

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

**BRIEF OF THE STATES OF ALABAMA, ALASKA,
ARKANSAS, COLORADO, FLORIDA, HAWAII, IDAHO,
INDIANA, MAINE, MARYLAND, MASSACHUSETTS,
MICHIGAN, NEBRASKA, NEVADA, NEW HAMPSHIRE,
NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA,
PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA,
SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT,
VIRGINIA, WASHINGTON, WISCONSIN, WYOMING,
AND THE DISTRICT OF COLUMBIA
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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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 when these factors already are included in the lodestar calculation?

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INTEREST OF AMICI CURIAE

On a daily basis, each of the 30 *Amici* States and the District of Columbia (“the States”) are engaged in litigation that is subject to a federal fee-shifting statute. The States appear here to request that, in cases in which a civil rights plaintiff prevails against a State, “reasonable attorney’s fees” remain just that: reasonable. 42 U.S.C. § 1988(b).

Every penny spent by the States litigating the amount of an attorney’s fees, and then paying the ultimate award, comes from the taxpayers’ pockets. Loss of these monies adversely affects government programs—sometimes, the very same programs that the plaintiffs successfully litigated to enhance. Limiting fee awards to what is “reasonable” therefore not only gives effect to § 1988(b)’s plain language, it is sound public policy.

SUMMARY OF ARGUMENT

The Court should expressly hold that an award of “reasonable attorney’s fees” under 42 U.S.C. § 1988(b) cannot encompass enhancements to the lodestar calculation based on the quality of

representation or the results obtained. Achieving favorable results is the trigger for receiving awards under § 1988(b), and the quality of a particular attorney's representation is reflected in the lodestar element concerning that attorney's hourly rate. A bonus, post-lodestar enhancement for achieving favorable results or superior quality of representation would therefore constitute an unreasonable—and thus statutorily impermissible—double-counting of these factors.

Beyond adherence to the plain language and legislative history of § 1988(b), as well as precedent of the Court, the States offer five reasons why the Court should adopt Petitioner's bright-line rule rejecting the use of 'results obtained' or 'quality of representation' as post-lodestar enhancements:

1. The purpose of § 1988(b) is to attract competent counsel to file and litigate civil rights actions. Post-lodestar enhancements are unnecessary to achieve that goal.

2. Granting post-lodestar enhancements against the States further drains the public fisc. Because the lodestar calculation alone renders a "reasonable attorney's fee," 42 U.S.C. § 1988(b), sound public policy favors spending additional monies on funding State programs that benefit taxpayers, not plaintiffs' attorneys.

3. Instead of engaging in protracted litigation, States often settle class action lawsuits because it is in the best interest of their citizens. But if lower courts are going to interpret such settlements as

superior results for the plaintiff, and thus grant sizable post-lodestar enhancements to their attorneys, the States will lose the incentive to negotiate sound public policy for fear of punitive fee awards.

4. Embracing post-lodestar enhancements creates yet another battle in the already-protracted, post-litigation war over attorney's fees.

5. Crafting objective standards to judge the quality of an attorney's performance, or his result, is impossible; thus creating a quagmire the Court has consistently tried to avoid.

* * *

Should the Court instead decide that some rare and exceptional cases warrant post-lodestar enhancements for superior quality of representation or results obtained, it should hold that this is not one of those cases. Here, the lodestar-calculated award constituted a "reasonable attorney's fee," 42 U.S.C. § 1988(b), especially where the pre-enhancement award (1) encompassed the plaintiffs' attorneys' quality of work, (2) far surpassed the compensation of public attorneys general, and (3) was reduced by the trial court because the plaintiffs submitted "excessive" billing hours.

ARGUMENT**I. THE COURT SHOULD HOLD THAT A LODESTAR-CALCULATED ATTORNEY'S FEE AWARD CANNOT BE FURTHER ENHANCED BASED ON THE "QUALITY OF REPRESENTATION" OR THE "RESULTS OBTAINED."**

In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley I)*, 478 U.S. 546 (1986), this Court stated that "[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate, the overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of 'double counting.'" *Id.* at 565. Like Petitioner, the States now ask the Court to transform its sound reasoning into a bright-line rule: It is unreasonable, and therefore statutorily impermissible, to enhance a lodestar calculated fee award under 42 U.S.C. § 1988(b) for either the results obtained or the quality of the representation.

Petitioner effectively argues why the plain language and legislative history of § 1988(b), as well as the Court's precedent interpreting § 1988(b) and similar fee-shifting statutes, reject the use of 'results obtained' and 'quality of representation' as enhancements to the lodestar award. We do not duplicate that effort here. Instead, the States offer five additional reasons why the Court should reject the use of results-based, post-lodestar enhancements.

A. Post-Lodestar Enhancements Are Unnecessary to Achieve § 1988(b)'s Purpose of Attracting Competent Attorneys to Represent Civil Rights Plaintiffs.

Without “congressional authorization” in the form of a fee-shifting statute, district courts are generally powerless to order a losing party to pay the expenses of a prevailing party’s attorney.¹ *Delaware Valley I*, 478 U.S. at 561-62. Congress’s purpose in granting fee-shifting power under § 1988(b) was both clear and limited: “[T]o ensure ‘effective access to the judicial process’ for persons with civil rights grievances.” *Hensley v. Eckerhart*, 461 U.S. 424, 429 (quoting H.R. Rep. No. 94-1558, p. 1 (1976)).

Section 1988(b), like similar Congressional fee-shifting statutes, “[was] not designed as a form of economic relief to improve the financial lot of attorneys, nor [was it] intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client.” *Delaware Valley I*, 478 U.S. at 565. “Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws.” *Id.*

¹None of the exceptions to this rule—*i.e.* (1) willfull violation of a court order, (2) bad faith by the losing party, or (3) cases in which a plaintiff recovered a “common fund for themselves and others through securities or antitrust litigation”—are present in this case. *Delaware Valley I*, 478 U.S. at 562, n.6.

As a result, as long as plaintiffs “find it possible to engage a lawyer based on the statutory assurance that he will be paid a ‘reasonable fee,’ the purpose behind the fee-shifting statute has been satisfied.” *Id.* In the case of § 1988(b), monetary enhancements above-and-beyond what is necessary to ensure that competent counsel will represent a civil rights plaintiff constitute an unnecessary—and therefore unreasonable—windfall. See *Blum v. Stenson*, 465 U.S. 866, 897 (1984) (“The legislative history [of section 1988] explains that ‘a reasonable attorney’s fee’ is one that is ‘adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.’”) (quoting S. Rep. No. 94-1011, p. 6 (1976)); *Hensley*, 461 U.S. at 443-44 (“Section 1988 manifests a finely balanced congressional purpose to provide plaintiffs asserting specified federal rights with ‘fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.’”) (Brennan, J., dissenting) (citation omitted).

1. Application of the lodestar method alone is more than sufficient to attract competent—indeed, excellent—counsel to litigate § 1983 claims. The lodestar calculation equals “the product of reasonable hours times a reasonable rate,” *Delaware Valley I*, 478 U.S. at 565, and the courts look to an attorney’s skill and experience to derive the reasonable hourly rate for that attorney. Accordingly, by definition, the lodestar calculation (1) accounts for an attorney’s quality of work and (2) provides an incentive—or, at the very least, removes the financial disincentive—for seeking out civil rights litigation.

In fact, if anything, the unenhanced lodestar method tends to overcompensate attorneys by encouraging the practice of “overbilling” hours to receive massive gross fee awards. *See* Report of the Federal Courts Study Committee 104 (Apr. 2, 1990) (lodestar method may “give lawyers incentives to run up hours unnecessarily, which can lead to overcompensation”). This case provides a prime example.

Respondents’ attorneys received lodestar rates ranging from \$215 per hour for the most junior attorneys to \$495 per hour for the most senior. Pet. App. 141-44. To put these rates in perspective, assuming 2,000 billable hours per year, the unenhanced lodestar calculation granted Respondents’ attorneys gross annual revenues of \$430,000 apiece for the most junior attorneys and \$990,000 apiece for the most senior attorney.

These mega-firm-sized hourly rates appear to be the norm rather than the exception in federal fee-shifting cases. *See, e.g., Lopez v. S.F. Unified Sch. Dist.*, 385 F. Supp. 2d 981, 986-87 (N.D. Cal. 2003) (\$460 per hour for partner at Skadden Arps); *Common Cause v. Jones*, 235 F. Supp. 2d 1076, 1081 (C.D. Cal. 2002) (\$455 per hour for attorneys at Munger, Tolles, and Olson). Indeed, one recent study in California determined that “the rates awarded in civil rights cases . . . are not only higher than the average rates, but actually are closer to the rates of partners in large law firms.” Michael Kao, *Calculating Lawyers’ Fees: Theory and Reality*, 51 UCLA L. Rev. 825, 846 (2004). Such top-dollar rates

are unquestionably “higher . . . than necessary to attract counsel” to litigate § 1983 claims, *id.* at 845; *a fortiori*, there is no need for post-lodestar enhancements.

2. That top-notch attorneys continue to file and litigate civil rights claims under § 1983, without a guarantee of post-lodestar enhancements, further proves that such enhancements are unnecessary to attract competent counsel. Again, this case provides a prime example.

Respondent is represented by the Children’s Rights Group and its founder, lead counsel Marcia Robinson Lowry. According to its website, the Children’s Rights Group has filed and litigated class-action lawsuits regarding child welfare systems in 16 States. *See* Children’s Rights, *Legal Cases*, <http://www.childrensrights.org/reform-campaigns/legal-cases/> (last checked June 24, 2009). Only two of these lawsuits were filed after the district court awarded the disputed enhancements in this case in October 2006. *Id.*

That the Children’s Rights Group filed at least 14 class action suits before receiving the present 75% enhancement shows that the availability of sizable post-lodestar enhancements was not necessary to persuade the group to litigate § 1983 claims regarding child welfare system.² To the contrary, the Children’s Rights Group, like most public interest

²In fact, Ms. Lowry received a lower hourly rate for work on a contemporaneous child welfare system case. Pet. App. 10.

groups, continues to litigate these claims because it is their stated mission: “[F]ighting to enshrine in the law of the land every child’s right to be protected from abuse and neglect and to grow up in a safe, stable, permanent home.” See Children’s Rights, *Mission and Methods*, <http://www.childrensrights.org/about/mission-and-methods/> (last checked June 24, 2009).

Nor do post-lodestar enhancements appear to be necessary to entice private law firm attorneys to assist in civil rights litigation. As noted by the court of appeals, Respondents’ private counsel, Jeffrey O. Bramlett, not only received the enhanced lodestar award for his work in this case, he also received an award “for dedication to justice and fair treatment for all people” and was elected the President of the Georgia State Bar Association the year after this case settled. Pet. App. 52-53.

Mr. Bramlett and his law firm are not acting alone. According to the Georgetown Law Center’s Pro Bono Institute, the nation’s largest law firms increased their pro bono hours by 170% between 1995 and 2007. *170 Percent Increase in Law Firm Pro Bono over Past Twelve Years*, available at <http://www.probonoinst.org/press.news.php>. The reasons are numerous: Pro bono work provides training for newer attorneys; it improves retention; and, it assists the firm in achieving community recognition. See, e.g., Esther Lardent, *Making the Business Case for Pro Bono*, Feb. 2000, available at <http://www.probonoinst.org/pdfs/businesscase.pdf>.

Simply put, receiving 100% of a lodestar-calculated award, plus multiple non-monetary benefits, appears to be more than sufficient “to ensure ‘effective access to the judicial process’ for persons with civil rights grievances.” *Hensley*, 461 U.S. at 429 (quoting H.R. Rep. No. 94-1558, p. 1 (1976)). Post-lodestar enhancements are simply icing on an already-sweetened cake.

3. A comparison between statutory fee awards for successful plaintiff’s attorneys and the compensation of State attorneys who defend the same cases further shows that post-lodestar awards are unnecessary to attract attorneys to litigate in the public’s interest—whether it be as public or private attorneys general.

When the district court enhanced Respondents’ \$215 to \$495 per hour fee awards by 75% in 2006, the average salary of division chiefs in state Attorneys General Offices ranged from \$39,000 to \$147,000—or \$19.50 to \$73.50 per hour based on a 2000 hour work year.³ National Association of Attorneys General, *Statistics on the Office of the Attorney General, Fiscal Year 2006*, p. 37-39 (on file with counsel). In Georgia, where this case was litigated, the highest paid division chief received \$117,680, or just under \$59 per hour. *Id.* at 38. Georgia’s entry-level attorneys received \$48,000 per year, or \$24 per hour. *Id.*

³The salaries of entry-level assistant attorneys general in 2006 ranged from \$33,000 to \$90,500 nationwide. National Association of Attorneys General, *Statistics on the Office of the Attorney General, Fiscal Year 2006*, p. 37-39.

The following hourly-rate chart captures the *pre-enhancement* disparity:

	<u>Plaintiffs</u>	<u>Georgia A.G.</u>	<u>Disparity</u>
Senior Atty.'s:	\$495	\$59	838%
Junior Atty.'s:	\$215	\$24	896%

Admittedly, the disparity is somewhat skewed because private firms, when they act as private attorneys general, take on overhead costs that are not reflected in a public attorney's general salary (although such overhead costs plainly do not require an eight-fold multiplier). Thus, a more proper comparison may be between private counsel representing plaintiffs and the State.

Petitioner's outside counsel, Mark Cohen, has previously represented the State of Georgia in similar cases for \$175 per hour in 2002 and \$225 per hour in 2006. Pet. App. 149, n.6. These "rates are approximately one-half of what an attorney of Mr. Cohen's experience and ability would generally charge a private client." *Id.* In comparison to Respondents' counsel, Mr. Cohen represented the State in 2006 for less than half of senior counsels' pre-enhancement award the same year.

To be clear, our point is not to insist that plaintiff's attorneys should be compensated at a level below the lodestar calculated rate. It is simply to point out that countless attorneys are attracted to civil rights cases under § 1983 as public and private

attorneys general without the promise of post-lodestar enhancements for a job well done. In fact, many litigate such matters for sub-lodestar compensation. Thus, in § 1988(b) parlance, it is ‘unreasonable’ to award post-lodestar enhancements when 100% of the lodestar calculation is more than sufficient to attract competent counsel on both sides of the table. *See Blum*, 465 U.S. at 897 (“The legislative history [of section 1988] explains that ‘a reasonable attorney’s fee’ is one that is ‘adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.’”) (quoting S. Rep. No. 94-1011, p. 6 (1976)).

B. Post-Lodestar Enhancements Levied Against Public Entities Harm Taxpayers, Public Programs, and in Some Cases, the Successful Plaintiffs.

When the States or their agencies are the defendants in litigation subject to fee-shifting statutes, fee awards are paid out of the public fisc. Thus, any unreasonably high attorney’s fees award, by definition, unreasonably shifts money from taxpayer’s pockets into the coffers of the plaintiffs’ attorneys.

When such a diversion occurs, the people suffer. Either tax rates will increase, or funding for government programs will diminish. *See Horne v. Flores*, No. 08-289, slip op. at 11 (June 25, 2009) (“When a federal court orders that money be appropriated to one program, the effect is often to take funds away from other important programs.”). In fact, an unreasonable application of fee-shifting statutes may even divert resources away from

precisely those agencies and programs that benefit the class of plaintiffs on whose behalf the lawsuit was brought. *See, e.g., Christiansburg Garment Co. v. Equal Emp. Opp. Comm.*, 434 U.S. 412, 422 n.20 (1977) (recognizing that “every attorney’s fees assessment against the [Equal Employment Opportunity] Commission will inevitably divert resources from the agency’s enforcement of Title VII”); *Lopez v. San Francisco Unified Sch. Dist.*, 385 F. Supp. 2d 981, 987 (N.D. Cal. 2003) (recognizing that “the class members who are students in SFUSD will be directly impacted by any award of attorneys’ fees to counsel, as it will reduce the resources that the District can use to provide an education to the class members”); *McPherson v. School District #186*, 465 F. Supp. 749, 757 (S.D. Ill. 1978) (noting that “it cannot be ignored that defendant is a public body and a fee award is essentially reallocating a portion of the property tax area residents pay towards furthering the educational process”).

Take the present case for example. The plaintiffs’ lodestar-calculated fee award exceeded \$6 million for three years work; a “reasonable” fee award under any stretch of § 1988(b)’s plain language. Yet, the district court’s post-lodestar enhancements for “quality of representation” and “results obtained” added an additional \$4.5 million to the attorneys’ haul—\$4.5 million that Petitioners could be spending on any number of important government programs, including implementation of the mediated improvements to Atlanta’s child welfare system.

Again, our point is not to deny “reasonable attorney’s fees” to successful plaintiffs’ attorneys. 42 U.S.C. § 1988(b). It is to point out that, once the court calculates a reasonable fee award under the lodestar, sound public policy disfavors diverting additional public monies away from government programs toward plaintiffs’ attorneys.

C. Post-Lodestar Enhancements Discourage Settlements by the States That Public Policy Should Encourage.

A State defendant’s interests are different from those of a private defendant. The State exists to serve its citizenry. Thus, in civil rights cases, the State defendants generally exist to serve both sides: the plaintiffs and the defendants. For this reason, a State’s interest in settling litigation may be simply to effectuate good public policy. In other words, settlements that enhance public services while avoiding the costs of protracted litigation can be ‘win-win’ situations for the States.

It is no secret that the primary—and often sole—impediment to settlements is the question of attorney’s fees. The prospect of a post-settlement enhancement to the lodestar that may escalate into the millions of dollars poses a significant disincentive to a State otherwise amenable to settlement. This is particularly true where the State has a reasonable chance of prevailing on the merits and avoiding having to pay any fees.

To make matters worse, lower courts appear to be more likely to grant such results-based

enhancements following settlements. It is easy for courts to misinterpret the State's decision to enter into a pre-trial settlement as a superior "result obtained" by the superior "quality of representation" by plaintiff's counsel, instead of a sound public policy decision by the State.

Such a misinterpretation may have occurred in this case. The district court based its findings of superior representation and results obtained, in part, on the observation that "even if plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief as 'intricately detailed and comprehensive' as that contained in the Consent Decree." Pet. App. 154. Yet, the court's reasoning overlooks the possibility that the State simply chose to spend its resources to swiftly fix the problem *in lieu of* engaging in expensive, protracted litigation.

Securing sound public policy outcomes will frequently involve different solutions than a court could have ordered in litigation.⁴ And sometimes these solutions provide greater benefits to the public than any class of plaintiffs could have achieved through litigation; *i.e.*, more than the law actually demands. This Court should not sanction

⁴For example, settlements sometimes include an agreement by the State to seek or enact new legislation; something that a court cannot order. *See, e.g.*, www.decentschools.org (discussing the settlement in *Williams v. California*, Superior Court of the State of California, County of San Francisco, Case No. 312236, in which the State of California agreed in 2004 to enact new legislation to improve California schools).

enhancements that effectively penalize States for acting reasonably (and often creatively) in the settlement process, rather than digging their heels into the litigation battlefield.

D. Post-Lodestar Enhancements Encourage Protracted Fee Litigation.

While the Court has stated that “[a] request for attorney’s fees should not result in a second major litigation,” *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Hum. Res.*, 532 U.S. 598, 609 (2001), in practice, it has. Battles over attorney’s fees play a major part in class action warfare.

Disagreements over the lodestar values (*i.e.* number of hours and hourly rates) crop up in most fee award battles. Adding post-lodestar enhancements into the calculative mix only heightens and lengthens the dispute. For this reason, among others, the Court rejected enhancements for attorneys retained on a contingency fee basis in *City of Burlington v. Dague*, 505 U.S. 557 (1992). *Id.* at 566 (stating that the “interest in avoiding burdensome satellite litigation . . . counsel[s] strongly against adoption of contingency enhancement”).

Lengthening fee disputes by adding post-lodestar enhancements is not only counter-productive for State defendants (and their taxpayers), but also for the courts. “[F]ee disputes now command an estimated ten percent of federal judges’ time.” Charles Silver, *Unloading the*

Lodestar: Toward a New Fee Award Procedure, 70 Tex. L. Rev. 865, 906-07 (1992), and “[f]ee enhancements number among the chief causes of fee litigation today.” *Id.* at 953. Indeed, “as the frequent battles over fee enhancements clearly show, the administrative costs of efforts to ‘fine tune’ fee awards are unacceptably high.” *Id.* at 911; *see also* Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 Duke L.J. 435, 436, 462 (noting the “considerable secondary litigation over attorney fees” that has placed large “burdens . . . on the judicial system,” and recognizing that “[c]alculating the fee to be awarded is perhaps the . . . most difficult problem in the world of fee awards”).

As Justice Brennan has noted, appeals from awards of attorney’s fees “must be one of the least socially productive types of litigation imaginable.” *Hensley*, 461 U.S. at 442 (Brennan, J., concurring in part and dissenting in part). Once again, this case provides a prime example. The present fee award dispute, which has centered primarily on the use of post-lodestar enhancements, has lasted three-and-a-half years (and counting)—a longer period than it took to resolve the underlying litigation on the merits.

This should not be surprising. Prevailing attorneys have every incentive to seek every enhancement possible because they are essentially playing with house money. In a classic “heads I win, tails you lose” scenario, once an attorney has prevailed in a lawsuit subject to fee shifting, he is virtually guaranteed to recover all of his fees for time

spent litigating his fees. *See, e.g.*, Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 28 & n.149 (Fed. Judicial Ctr. 2d ed. 2005) (noting that the courts are “unanimous” that “work on [a] fee petition and litigating a fee dispute” is compensable under fee-shifting statutes). And for those attorneys who seek enhancements and win, the payouts can be quite extraordinary, as evidenced by the \$4.5 million enhancement in this case.

Of course, every game has a loser. In the case of enhancements against State defendants, it is the public at large. The taxpayers bear the additional court costs of litigating fee awards. The taxpayers bear the burden of funding the State's defense. Should the plaintiff's attorneys win, the taxpayers pony up the award too. And all of this additional spending either results in new taxes or cuts in government programs.

E. Enhancements Lead to Arbitrary and Unpredictable Fee Awards.

Throughout its fee award precedent, this Court has emphasized that fee calculations should be as objective as possible and that methods that lead to subjective and potentially arbitrary awards should be avoided:

- In *Hensley*, the Court adopted the lodestar method as the starting point for calculating fees in large part because the lodestar “provides an *objective basis* on which to make

an initial estimate of the value of a lawyer's services." 461 U.S. at 433 (emphasis added).

- In *Delaware Valley I*, the Court noted that the "major fault" of using the '*Johnson* factors'⁵ to determine fee awards was that the 12 factors "gave very little actual guidance to district courts." 478 U.S. at 563. The Court further commented that "[s]etting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results." *Id.* The lodestar method, in contrast, was preferred because it "provided a more analytical framework for lower courts to follow than the unguided 'factors' approach provided by *Johnson*." *Id.* The Court further cautioned that "allowing the courts to adjust the lodestar amount based on considerations of the 'riskiness' of the lawsuit *and the quality of the attorney's work* could still produce inconsistent and arbitrary fee awards." *Id.* (emphasis added).
- In *Dague*, this Court rejected use of contingency enhancements in part because they "would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable." 505 U.S. at 566.

⁵*Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

This Court's statement in *Delaware Valley I* that enhancements may be permitted, if at all, only in "rare" and "exceptional" cases, 478 U.S. at 565, has done little to reduce the arbitrary nature of fee awards because "there is no bright-line rule as to what constitutes an 'exceptional' case," and "no uniform definition for an exceptional case has emerged." Matthew D. Klaiber, Comment, *A Uniform Fee-Setting System for Calculating Court-Awarded Attorney's Fees: Combining Ex Ante Rates with a Multifactor Lodestar Method and a Performance-Based Mathematical Model*, 66 Md. L. Rev. 228, 257 n.183 (2006). Certainly, there is no unanimity on what constitutes a superior "quality of representation" or superior "results obtained." See, e.g., Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 290, 292 (1977) ("[R]egardless of which factor is being rewarded by inflating the hourly rate, the process of selecting an appropriate multiplier has been essentially arbitrary," and thus "[t]he only truly consistent thread that runs throughout federal court decisions on attorneys' fees is their almost complete inconsistency.").

These arbitrary and inconsistent results can be avoided by adopting Petitioner's bright-line rule that no lodestar calculated award can be enhanced based on findings of superior quality of representation or results obtained.

II. EVEN IF THIS COURT PERMITS THE USE OF POST-LODESTAR ENHANCEMENTS IN RARE AND EXCEPTIONAL CASES, THE ENHANCEMENTS IN THIS CASE WERE UNREASONABLE.

For the reasons set forth above, the *Amici* States believe that post-lodestar enhancements for quality of representation and results obtained should never be permitted. However, should the Court leave the door open for use of such enhancements in rare and exceptional cases, it nonetheless should reverse the \$4.5 million post-lodestar enhancement in this case for any of three reasons.

1. The plaintiffs' pre-enhancement award of \$6 million constituted a "reasonable attorney's fee" under 42 U.S.C. § 1988(b) because it already accounted for the plaintiffs' favorable result and the quality of their counsel. (If anything, the award was overly generous.) The district court calculated the lodestar using top-of-the-market, large firm billing rates that ranged from \$215 per hour for the most junior attorneys to \$495 per hour for the most senior attorney. Pet. App. 141-44. The district court justified these high lodestar billing rates based in part on "the stellar performance of plaintiffs' counsel throughout this long and difficult case." Pet. App. 144.

In other words, this is not an exceptional case where the lodestar failed to adequately account for the quality of work performed by plaintiffs' counsel. The lodestar in this case squarely, and generously, reflected this factor. Accordingly, the district court's subsequent enhancement of the lodestar based on

quality of representation improperly double-counted this factor—sending the once “reasonable” (and very generous) attorney’s fee award into unreasonable territory.

2. The district court’s finding that many of respondents’ attorneys’ hours were “vague” and “excessive,” Pet. App. 145, strongly counsels against deeming this a rare or exceptional case warranting an enhancement for superior 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.’”).

3. As outlined *infra* at pages 10-12, the pre-enhancement awards in this case compensated the plaintiffs’ attorneys at hourly rates double that of Georgia’s outside counsel and eight times that of Georgia’s assistant attorneys general. If “rare” or “exceptional” cases justifying post-lodestar enhancements existed, perhaps they would arise if successful counsel’s hourly lodestar rate fell below opposing counsel’s hourly rate. But the Court should reject the notion that it is reasonable under § 1988(b) to enhance the awards of private attorneys general who are already being compensated well above their public counterparts under the lodestar method.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

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