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 U.S. Court of Appeals for the Eleventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can a reasonable attorney fee award under a federal fee-shifting statute ever be enhanced based solely on quality of performance and/or results obtained, or are these factors already included in the lodestar calculation?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] It regularly appears in this and other federal courts in cases involving the reasonableness of attorney fee awards. *See, e.g., Gisbrecht v. Barnhart,* 535 U.S. 789 (2002); *Farrar v. Hobby*, 506 U.S. 103 (1992); *City of Burlington v. Dague,* 505 U.S. 557 (1992).

The Court has determined that there is a strong presumption that the lodestar figure, without any adjustment, is the reasonable attorney fee to be awarded to prevailing plaintiffs under federal fee-shifting statutes. Although in none of its past decisions has the Court upheld an upward adjustment from the lodestar figure, it nonetheless has left the door slightly open to the possibility that an enhancement might be warranted in some exceptional case. WLF is concerned that by leaving open that possibility, the Court has spawned frequent and costly satellite litigation over the propriety of an upward adjustment. WLF believes that those costs are not worth the candle – the goals Congress sought to achieve in adopting fee-shifting statutes can be fully accommodated within the framework of the lodestar method, at much less cost.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

The Question Presented addresses whether the fee award may ever be enhanced above the lodestar figure based solely on quality of performance and/or results obtained. While WLF believes that that question should be answered "no," it is concerned that a decision limited solely to one type of enhancement would keep the door ajar and thus would not eliminate costly satellite litigation over enhancement multipliers. WLF respectfully submits that the Court should more broadly address whether enhancements above the lodestar figure should *ever* be permitted, for any reason.

STATEMENT OF THE CASE

Respondents are foster children in the custody of the Georgia Department of Human Resources. They filed suit in 2002 against various Georgia government agencies and officials, alleging that the defendants were responsible for deficiencies in the foster care systems in Fulton and DeKalb Counties and that those deficiencies violated their rights under federal and state law and the U.S. Constitution. The district court certified the named plaintiffs as representatives of a class consisting of all foster children in those two counties.

Respondents and Petitioners settled all claims in October 2005, other than the amount of attorney fees to which Respondents were entitled under 42 U.S.C. § 1988.[2] Respondents separately settled in May 2006 with two other defendants, Fulton County and DeKalb

[2] Among the Petitioners is Georgia Governor Sonny Perdue; Petitioners are hereinafter referred to collectively as "Perdue."

County. Respondents received an agreed-upon attorney fee award as part of that second settlement, and the size of that award is not the subject of this appeal.

The district court entered a consent judgment in favor of the plaintiff class, memorializing the terms of the October 2005 settlement. After Perdue and Respondents could not reach an agreement on the amount of fees and expenses to be awarded to Respondents in connection with the consent judgment, Respondents filed a motion for an award. In October 2006, the district court granted the motion in substantial part. Pet. App. 94-172. In computing a lodestar fee, the court accepted Respondents' requested hourly rates for each of the attorneys and paralegals who worked on the case, but it determined that the number of hours of work for which Respondents sought reimbursement was unreasonably high and, in some cases, insufficiently documented. Reducing the number of hours reasonably worked by 15% from the number of non-travel hours requested,[3] the court determined that the lodestar amount was $6.01 million.

The district court then determined that Respondents were entitled to a 75% percent enhancement of the lodestar amount, Pet. App. 154, based primarily on the "superb quality" of the work performed by counsel for Respondents and the "truly exceptional" success they achieved for their clients. *Id.* at 151, 152. The court also cited three contingency-

[3] The reduction in non-travel hours was 4,371 hours, and the reduction in travel hours was 384 hours – a 50% reduction in the latter category.

related factors as supportive of the 75% enhancement.[4] The court also credited the declaration of Atlanta attorney Ralph Knowles, who stated that "successful class counsel in similar cases have received multiples of 1.5-5 times the lodestar." *Id.* at 155. Multiplying the lodestar amount by 1.75, the district court awarded fees totaling $10.52 million.

The Eleventh Circuit affirmed. *Id.* at 1-93. Although the panel unanimously agreed that the 75% enhancement should be upheld, no rationale for doing so commanded majority support. Judge Wilson determined that quality of representation and exceptional results can, in rare circumstances, justify enhancement of the lodestar amount, and that the district court did not abuse its discretion in granting a 75% enhancement in this case. *Id.* at 71-93. Judge

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[4] Those three factors were: (1) class counsel were required to advance case expenses of $1.7 million over a three-year period with no ongoing reimbursement; (2) class counsel were not paid on an on-going basis as the work was being performed; and (3) class counsel's ability to recover a fee and out-of-pocket expenses was "completely contingent on the outcome of the case." *Id.* at 151. The third factor is self-evidently contingency-related, and the first two must also be understood as contingency-related to the extent that the district court was citing them as the basis for enhancing the lodestar amount (rather than as a basis for increasing the hourly rates for Respondents' counsel in order to compensate for the delay in payment, or as a basis for awarding interest on expenses incurred). After citing those three factors, the court conceded that "a lodestar enhancement cannot be based on contingency alone" (citing *Dague*), but it concluded that the three factors constituted something more than mere risk of nonpayment, and thus could properly be relied on, along with other listed factors, as the basis for the court's 75% enhancement above the lodestar amount.

Carnes determined that the logic of *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* ["*Delaware Valley I*"], 478 U.S. 546 (1986), and *Dague* effectively precluded any enhancement above the lodestar amount based on the quality of performance and/or the results obtained. *Id.* at 17-57. He voted to affirm the 75% enhancement solely because he felt bound to do so by controlling circuit precedent that post-dated *Delaware Valley I*. *Id.* at 57-70. Judge Hill simply concurred in the judgment, declining to take sides in the disagreement between the other judges regarding the proper basis for affirmance. *Id.* at 93a.

The Eleventh Circuit subsequently voted 8-3 to deny rehearing *en banc*. Judge Tjoflat wrote an opinion dissenting from the denial. He stated that the district court had adopted the lodestar enhancement in a procedurally deficient manner, and he opined that enhancement based on exceptional results is never permissible in a case in which the plaintiffs primarily seeks sweeping equitable relief. *Id.* at 173-202. Judge Carnes (joined by Judge Tjoflat and Judge Dubina) also dissented, restating his belief (previously set forth in Part VI of his concurring opinion) that the lodestar amount should never be enhanced based on superb performance or exceptional results. *Id.* at 202-216.

SUMMARY OF ARGUMENT

When Congress has added fee-shifting provisions to federal statutes, it has done so to ensure that individuals possessing substantial claims under those statutes can attract competent counsel to represent them in court, even when they lack funds to pay up-front fees. Accordingly, when a fee-shifting provision

provides for an award of "reasonable" attorney fees to a prevailing party, the Court has understood the reason-ableness of a fee to be solely a function of the amount necessary to attract competent counsel.

Over the past three decades, the Court has settled upon the "lodestar" as the appropriate method for determining what constitutes a "reasonable" fee award under a federal fee-shifting statute. The lodestar amount is defined as the number of hours reasonably expended on a case multiplied by an reasonable hourly rate for those professionals who worked on the case. The Court has established a strong presumption that the lodestar represents the reasonable fee. While it has stated occasionally that there may exist exceptional cases in which an award in excess of the lodestar amount would be required in order to render the award "reasonable," the Court has never upheld such an enhanced award.

Despite the strong presumption against enhancements, the courts below held that a 75% enhancement was appropriate in this case because, the district court found, counsel for Respondents performed work of "superb quality" and achieved "truly exceptional" success for their clients. WLF submits that an enhancement above the lodestar amount based on the quality of work performed and the level of success achieved is never appropriate, because those factors are not logically related to a plaintiffs' ability to attract competent counsel. In the opinion of the district court, Respondents were extremely fortunate to have attracted counsel capable of performing work (and who did perform) at a level far superior to what they could have expected from reasonably competent attorneys with

similar levels of experience. But Respondents' good fortune bears no logical relationship to what should be the focus of the "reasonable" fee inquiry: what fee was necessary for Respondents to attract competent counsel and is necessary to ensure that similarly situated claimants will be able to attract counsel to press their claims. To the extent that this case required counsel for Respondents to undertake a herculean effort and to employ their special skills in order to achieve the "superb results," that effort and skill are reflected in the $6.01 million lodestar amount – both in the approval of 25,000 hours of billable time and in the approval of hourly rates of up to $495 per hour.

Judge Carnes aptly observed that this Court's fee-award decisions have been moving steadily in the direction of a flat prohibition on enhancements above the lodestar amount. While earlier cases stated that enhancements might be appropriate in "exceptional" cases, both *Delaware Valley I* and *Dague* strongly questioned the appropriateness of enhancements. But because the Court has not completely shut the door on the possibility of enhancements, the unsurprising result is that a high percentage of all fee requests under federal fee-shifting statutes include a request for an enhancement above the lodestar amount. The result is a highly inefficient system in which significant resources are being expended by attorneys and courts in debating whether the circumstances of an individual case are sufficiently exceptional to warrant an upward adjustment. WLF submits that this expensive search for truly extraordinary cases is not warranted. Use of the lodestar method is sufficient for determining a "reasonable" attorney fee in all, or virtually all, cases. Opening up the process to possible upward adjustment

not only leads to needless expense but also, due to the absence of objective criteria for determining just when a case is extraordinary, is likely to lead to arbitrary, non-uniform application of the law.

Perdue has convincingly demonstrated why upward adjustments are never warranted based either on the quality of counsel's performance or on the results achieved. But eliminating those rationales for lodestar enhancements is unlikely to reduce the large volume of enhancement requests so long as the Court leaves open the possibility of other rationales. WLF notes, for example, that the district court based its 75% enhancement in part on contingency-related factors that the court deemed not to have been foreclosed by *Dague*. Accordingly, WLF submits that the Court should state categorically that calculation of a "reasonable" fee should focus solely on the lodestar calculation and that no upward adjustments from the lodestar amount should be permitted. There is no convincing evidence that the lodestar methodology is incapable of computing a "reasonable" fee in any discernable class of cases. In particular, the evidence does not support a claim that enhancements are necessary to ensure that "unpopular" litigants are able to attract competent counsel.

ARGUMENT

I. IN MANDATING "REASONABLE" FEES, CONGRESS SOUGHT FEES SUFFICIENT TO ATTRACT COMPETENT COUNSEL

Respondents seek an award under 42 U.S.C. § 1988(b), which permits an award of "reasonable" attorney fees to a prevailing party in a variety of civil rights actions – including (as here) an action to enforce federal constitutional rights under 42 U.S.C. § 1983.[5] In attempting to discern what constitutes a "reasonable" fee award, the Court repeatedly has looked to the intent of Congress in adopting § 1988(b) and other fee-shifting provisions.

Congress's purpose in adopting fee-shifting provisions has been "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. "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley*, 461 U.S. at 429 (quoting H.R.

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[5] The language of § 1988(b) is fairly typical of federal fee-shifting provisions. It provides that "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." The appendix to Judge Carnes's opinion dissenting from the denial of rehearing *en banc* provides a list of nearly 100 federal statutes that include a provision permitting the award of "reasonable" attorney fees to the prevailing party. Pet. App. 217-223. The Court has determined that Congress intended that a single standard for determining "reasonable" fees should apply to all such statutes. *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

Rep. No. 94-1558, at 1 (1976)). In other words, Congress's focus has been on fairness to litigants, not fairness to their counsel or a concern over the financial well-being of the legal profession. A fee award should "result[ ] in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Blum v. Stenson*, 465 U.S. 886, 893-94 (1986) (quoting S. Rep. No. 94-1011, at 6 (1976)).

Over the past three decades, the Court has settled upon the "lodestar" as the appropriate method for determining what constitutes a "reasonable" fee award under a federal fee-shifting statute. *Dague*, 505 U.S. at 562. The lodestar amount is defined as the number of hours reasonably expended on a case multiplied by a reasonable hourly rate for those professionals who worked on the case. *Delaware Valley I,* 478 U.S. at 565. By the mid-1980s, the Court had "established a 'strong presumption' that the lodestar represents the 'reasonable' fee." *Dague*, 505 U.S. at 562 (quoting *Delaware Valley I* at 565).

The "lodestar" method was not developed, however, until some time after the courts were required to begin establishing guidelines for determining the size of a "reasonable" fee. The delayed arrival of the lodestar method is hardly surprising when one considers that the concept of attorneys preparing bills based on hours worked is relatively new. As the Court recently explained, attorneys did not even begin keeping careful track of the hours spent on individual client matters until the 1940s (and even then it was only as a means to "allow attorneys and firms to determine whether fees charged were sufficient to cover overhead and generate suitable profits"), and the practice of billing clients

based on the number of hours worked did not become "widespread" until the early 1970s. *Gisbrecht v. Barnhart*, 535 U.S. 789, 800-801 (2002). Thus, before the early 1970s, courts seeking to determine a "reasonable" fee award could not easily have used the lodestar method, due to the scarcity of records of the number of hours actually expended on a case.

Early decisions regarding "reasonable" fees authorized courts to look to a wide variety of non-quantifiable factors in making the reasonableness determination. *See, e.g., Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (the number of hours devoted to a case was but one of 12 factors to consider in determining a reasonable fee). But as the practice of tracking hours became more universally accepted within the legal profession, courts began to see the advantages of the lodestar method and its use of relatively quantifiable and objective criteria. *Gisbrecht,* 535 U.S. at 801.

In 1983, this Court in *Hensley* embraced the lodestar method as the presumptively appropriate method for computing attorney fees. But perhaps because of the existence of a large body of case law that pre-dated the lodestar method and that had endorsed the use of a wide variety of other factors in determining the reasonableness of a fee request, the Court was reluctant to flatly prohibit use of those other factors. Instead, the Court repeatedly touted the virtues of the lodestar method while still leaving open the possibility of awards exceeding the lodestar amount in exceptional cases. *See, e.g., Hensley*, 461 U.S. at 435 (while actually reducing the fee award below the lodestar amount, the Court stated in *dicta* that "an enhanced award *may* be

justified" in some cases of "exceptional success") (emphasis added); *Blum*, 465 U.S. at 899 (while stating that the lodestar amount is "presumed" to be the reasonable fee under § 1988 and that superior quality of representation is generally reflected in the reasonable hourly rate, such superior work "may" justify an upward adjustment in a "rare case.").

As noted above, the Court's later decisions in *Delaware Valley I* and *Dague* considerably strengthened the presumption that the lodestar amount is *the* reasonable attorney fee contemplated by a federal fee-shifting provision. While still declining to shut the door all together on lodestar enhancements, the Court made clear that anyone seeking such an enhancement bears the burden of demonstrating that the enhancement is "necessary" to render the fee reasonable, and it absolutely prohibited any enhancement based on the attorney having assumed the risk that the plaintiff would not prevail (thereby losing any entitlement to a fee award). *Dague*, 505 U.S. at 562, 567. Importantly, in none of its fee-shifting cases has the Court upheld a lodestar enhancement, and thus its statements about the possible availability of such enhancements were largely *dicta*.

The Court for the first time is squarely faced with the issue of whether lodestar enhancements are *ever* permissible based on quality of performance or results achieved. A close examination of Congress's intent in authorizing "reasonable" fee awards to prevailing parties makes plain that neither of those factors justifies the award of lodestar enhancements.

A. If the Lodestar Is Sufficient to

Attract Competent Counsel, It Is Irrelevant Whether Counsel Has Performed Superbly

In support of it decision to award a 75% enhancement to Respondents, the district court cited its finding that counsel for Respondents had performed work of "superb quality." Pet. App. 151. That finding does not justify a lodestar enhancement because it bears no relationship to Congress's understanding regarding the reasonableness of a fee award.

As noted above, a "reasonable" fee is one that is "adequate to attract competent counsel," not one that pays counsel 100% of their after-the-fact, self-interested estimations of the value of their services. *Blum*, 465 U.S. at 893-94. An attorney who is contemplating taking on a representation involving a potential fee under a fee-shifting statute will be attracted to do so if (s)he can count on award of a fee (in the event the client prevails) that pays the attorney for every hour that (in the attorney's reasonable estimation) will be required to establish the client's claim, and that is based on an hourly pay rate that fairly compensates an attorney of his/her skill or experience. In other words, a competent attorney will be attracted to take on the representation by the promise of a lodestar fee. In order to be induced to take on the representation, the attorney will not need the promise of a lodestar enhancement in the event that his/her performance is subsequently deemed to be one of those truly "rare" cases in which the performance vastly exceeds what could reasonably be expected of an attorney of his skill and experience, because the attorney would realize that "rare" events happen only

rarely and thus have little or no bearing on the economics of taking on the case.

In sum, the ability of Respondents and similarly situated claimants to find competent counsel to represent their interests does not depend on the availability of a lodestar enhancement that potential counsel know to be only rarely available. In the opinion of the district court, Respondents were extremely fortunate to have attracted counsel capable of performing work (and who did perform) at a level far superior to what they could have expected from reasonably competent attorneys with similar levels of experience. But Respondent's good fortune bears no logical relationship to the "reasonable" fee mandated by § 1988(b) – that is, the fee necessary for Respondents to have attracted competent counsel.

B. If the Lodestar Is Sufficient to Attract Competent Counsel, It Is Irrelevant Whether Counsel Has Achieved Exceptional Results

For similar reasons, the fact that counsel for Respondents may have achieved exceptional results is irrelevant to the computation of a reasonable fee under § 1988(b). A n attorney who is contemplating taking on a representation involving a potential fee under a fee-shifting statute will be attracted to do so if (s)he can be assured that (s)he will be fairly compensated for every hour of time necessary to ensure that his/her client will prevail – regardless whether the client prevails in truly exceptional fashion or (as will occur much more frequently) the client prevails in a fashion that the

client could ordinarily have hoped for at the outset of litigation. Of course, to the extent that achieving truly exceptional results requires an expenditure of an increased number of hours or exercise of the attorney's exceptional skills and/or experience, those increased hours and skills/experience will be fully reflected in the lodestar amount – thereby eliminating any need for an enhancement above the lodestar amount.

The "superb results" identified by the district court in this case apparently were the product of herculean efforts on the part of Respondent's counsel. They reasonably expended 25,000 hours of billable time and employed the services of attorneys whose time was valued by the market at as much as $495 per hour. But those efforts were fully reflected in the $6.01 million lodestar amount computed by the district court. Respondents should be grateful for what their attorneys achieved. But they have not demonstrated that the promise of a lodestar enhancement was necessary to attract competent counsel willing to devote resources of this magnitude to the case. In the absence of such a demonstration, it makes no sense to require Perdue and other similarly situated defendants to compensate opposing counsel for "extra value" conferred on the plaintiffs above and beyond the compensation necessary to attract the competent counsel contemplated by Congress when it adopted § 1988(b).

II. BY HOLDING OUT THE POSSIBILITY OF ENHANCEMENTS BASED ON QUALITY OF PERFORMANCE AND RESULTS OBTAINED, THE COURT ENCOURAGES INEFFICIENT FEE DISPUTES

As noted above, the Court has become increasingly insistent that the lodestar fee is presumptively the "reasonable" fee contemplated under fee-shifting statutes. But it nonetheless has included statements in its decisions suggesting that, under factual scenarios not yet faced by the Court, lodestar enhancements might be warranted. *See, e.g.*, *Dague,* 505 U.S. at 562.

Because the Court has not completely shut the door on the possibility of enhancements, the unsurprising result is that a high percentage of all fee requests under federal fee-shifting statutes include a request for an enhancement above the lodestar amount. Respondents argue that the Court need not concern itself with that issue because lodestar enhancements are granted only infrequently. *See, e.g.*, Brief in Opposition at 23 (stating that Respondents have identified only nine reported decisions since *Dague* was decided in which a fee applicant obtained a lodestar enhancement based on quality of representation and/or results obtained and in which the enhancement was not overturned on appeal). But whether such awards are rare is not the principal concern.[6] Rather, WLF is

[6] Moreover, the district court's findings suggest that such enhancements are not nearly as rare as Respondents insist. To support its conclusion that the award of a lodestar enhancement

concerned that leaving the door ajar creates a highly inefficient system in which significant resources are being expended by attorneys and courts in debating whether the circumstances of an individual case are sufficiently exceptional to warrant an upward adjustment. Perdue's brief has thoroughly documented the vast scope of such fee disputes and the large number of reported decisions in which courts have addressed claims for lodestar enhancements. Resolution of such disputes cannot be deemed an efficient use of judicial resources. As the Court explained in *Dague*, in shutting the door on all lodestar enhancement claims based on contingency:

> The interest in ready administrability that has underlain our adoption of the lodestar approach, *see, e.g., Hensley*, 461 U.S. at 433, and the related interest in avoiding burdensome satellite litigation (the fee application "should not result in a second major litigation," *id.* at 437), 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.

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was appropriate, the district court credited the declaration of Atlanta attorney Ralph Knowles, who stated that "successful class counsel in similar cases have received multiples of 1.5-5 times the lodestar." Pet. App. at 155. That finding suggests that despite the admonitions of *Delaware Valley I* and *Dague* that the lodestar fee is the presumptively reasonable fee, lower federal courts have routinely been granting lodestar enhancements to plaintiffs who successfully challenge the adequacy of government-run foster care systems.

Dague, 505 U.S. at 566.

WLF submits that this expensive search for truly extraordinary cases is not warranted. Use of the lodestar method is sufficient for determining a "reasonable" attorney fee in all, or virtually all, cases. Opening up the process to possible upward adjustment based on quality of performance and/or results achieved not only leads to needless expense but also, due to the absence of objective criteria for determining just when a case is extraordinary, is likely to lead to arbitrary, non-uniform application of the law.

Moreover, there is significant reason to doubt whether the courts ought to reward the achievement of extraordinary outcomes, because the law ought to be encouraging "just" results, not the result that happens to be the most advantageous to the plaintiff. The district court suggested that the outcome achieved in this case through settlement negotiations – a settlement approved by the court as just and reasonable – entailed injunctive relief that federal courts might well not have ordered if the case had been fully litigated. But as Judge Tjoflat pointed out in his opinion dissenting from the denial of rehearing *en banc*:

> Assuming that a court sitting in equity properly discharges its function in entering a just and legally appropriate injunction, whether following a bench trial or after consideration of a consent decree crafted by the parties, there can be but one qualitative result; in no such case can one result be any more "exceptional" than, or "superior" to, another.

Pet. App. 193-94.

One can assume that the settlement approved by the district court mandated the most appropriate equitable relief in light of the facts presented to the Court by counsel for Respondents. Thus, while Respondents are entitled to an award (as part of the lodestar) of a fee covering the cost and effort of bringing the relevant facts to the attention of the Court, it makes little sense to maintain rules that encourage the expenditure of resources for the purpose of identifying cases with truly extraordinary results, when the very existence of such a category is subject to serious question.

The federal courts have operated for more than two decades under a regime that contemplates the award of lodestar enhancements only in "rare" cases, if at all. There is no reason to believe that eliminating the theoretical but highly unlikely possibility of enhancements based on quality of performance and/or results obtained will have more than an extremely minor impact on the willingness of attorneys to take on cases of individuals asserting claims under statutes that contain a fee-shifting provision. Accordingly, the burdens imposed on the judiciary by the continued existence of that slight possibility far outweigh any benefits (of the sort contemplated by Congress) created by leaving the door ever-so-slightly ajar.

III. THE COURT SHOULD PROHIBIT ALL ENHANCEMENTS OF THE LODESTAR AMOUNT

Perdue has convincingly demonstrated why lodestar enhancements are never warranted based either on the quality of counsel's performance or on the results achieved. But eliminating those rationales for lodestar enhancements is unlikely to reduce the large volume of enhancement requests so long as the Court leaves open the possibility of other rationales.

WLF notes, for example, that the district court based its 75% enhancement in part on contingency-related factors that the court deemed not to have been foreclosed by *Dague*. *See supra* at 4 & n.4. Thus, even if the Court were to instruct the district court on remand not to base a decision to enhance the lodestar on the quality of counsel's performance or the results achieved, the district court might deem itself free to adhere to a 75% enhancement based on these contingency-related factors.

Accordingly, WLF submits that the only way to put an end to wasteful and unproductive satellite litigation of the sort at issue here is for the Court to state categorically that calculation of a "reasonable" fee should focus solely on the lodestar calculation and that no upward adjustments from the lodestar amount are permitted. There is no convincing evidence that the lodestar methodology is incapable of computing a "reasonable" fee in any discernable class of cases.

In particular, the evidence does not support a

claim that enhancements are necessary to ensure that "unpopular" litigants are able to attract competent counsel. In his concurring opinion, Judge Carnes expressed a concern that lodestar enhancements might be appropriate in cases involving unpopular litigants, because some attorneys might be reluctant to take such cases for fear that the client's unpopularity might rub off on them and thereby impair their ability to recruit future clients. Pet. App. 49-57.

There is no evidence, however, that a reputation for representing unpopular clients harms an attorney's business prospects.[7] To the contrary, the example of Atticus Finch – an attorney willing to represent any client in need of representation, no matter how unpopular – for decades has been held up in the popular imagination as the ideal of a public-minded attorney. *See* Harper Lee, *To Kill A Mockingbird* (1960). And even if attorneys living in Town X might be reluctant to take on a particular case for fear of offending some of the residents of the town, the availability of attorneys from other cities and towns eliminates any realistic possibility that local prejudice would present a significant obstacle to obtaining representation.

The bombing of the federal building in Oklahoma

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[7] Of course, Respondents can make no claim that *this* case involves an unpopular class of clients whose unpopularity makes it difficult to attract legal representation. *See, e.g.,* Pet. App. 207 n.2 (Carnes, J., dissenting from denial of rehearing *en banc*) ("No one contends that this is a case where the clients were detested, the litigation was unpopular, or the attorneys' standing in their profession or community suffered in the least. In fact, just the opposite is true.")

City in 1995 provides a good example of the willingness of attorneys to take on unpopular clients. The two individuals implicated in that bombing, Terry Nichols and Timothy McVeigh, can fairly be described as among the most unpopular litigants in the United States during the past several decades. Their attorneys are not in a position to boast that their unusual skills produced extraordinary results for their clients: both defendants were convicted of murder, McVeigh was executed for his crimes, and Nichols received a life sentence.

Thus, if it were true that attorneys are fearful that a reputation for having represented very unpopular clients would be bad for future business, then one would expect that attorneys for Nichols and McVeigh would have wanted to suppress information about their involvements in the case. But the precise opposite has proven true. Ronald G. Woods and Michael E. Tigar (counsel for Nichols) and Stephen Jones (counsel for McVeigh) have widely publicized their involvement and list that involvement on professional web sites as among the major achievements of their legal careers. *See, e.g.*, Stephen Jones and Jennifer Gideon, *United States v. McVeigh: Defending the "Most Hated Man in America*," 51 Okla. L. Rev. 617 (1998); Michael E. Tigar, *Defending*, 74 Tex. L. Rev. 101 (1995); attorney profile for Ronald Woods at www.ronwoodslaw.com (last visited June 26, 2009) (listing representation of Terry Nichols as among Mr. Woods's major achievements). The Nichols/McVeigh example is typical; attorneys regularly publicize their representation of notorious, unpopular clients, presumably on the theory that the public will view such representation as evidence both of a high degree of legal skills and of a willingness to fight for one's clients regardless of personal costs.

In sum, WLF urges the Court to adopt a rule establishing the lodestar amount as a ceiling on the award of attorney fees under fee-shifting statutes. If the court instead merely prohibits lodestar enhancements based on quality of representation and/or results achieved, enterprising attorneys (who no doubt sincerely believe that their services are worth more than the lodestar amount) will find other grounds for requesting enhancements and will continue to flood the federal courts with such requests.

CONCLUSION

Amici curiae request that the Court reverse the decision of the court of appeals.

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