsel without providing a windfall is fully realized when an attorney for a prevailing party is awarded attorney’s fees for the amount of work that he or she *actually* and *reasonably* provided. The awarding of an enhancement on top of an award of reasonable hours times reasonable rate, as was done in this case, flies in the face of the plain language of the Act and is contrary to the explicit intent of Congress.

II. The Court's Prior Attorney's Fees Decisions Support the Conclusion That a Lodestar Enhancement Should Not Be Allowed for Results Obtained or Quality of Representation.

The Court's decisions that discuss whether an enhancement to a fee award should be permitted for results obtained or quality of representation have evolved as follows: (1) in its first decision, *Hensley*, generally indicating that enhancements may be supportable in certain circumstances notwithstanding the fact that an actual enhancement award was not before the Court, (2) in later decisions in *Blum* and *Delaware Valley I*, finding enhancements unwarranted in specific circumstances but not forbidding enhancements completely, and (3) in *Delaware Valley II* and *Dague*, addressing a particular *Johnson* factor which is similar to results obtained – the contingent nature of the case – and definitively concluding in *Dague* that enhancement is never permissible for that factor. As one of the Circuit Judges in this case characterized this history, “[s]uggestion has been followed by retrenchment, resulting in a decisional arc that bends decidedly against enhancements.” *Kenny A.*, 532 F.3d at 1221 (Carnes, J., concurring).

A. *Hensley v. Eckerhart*: Establishment of the Lodestar With the Possibility of an Adjustment.

The *Hensley* decision in 1983 was the first time the Court interpreted what § 1988 contemplates by

the term “a reasonable attorney’s fee” and, in doing so, adopted the lodestar method of “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate” as the proper basis for calculating fees in fee-shifting cases.¹⁴ 461 U.S. at 433-34 & n.7. The Court referred to this calculation as “[t]he most useful starting point for determining the amount of a reasonable fee,” but noted that this “does not end the inquiry” because “[t]here remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the ‘results obtained.’” *Id.* at 433-34. Although the Court in *Hensley* cited no case law for this proposition, this language regarding the possibility of an enhancement in some cases of exceptional success appears to arise from the Third Circuit’s decisions in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 108, 112-18 (3d Cir. 1976) (“*Lindy II*”), and 487 F.2d 161, 166-69 (3d Cir. 1973) (“*Lindy I*”); see also *Delaware Valley I*, 478 U.S. at 563-64 (citing *Lindy I*, *Lindy II*, and *Johnson* for what the Court termed the “hybrid” approach it adopted in *Hensley*).¹⁵

¹⁴ Prior to *Hensley*, one Justice of the Court had cited *Johnson* in a footnote to a concurring opinion discussing use of the lodestar analysis in a Title VII case. See *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 365 & n.3 (1981) (Powell, J., concurring).

¹⁵ Importantly, *Lindy* was actually a common fund case in which fees were recovered from the plaintiffs’ counsel’s own clients based on *quantum meruit* (see *Lindy II*, 540 F.2d at 119-20, 122; *Lindy I*, 487 F.2d at 165-66), rather than shifting of
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attorney's fees to the opposing party, and this Court has suggested that the standards applicable to such common fund cases (and the possibility for fee recovery in excess of the lodestar) are not equally applicable to fee-shifting cases. *See Blum*, 465 U.S. at 900 n.16 (“Unlike the calculation of attorney’s fees under the ‘common fund doctrine,’ where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation.”); *cf. Delaware Valley I*, 478 U.S. at 562 n.6 (noting the existence of common fund recovery and its inapplicability in a fee-shifting case).

Courts have traditionally determined the amount of common fund fee awards by considering several factors, especially the size of the fund, and frequently have based awards on what they consider a reasonable percentage of the fund. In the early 1970s, courts began moving away from this practice and toward the lodestar method. *However, in the 1980s two developments sparked reconsideration of the lodestar in common fund cases. First, in a footnote in Blum v. Stenson, the Supreme Court distinguished between the calculation of fees under fee-shifting statutes and calculation under the “‘common fund doctrine,’ where a reasonable fee is based on a percentage of the fund bestowed on the class.”* Second, in 1985, a Third Circuit task force on attorneys’ fees recommended the percentage method in common fund cases.

Alan Hirsch & Diane Sheehey, *Awarding Attorneys’ Fees and Managing Fee Litigation* 72 & n.361 (Fed. Judicial Ctr. 2d ed. 2005) (citing *Lindy I* as the “seminal case” for consideration of the lodestar in common fund cases) (footnotes omitted). In addition, the *Lindy* decisions approved an adjustment for contingency, which this Court has since held is impermissible, *see Dague*, 505 U.S. at 567. Therefore, any continued reliance on *Lindy* for the proposition that enhancements may be appropriate in fee-shifting cases appears unfounded.

Hensley, however, presented no issue of an upward enhancement having been made by the district court. The adjustment issue actually presented in *Hensley* was whether attorney's fees should be *reduced* for those plaintiffs who achieve only partial or limited success, and the Court held that fees should indeed be reduced by the amount spent on distinct, unsuccessful claims. *See Hensley*, 461 U.S. at 426, 434-37, 440 ("The issue in this case is whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims."). It was in this context that the Court discussed the importance of the "results obtained" factor, stating that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 440. The *Hensley* opinion, nonetheless, does contain dicta recognizing the *possibility* of an enhancement for results obtained, despite the issue not being before the Court: "[I]n some cases of exceptional success an enhanced award *may be justified*" even though excellent results will normally be encompassed by all hours reasonably expended on the litigation. *Id.* at 435 (emphasis added).

B. *Blum v. Stenson*: Quality of Representation and Results Obtained Are Generally Reflected in the Lodestar So That an Upward Adjustment Is Usually Impermissible.

In the following term, this Court decided *Blum*, which was the first time that the Court, in construing § 1988 and the dicta in *Hensley*, was presented with a case in which the district court had actually enhanced a fee award. 465 U.S. at 891. The district court in *Blum* had enhanced the lodestar figure by 50% based on a number of the same factors identified in *Johnson*, specifically “the quality of representation, the complexity of the issues, the riskiness of success, and the ‘great benefit to a large class’ that was achieved.” *Id.* The Court repeated *Hensley*’s statement that “in some cases of exceptional success an enhanced award may be justified,” but emphasized immediately thereafter that when “the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable,” the lodestar amount “is presumed to be the reasonable fee contemplated by § 1988.” *Id.* at 897. The Court then stated that “[t]he issue remaining is the appropriateness of an upward adjustment to the fee award in this case” and held that awarding the enhancement was an abuse of the district court’s discretion. *Id.* at 898-902.

This Court rejected each of the district court’s four *Johnson*-based justifications for the enhancement. As to the novelty and complexity of the issues presumably being reflected in the lodestar, the Court

emphasized that, even where the experience and special skill of an attorney may result in fewer hours expended on an otherwise novel or complex issue, that attorney's special skill and experience "should be reflected in the reasonableness of the hourly rates." *Id.* at 898. "Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award." *Id.* at 898-99. Quality of representation, the Court held, "generally is reflected in the reasonable hourly rate" and "may justify an upward adjustment *only* in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Id.* at 899 (emphasis added). Absent this especially rare efficiency, "an upward adjustment for quality of representation is a clear example of double counting." *Id.* Regarding the district court's determination that the ultimate outcome of the litigation "was of great benefit to a large class of needy people," the Court classified this statement as falling within the "results obtained" factor and, in an apparent break with the dicta in *Hensley*, said, "[b]ecause acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." *Id.* at 900. The Court also emphasized in a footnote to that sentence:

Nor do we believe that the number of persons benefited is a consideration of significance in calculating fees under § 1988. Unlike the calculation of attorney's fees under the "common fund doctrine," where a reasonable fee is based on a percentage of the fund bestowed on the class, *a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation*. Presumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual.

Id. at 900 n.16 (emphasis added).

Importantly for purposes of this case, the Court in *Blum* left more open the possibility for an upward adjustment based on contingency than the other factors of results obtained, quality of representation, and novelty and complexity of the case, because it left for future decision whether contingency could ever justify a lodestar enhancement.¹⁶ *Id.* at 901 n.17 ("We have no occasion in this case to consider whether the

¹⁶ In a concurring opinion, Justice Brennan directly addressed the contingency issue, reaffirming his opinion in *Hensley* that "Congress has clearly indicated that the risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee," citing *Johnson* and *Stanford Daily* as support. *Blum*, 465 U.S. at 902-03 (Brennan, J., concurring in part and dissenting in part) (citing *Hensley*, 461 U.S. at 448-49).

risk of not being the prevailing party in a § 1983 case, and therefore not being entitled to an award of attorney's fees from one's adversary, may ever justify an upward fee adjustment."). The Court simply stated that "we cannot be sure what prompted the [district] court's statement" because the record failed to identify any specific risks to counsel. *Id.* at 901. Based on its analysis, the Court vacated the portion of the district court's order enhancing the fee award. *Id.* at 901-02.

C. *Pennsylvania v. Delaware Valley*: Quality of Performance and Results Obtained Should Not Justify Enhancement of the Lodestar, Particularly When a Large Number of Attorney Hours Are Eliminated As Unnecessary.

In *Delaware Valley I*, the Court further narrowed the application of the *Johnson* factors and stated that "most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee" are included within the lodestar figure. 478 U.S. at 566. The district court in *Delaware Valley* enhanced the plaintiffs' fee award because of the contingent nature of the case, the "quality of the work performed and the results obtained . . . which culminated in an outstanding result." *Id.* at 555 (citation omitted). In reviewing the district court's reasons for enhancing the fee award, the Court found all of them insufficient, just as it had in *Blum*.

Going beyond its statement in *Blum* that a “presumption” exists that the lodestar represents the reasonable fee, 465 U.S. at 897, in *Delaware Valley I*, the Court stressed that it is a “strong presumption,” 478 U.S. at 565. The Court explained that this “strong presumption” that the lodestar figure represents a “reasonable” fee is wholly consistent with the rationale behind fee-shifting statutes. *Id.* (“These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client.”).

The Court then appeared to indicate that a number of the *Johnson* factors that prior decisions might have left open as a possible basis for enhancement in certain exceptional cases were no longer available, stating explicitly that the strong presumption against enhancements cannot be overcome by “the special skill and experience of counsel,” the “quality of representation,” or the “results obtained.” *Id.* (citing *Hensley*, 461 U.S. at 435, and *Blum*, 465 U.S. at 897, 899). The Court stated that, because these factors “are presumably fully reflected in the lodestar amount,” they “cannot serve as independent bases for increasing the basic fee award.”¹⁷ *Id.* (emphasis added).

¹⁷ Properly read, *Delaware Valley I* should have closed the door on enhancements based on results obtained or quality of representation. Indeed, Justice Blackmun’s dissent reflects this reading of the decision by stating that the majority opinion
(continued on following page)

According to the Court, when an attorney first agrees to take on a representation, “he obligates himself to *perform to the best of his ability* [e.g., quality of representation] and to *produce the best possible results* [e.g., results obtained] commensurate with his skill and his client’s interests.” *Id.* (emphasis and brackets added). Consequently, the accounting for these factors in the lodestar calculation of the reasonable number of hours multiplied by a reasonable hourly rate “adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance.” *Id.* at 565-66. To enhance the fee for overall quality of performance and, by extension, results obtained risks the “danger of ‘double counting.’” *Id.* at 566.

This Court reversed the district court’s application of a multiplier for quality of representation and results obtained. *Id.* at 568. Notably – and relevant to the facts in this case where the lodestar was reduced more than \$1 million for excessive billing and then

makes it now “virtually impossible for a plaintiff to meet” the standard for an enhancement. *Delaware Valley I*, 478 U.S. at 569 (Blackmun, J., dissenting). Nonetheless, as this case shows, federal judges have not always read the Court’s *Delaware Valley I* opinion so strictly. See *Kenny A.*, 454 F. Supp. 2d at 1288 (recognizing from *Delaware Valley I* that most of the factors relevant to calculating a reasonable fee award “cannot serve as independent bases for increasing the basic fee award,” but then relying on the previously decided *Blum* opinion to conclude that “[n]evertheless, upward adjustments of the lodestar figure are still permissible” in rare cases) (emphasis added and citations omitted).

increased by a \$4.5 million enhancement for quality of representation and results obtained, *see Kenny A.*, 454 F. Supp. 2d at 1270, 1286, 1290 – the Court recognized that excessive billing which leads to a reduction in the lodestar calculation cannot then support an enhancement for superior quality of representation. *See Delaware Valley I*, 478 U.S. at 566-67 (“The District Court’s elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive is not supportive of the court’s later conclusion that the remaining hours represented work of ‘superior quality.’”).

On the separate issue of whether basing the enhancement on the contingent nature of the fee was proper (perhaps again showing that contingency was a more nettlesome factor to preclude an enhancement than results obtained or quality of representation), the Court ordered reargument. *See id.* at 568; *see also Blum*, 465 U.S. at 901 n.17. The answer to this question following reargument ultimately resulted in no majority decision. *See Delaware Valley II*, 483 U.S. at 723-31 (plurality opinion).

D. *City of Burlington v. Dague*: Enhancements for Contingency Are Never Permitted.

The question left open by *Delaware Valley II* was resolved definitively by the Court in *Dague*, where it rejected the proposition that a court “may enhance the fee award above the ‘lodestar’ amount in order to

reflect the fact that the party’s attorneys were retained on a contingent-fee basis and thus assumed the risk of receiving no payment at all for their services.” 505 U.S. at 559.

In reasoning that an enhancement for contingency would substantially duplicate factors already considered in the lodestar, the Court explained that the risk of loss is the product of two factors: “(1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits.” *Id.* at 562. The Court said that the first factor “should play no part in the calculation of the award” because otherwise there always would be risks affecting the lodestar, and the lodestar consequently could never be the final calculation.¹⁸ *Id.* at 563. Such a result would contradict the “strong presumption” that the lodestar is the proper fee award. *Id.* at 562 (citing *Delaware Valley I*, 478 U.S. at 565).

As to the second factor, the Court said the difficulty of establishing the merits of a case is generally already included in the lodestar, either in the higher hourly rate of an attorney “skilled and experienced enough” or in the number of hours expended. *Id.* The difficulty of establishing the merits thus would seem to encompass, or at least relate to, results obtained

¹⁸ The Court reasoned that awarding enhancements based on the financial risk of taking a case would “provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones.” *Dague*, 505 U.S. at 563.

and quality of representation, and, supporting this inference, the Court stressed that an enhancement for contingency “would likely duplicate in substantial part factors already subsumed in the lodestar.” *Id.* As it had warned in *Blum* and *Delaware Valley I*, taking account of such factors again through enhancement “amounts to double counting.” *Id.* at 563; *see Delaware Valley I*, 478 U.S. at 566; *Blum*, 465 U.S. at 899. In short, neither the “relative merits of the claim” nor “the difficulty of establishing those merits” should serve as the basis for multiplying a fee award, and the Court accordingly concluded that “no contingency enhancement whatever is compatible with the fee-shifting statutes at issue.”¹⁹ *Dague*, 505 U.S. at 562-63, 565.

Beginning with *Hensley* and concluding with *Dague*, the Court has progressively underscored the lodestar’s importance while eliminating or limiting

¹⁹ The Court also noted that awarding such enhancements would make attorney’s fee awards even more complicated and would prolong litigation:

And finally, the interest in ready administrability that has underlain our adoption of the lodestar approach, and the related interest in avoiding burdensome satellite litigation (the fee application “should not result in a second major litigation”), counsel strongly against adoption of contingency enhancement. Contingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable.

Dague, 505 U.S. at 566 (quoting *Hensley*, 461 U.S. at 433, 437).

those factors which could support an enhancement to the lodestar.

III. No Lodestar Enhancement Should Be Permitted for Results Obtained.

A. The Circuit Court's Decision Affirming the District Court's Award of an Enhanced Fee for Results Obtained Is Contrary to *Delaware Valley I* and *Dague*.

This Court should hold definitively that lodestar enhancements based on results obtained are never permitted in cases in which “a reasonable attorney’s fee” is sought pursuant to 42 U.S.C. § 1988. Applying an indiscriminate multiplier to a fee award for obtaining an “excellent” or “exceptional” result is inconsistent with the spirit if not the letter of the Act and this Court’s precedent, runs counter to notions of fairness, and leads to anomalous results.

First, the reference to the importance of results obtained comes from *Hensley*, a case in which the actual issue was whether fees should be *reduced* based on “results obtained” related to unsuccessful claims. 461 U.S. at 426, 434-37, 440. For cases in which there are no such unsuccessful claims, it is common sense that a full lodestar award based on reasonable hours multiplied by a reasonable rate should wholly compensate an attorney for all the effort he or she has put into the case. *See id.* at 435 (“Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.”).

Such a rule also comports with the legislative history underlying § 1988. *See* S. Rep. 94-1011, at 2 (1976) (providing that citizens should recover *what it costs* for counsel, and their counsel should be paid for their time reasonably *expended*). A fee that exceeds reasonable hours times reasonable rates provides an unauthorized windfall. *See* H. Rep. 94-1558, at 9 (1976); S. Rep. 94-1011, at 6 (1976). Multiplying an award to compensate for results obtained is as inconsistent with congressional intent as an enhancement based on contingency, which this Court has forbidden. *See Dague*, 505 U.S. at 565 (“First, just as the statutory language limiting fees to prevailing (or substantially prevailing) parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost, so should it bar a prevailing plaintiff from recovering for the risk of loss.”) (citing *Delaware Valley II*, 483 U.S. at 719-20, 724-25, and *Hensley*, 461 U.S. at 424). In such a situation, the attorney would recover more fees than are accounted by the time that attorney reasonably spent on the litigation. *See id.* Public attorneys general do not receive windfalls for protecting the public interest. The same should be true for private attorneys general. *See Johnson*, 488 F.2d at 719 (stating that fee-shifting “should not be implemented in a manner to make the private attorney general’s position so lucrative as to ridicule the public attorney general”).

Second, as with the risk of loss or, more appropriately stated here, likelihood of success, the fundamental components of results obtained in litigation

are the quality of counsel and the merits of the case. Any difficulty in overcoming unfavorable facts or difficult precedent affecting the merits of the case would fall within the “novelty [and] complexity of the issues” and/or the amount of hours that counsel is required to expend – items that are wholly subsumed in the lodestar. *See Blum*, 465 U.S. at 898. Moreover, any additional effort that an attorney must expend to respond to the opposition’s vigorous defense will be reflected in the hours spent on the case, and this Court has stated, in construing the Title VII fee-shifting statute, that “[a] fair adversary process presupposes both a vigorous prosecution and a vigorous defense.” *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978). An enhancement for results obtained necessarily constitutes double counting that yields a fee award in excess of the actual work put into the case. *See Dague*, 505 U.S. at 562-63; *Delaware Valley I*, 478 U.S. at 566; *Blum*, 465 U.S. at 899. Indeed, “results obtained” is one of several factors that are part and parcel of the entire litigation and are little more than reflections of the lodestar itself. *Cf. Pierce v. Underwood*, 487 U.S. 552, 573 (1988) (stating, in an Equal Access to Justice Act case, that factors such as “results obtained,” “novelty and difficulty of issues,” and “work and ability of counsel” “are factors applicable to a broad spectrum of litigation; they are little more than routine reasons why market rates are what they are”).

Third, this Court has already held that whether the results obtained are of far-reaching significance

should not provide grounds for an enhancement. *See Blum*, 465 U.S. at 900 n.16. The purpose of fee-shifting statutes such as § 1988 is “to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws.” *Delaware Valley I*, 478 U.S. at 565. By “seeking redress,” the Act did not expressly state or imply that fees should be increased based upon the quantum of redress obtained. A fee award “should be calculated in a way that furthers the purpose of the fee-shifting statutes; they should not be used to encourage or reward results that go beyond that purpose.” *Kenny A.*, 532 F.3d at 1230 (Carnes, J., concurring) (citing *Blum*, 465 U.S. at 893-95).

Fourth, there frankly is an underlying candor problem built into a system that provides enhancements for results obtained which (1) puts a plaintiff’s attorney in the position of arguing conflicting positions during the merits stage of the litigation compared with the attorney’s fees stage and (2) forces a defense attorney either to concede the strength of plaintiff’s case in order to argue the results were not unexpected or instead insist victory was an anomaly and then possibly be saddled with a “results obtained” enhancement. *Cf. Delaware Valley II*, 483 U.S. at 721-22 (“First, evaluation of the risk of loss creates a potential conflict of interest between an attorney and his client, for in order to increase a fee award, a plaintiff’s lawyer must expose all of the weaknesses and inconsistencies in his client’s case,

and a defendant's attorney must either concede the strength of the plaintiff's case in order to keep down the fee award, or 'allo[w] the fee to be boosted by the contingency bonus [by] insisting that the plaintiff's victory was freakish.'" (citation omitted). Indeed, throughout this litigation, Plaintiffs contended that the unconstitutionality of the State's foster care policies was a foregone conclusion, even to the point of challenging the State's mere filing of a motion for summary judgment as an "extraordinary decision." (J.A. at 38 ¶ 20.) However, in their fee application after settlement, Plaintiffs' counsel suddenly contended they had achieved extraordinary results by asserting some "novel" claims in an area of the law that was "unsettled." (Br. Supp. Pls.' Application for Attorney's Fees [Dkt. 495] at 12, 24.) The State, on the other hand, endeavored to defend its policies prior to mediation, then agreed to a comprehensive settlement without regard to whether the "results obtained" would be deemed better or worse than the District Court would have ordered if the case proceeded to a trial and the State had lost.

Finally, an enhancement to the lodestar based on results obtained flies in the face of the rationale which led the Court to bar enhancements for contingency in *Dague*, where the Court decided that the relative merits of a claim "should play no part in the calculation of the [fee] award." 505 U.S. at 563. If the legal and factual merits of the claim, or the difficulty in establishing those merits, are not grounds for enhancement, *id.* at 562-63, then it strains credibility

to argue that an enhancement nevertheless may be awarded when the case is determined to have merit and a particular remedy is ordered. Whether that remedy is considered modest or extensive, the party has prevailed and its rights have been redressed, which is what the “reasonable fee” award authorized by § 1988 is meant to accomplish. No additional bonus or multiplier is necessary to achieve the purpose of the Act.

B. The District Court’s Award of an Enhancement for Results Obtained Was an Abuse of Discretion and Operated to Punish Georgia’s Officials for Agreeing to a Broad-Based Settlement of Plaintiffs’ Claims.

This case demonstrates exactly why lodestar enhancements based on results obtained should not be permitted. The District Court characterized “plaintiffs’ success in this case [as] truly exceptional” by stating that the “centerpiece” of the success “is a series of thirty-one outcome measures that *State Defendants have agreed to meet* and sustain for at least three consecutive six-month reporting periods.” *Kenny A.*, 454 F. Supp. 2d at 1289 (emphasis added). The court also emphasized that the “Consent Decree provides *sweeping relief* to the plaintiff class” and that, in fifty-eight years as a practicing attorney and judge, the district judge had never seen “such a favorable result on such a *comprehensive scale.*” *Id.* at 1289-90 (emphasis added). In short, the District

Court gave a “results obtained” enhancement for what it viewed as far-reaching significance and “sweeping relief” to a large class of persons, contrary to this Court’s precedent explicitly stating that such grounds are an improper basis for an enhancement. *See Blum*, 465 U.S. at 900 n.16 (“Nor do we believe that the number of persons benefited is a consideration of significance in calculating fees under § 1988.”).

It cannot be stressed enough that this case was settled, and the State’s willingness to agree to settlement, not obstinate conduct, made Plaintiffs prevailing parties. Indeed, it takes two to tango. When the Consent Decree was entered, the District Court concluded that “[i]t is a tribute to all concerned that such a just settlement was consummated.” (Dkt. 486 at 14.) Additionally, there are many reasons why parties (especially governments with changing administrations and officials) settle cases, and it should never be presumed that a party has settled because it was overwhelmed by opposing counsel. *See Pierce*, 487 U.S. at 568 (“Respondents contend that the lack of substantial justification for the Government’s position was demonstrated by its willingness to settle the litigation on unfavorable terms. Other factors, however, might explain the settlement equally well – for example, a change in substantive policy instituted by a new administration. The unfavorable terms of a settlement agreement, without inquiry into the reasons for settlement, cannot conclusively establish the weakness of the Government’s position. To hold

otherwise would not only distort the truth but penalize and thereby discourage useful settlements.”). The District Court’s decision penalized the State for actually coming to the table and negotiating a settlement with Plaintiffs.²⁰

The enhancement went well beyond making Plaintiffs’ counsel whole. Rather, the \$4.5 million enhancement constituted an increase of \$3.5 million above what even Plaintiffs’ counsel claimed that they expended on the case. *See Kenny A.*, 454 F. Supp. 2d at 1270. If the District Court’s award of an enhancement is allowed to stand, the message to governments and their officials who have to defend claims under 42 U.S.C. § 1983 will be clear: If a government official settles the case for a result that the court later determines is “exceptional,” then the official risks an enhanced award of attorney’s fees

²⁰ The District Court also indicated that if the parties failed to settle and Plaintiffs would have prevailed at trial, “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. By awarding an enhancement for such a result, the District Court effectively punished Georgia’s officials for entering into a broad-based settlement. Indeed, when considering whether to approve the settlement, the District Court was obligated to decide whether the proposal, taken as a whole, was “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). It was inconsistent on the one hand for the District Court to approve a settlement as “reasonable” and then, on the other hand, to award an enhanced fee based on a determination that the settlement was beyond anything the District Court would have ordered.

against the government. If, however, the official decides to roll the dice and proceed to trial, then a negative judgment may result in a more modest remedy and a lower fee award.

Moreover, enhancements in cases such as this one provide no standards by which a litigant can measure the risks or potential dollar value of a judgment that may be entered against it. The lodestar was an attempt to provide structured guidance to the federal courts. See *Gisbrecht*, 535 U.S. at 801-02; *Delaware Valley I*, 478 U.S. at 562-63. This Court has explained that the main fault of the *Johnson* mode of analysis “was that it gave very little actual guidance to district courts.” *Delaware Valley I*, 478 U.S. at 562-63. It is no less true when those same factors are used to *enhance* fee awards. “Setting attorney’s fees by reference to a series of sometimes subjective factors place[s] unlimited discretion in trial judges and produce[s] disparate results.” *Id.* at 563.

The use of the multiplier is a single factor that can drastically change the presumptively reasonable fee, with no clear standards for doing so. District courts today are expected to calculate the lodestar carefully, but those requirements are of no real force if the courts can then trump them to the effect of a \$4.5 million increase with mere vague, subjective

statements that the results obtained were “exceptional.”²¹ *Kenny A.*, 454 F. Supp. 2d at 1289.

The astonishing \$4.5 million enhancement in this case resulted from one district judge’s conclusion that the amorphous “results obtained” were somehow “exceptional,” when many other judges might have found such results not out of the ordinary at all. *Kenny A.*, 454 F. Supp. 2d at 1289. Petitioners respectfully submit that this Court has a supervisory duty over the district courts to prevent such disparate results in the fair and orderly administration of justice. See *Delaware Valley I*, 478 U.S. at 563.

IV. No Lodestar Enhancement Should Be Permitted Based on Quality of Representation.

A. The Circuit Court’s Decision Affirming the District Court’s Award of an Enhanced Fee for Quality of Representation Is Contrary to *Delaware Valley I*.

This Court should also state definitively that lodestar enhancements based on “quality of representation” are inappropriate in cases in which “a

²¹ Regardless of how often enhancements actually occur, “an arbitrary or unjust result is no less so for its rarity. Furthermore, the difficulties created by this type of enhancement will arise not only when the enhancement is granted, but also whenever it is sought.” See *Delaware Valley II*, 483 U.S. at 732 (O’Connor, J., concurring).

reasonable attorney's fee" is sought pursuant to 42 U.S.C. § 1988. This Court already stated in *Delaware Valley I* that quality of representation "cannot serve as [an] independent bas[i]s for increasing the basic fee award" because this factor is "presumably fully reflected in the lodestar amount." 478 U.S. at 565. If that was not a clear enough statement, the Court went on to conclude that "it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance." *Id.* at 566.

Nevertheless, district courts like the one below have continued to enhance lodestars for quality of representation because of this Court's statement in *Blum* that, although quality of representation "generally is reflected in the reasonable hourly rate," an upward adjustment may be justified "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.'" 465 U.S. at 899; *see, e.g., Thompson v. Connick*, 553 F.3d 836, 868-69 (5th Cir. 2008) (affirming attorney's fee enhancement on grounds *inter alia* that "it is extraordinarily difficult to actually obtain a jury verdict for the plaintiff in a civil rights case"); *Barnes v. City of Cincinnati*, 401 F.3d 729, 745-46 (6th Cir. 2005) (citing *Blum* in affirming enhancement because of "immense skill requisite to conducting this case properly"). Although the Court has never disavowed this statement in *Blum* and has

not explained what rare case would provide the basis for a “quality of representation” enhancement, its holding in *Delaware Valley I* would appear to limit further, if not implicitly reject, the statement in *Blum*.

Petitioners submit that quality of representation is an inappropriate basis for an enhancement. It is a lawyer’s duty always to provide the best service possible, and that duty should not serve as the basis for a financial windfall above what the lawyer would normally earn if he or she performs at an expected superior level. *See, e.g.*, Model Rules of Prof’l Conduct R. 1.1, 1.3 & 1.3 cmt. 1 (2008).

[W]hen an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client’s interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance.

Delaware Valley I, 478 U.S. at 565. Indeed, the correct way to recognize an attorney’s performance is in setting the hourly rate, which is concrete, definable, and comparable, rather than enhancing the lodestar, which is amorphous and lacking in clear standards.

Blum provides that one cannot receive an enhancement for special skill with novel and complex issues. 465 U.S. at 898 (emphasizing that, even where the experience and special skill of an attorney may result in fewer hours expended on an otherwise novel or complex issue, that attorney's special skill and experience "should be reflected in the reasonableness of the hourly rates"). If special skill and experience to handle novel and complex cases is off the table as a basis for an enhancement, then a "quality of representation" enhancement arguably can only mean a case in which an attorney performs work significantly superior to that to be expected of those with a similar level of experience in a most efficient manner in a short period of time. However, "time limitations imposed by the client or the circumstances" is one of the *Johnson* factors that should be subsumed within the lodestar and used to determine a reasonable hourly rate. See *Johnson*, 488 F.2d at 718.

Attorney's fees applications by prevailing parties in fee-shifting cases are made at the end of the litigation, and counsel for the prevailing party can always argue as a part of the lodestar calculation why he or she should obtain a higher hourly rate in the litigation than the customary rate he or she charges in other cases. See *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989) (stating that current rates may be submitted in fee applications). After all, the attorney already knows how much time and effort was devoted to the case. Presumably then, counsel for a prevailing party will always submit a request for a rate that

adequately compensates him or her for services performed.²² See *Kenny A.*, 547 F.3d at 1331 (Tjoflat, J., dissenting from the denial of rehearing *en banc*) (stating that counsel themselves pick hourly rates that they feel will adequately compensate them).

Enhancements based on quality of representation provide no clear standards, in contrast to the more concrete, definable, and comparable longstanding method of taking quality into account when setting hourly rates. “We have found it all too common for the district courts to adjust the lodestar upward to reflect what the courts view as a high level of quality of representation. This trend should stop.” *Donnell v. United States*, 682 F.2d 240, 254 (D.C. Cir. 1992).

²² In its discussion of the enhancement sought in *Blum*, the Court noted that “[n]ot only has respondent failed to show that the hourly rates failed to provide a reasonable fee for the quality of representation provided, but she candidly concedes that the ‘fees awarded [to her attorneys] may be at the upper end of the market for awards under § 1988. . . .’” 465 U.S. at 900 (citation omitted). In this case, even the District Court noted that Plaintiffs’ lead counsel from New York was being “compensated near the high end of the Atlanta market.” *Kenny A.*, 454 F. Supp. 2d at 1286. On appeal, the Court of Appeals panel noted this fact: “The court did not reduce the requested rates at all even though some of them were New York rates instead of Atlanta rates, and even though some of the attorneys (for example, Marcia Robinson Lowry, one of the two lead attorneys) recently had been awarded a smaller hourly rate for work on another case of exactly the same type.” *Kenny A.*, 532 F.3d at 1217.

B. The District Court’s Award of an Enhancement for Quality of Representation Was an Abuse of Discretion, Particularly When the Lodestar Was Substantially Reduced for Excessive Hours Billed.

Once again, the decision of the District Court in this case as affirmed by the Eleventh Circuit shows the peril of permitting the lodestar to be enhanced based on quality of representation. The District Court adopted an extremely broad interpretation of the reference in *Blum* that upward adjustments of the lodestar “are still permissible ‘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 . . . ,’” notwithstanding the *Delaware Valley I* admonishment that quality of representation “cannot serve” as a basis for making such an upward adjustment. *Kenny A.*, 454 F. Supp. 2d at 1288 (quoting *Blum*, 465 U.S. at 899, and *Delaware Valley I*, 478 U.S. at 565).

The “specific evidence” relied upon by the District Court is evidence that this Court has already ruled inappropriate for such consideration and merely duplicates what is already subsumed in the lodestar. The facts that underlay the District Court’s finding that quality of representation “was far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect” were the facts that class counsel were required to advance

expenses, were not paid on an ongoing basis, and had a fee and expense reimbursement contingent on the outcome of the case.²³ *Id.* In other words, because payment would be delayed and was contingent on success, the taxpayers of Georgia were assessed a \$4.5 million penalty. That is directly contrary to both (1) this Court’s holding that delay in compensation is remedied by fee recovery based on current rates when the fee petition is filed, *see Jenkins*, 491 U.S. at 283-84; *Delaware Valley II*, 483 U.S. at 716, and (2) the Court’s opinion in *Dague*, which held that enhancement for contingency – or the risk that an attorney *may not be paid at all* for costs advanced and fees earned – is not permitted under a fee-shifting statute, *Dague*, 505 U.S. at 567. Indeed, as stated by one of the Circuit Court judges, it is simply “the nature of the beast” that attorneys for plaintiffs in civil rights actions have to advance the cost of the litigation.

²³ The District Court cited as support for this conclusion declarations filed in support of the fee application by four Atlanta lawyers who represent plaintiffs. *See Kenny A.*, 454 F. Supp. 2d at 1288. These self-interested declarations, however, provide no basis to support the \$4.5 million enhancement. *See U.S. Dep’t of Labor v. Triplett*, 494 U.S. 715, 724-25 (1990) (discounting record based on affidavits “small in volume, anecdotal in character, and self-interested in motivation” and “blatantly insufficient to meet respondent’s burden of proof, even if entirely un rebutted”); *see also Kenny A.*, 532 F.3d at 1231 (Carnes, J., concurring) (stating that the District Court’s conclusion that the declarations were from “disinterested Atlanta attorneys” was clearly erroneous and “the lawyers who signed the [declarations] have a financial interest in keeping the fee award in this case and every case like it as high as possible”).

Kenny A., 532 F.3d at 1227 (Carnes, J., concurring). If delayed payment and risk of loss were grounds for a quality of representation enhancement, then such an enhancement “would be required in virtually every class action covered by one of the traditional federal fee-shifting statutes.” *Id.* This “specific evidence” cited by the District Court therefore cannot possibly justify an enhanced fee award.²⁴

The other “specific evidence” cited by the District Court to justify a quality of representation enhancement is based upon the court’s “personal observation” of Plaintiffs’ counsel’s performance in the litigation, which the court found “far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar.” *Kenny A.*, 454 F. Supp. 2d at 1288-89. If that was not praise enough, the District Court stated that Plaintiffs’ counsel brought more skill 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.” *Id.* at 1289.

First, what the District Court referred to as “standard hourly rates” ranged from \$215 to \$495 an hour, which the District Court itself found were

²⁴ The District Court appears to have known it was skating on thin ice because it acknowledged the prohibition against contingency enhancement in *Dague*, but reasoned that this Court did not mean to prohibit what can be referred to as “contingency plus.” *Kenny A.*, 454 F. Supp. 2d at 1288 n.8. Petitioners submit that when the “plus” means contingency plus delayed payment, it means nothing more than “contingency.”

“eminently fair and reasonable,” “consistent with the prevailing market rates in Atlanta for comparable work,” and with respect to the highest rate, “near the high end of the Atlanta market.” *Id.* at 1285-86, 1289. Indeed, a 1.75 multiplier made the actual hourly rate recovered for Plaintiffs’ two lead counsel \$866.25 and \$787.50 (\$495 and \$450, respectively, multiplied by 1.75), far above the Atlanta market rates. In addition, the fact that Plaintiffs’ counsel performed with the highest degree of skill and professionalism entitles them to be compensated by the same reasonable hourly rate in the prevailing market as any other lawyer who is required to represent his or her client with the same degree of skill and professionalism. Permitting an enhancement to an otherwise reasonable fee on such a basis would create two classes of attorneys in this country: one class that performs adequately and is entitled to one fee, and the other class that performs above the accepted norm and gets a bonus for a job well done. The problem with this distinction is that both classes have the exact same ethical duty to work zealously on behalf of their clients and should receive the same payment for the same work. *See, e.g.*, Model Rules of Prof’l Conduct 1.1, 1.3 & 1.3 cmt. 1 (2008) (stating *inter alia* that a lawyer should “take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor” and should also “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf”).

Second, the District Court ignored the inconsistency of, on the one hand, reducing the lodestar amount by over \$1 million (or 15% of the fee requested) because of unreasonable and excessive billing while, on the other hand, applying a 1.75 multiplier for superb lawyering. This Court has explicitly held that a district court's "elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive is not supportive of the court's later conclusion that the remaining hours represented work of 'superior quality.'" *Delaware Valley I*, 478 U.S. at 566-67.

Third, one must keep in mind that the entire purpose of the Act is to enable plaintiffs to attract competent counsel while avoiding windfalls. There is no dispute that the hourly rates found as "eminently fair and reasonable" and, in one case, "near the high end" of the market would enable these or any plaintiffs to obtain competent counsel. The class in this case was able to obtain excellent counsel without any promise of reward to that counsel for extraordinary performance. *See Delaware Valley I*, 478 U.S. at 568. It is unlikely that any lawyer, including Plaintiffs' counsel, would argue that he or she would have worked less (some 30,000 hours in just over three years), failed to raise any particular claim, or negotiated a less comprehensive settlement had he or she not had a chance to recover an enhanced fee award.

Permitting an enhancement to the lodestar for quality of representation would be an unfortunate acknowledgement that those in our profession need

an additional monetary incentive in order to perform in an excellent manner. That is not the standard of our profession. Class counsel in this case performed extremely well, as their clients would have expected, and have been awarded a lodestar of more than \$6 million based on reasonable hourly rates. The Act does not require more, and this case starkly demonstrates that something is very wrong with the current system if multi-million-dollar fee enhancements from the public purse are available to overcompensate attorneys who are duty-bound to represent their clients with the utmost zeal and competency, irrespective of their potential fee recovery.



CONCLUSION

For the reasons set forth above, the decision of the United States Court of Appeals for the Eleventh Circuit affirming the award of a \$4.5 million enhancement to the lodestar should be reversed.

Respectfully submitted,

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