NO. 08-970

In the

Supreme Court of the United States

SONNY PERDUE, Governor 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

RESPONDENTS' BRIEF

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QUESTION PRESENTED

Can an attorney's fee award under a federal fee-shifting statute ever be enhanced based on quality of performance and results obtained?

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STATEMENT OF THE CASE

In 2002, Georgia's state-run foster care system as operated in metropolitan Atlanta (Fulton and DeKalb Counties) was in disarray. Children at two emergency shelters suffered under truly deplorable conditions. And more broadly, a system intended to protect children temporarily in state foster care custody pending reunification with their families or adoption was accomplishing neither goal while subjecting children to abusive and dangerous conditions. Meanwhile, children routinely languished in state custody for years, in some cases their entire childhood.

Plaintiffs filed this action for declarative and injunctive relief to stop the physical, emotional, and psychological harm that was being inflicted upon thousands of abused and neglected children in state custody. After the district court entered a consent decree awarding comprehensive relief to the class, it determined that plaintiffs were entitled to a reasonable attorney's fee. The fee included approximately $6 million based on each attorney's hours worked and hourly rate, as well as a 75% enhancement based on the exceptional quality of the attorneys' work and the exceptional results obtained. After the court of appeals upheld the award, this Court granted review limited to a single question: whether an enhancement may *ever* be based on quality of work or results obtained. The text, legislative history, and this Court's precedents make clear that the question must be answered in the affirmative.

1. Plaintiffs, nine foster children and a putative class of all 3,000 foster children in Fulton and DeKalb Counties, filed a class action complaint on June 6, 2002, in the Superior Court of Fulton County, Georgia. Pet. App. 96. Plaintiffs asserted 15 causes of action against state officials, including claims under federal law pursuant to 42 U.S.C. § 1983, alleging a systemic failure to oversee the safety of foster children and to provide them with basic services such as medical, dental, and mental health care. Pet. App. 96.

The district court later found that this case was "one of the most complex and difficult cases that the undersigned has handled in more than 27 years on the bench," requiring "enormous time and effort." *Id.* at 94-95, 96. That time and effort began long before the suit was filed. Litigation of this type generally requires extensive pre-suit investigation. J.A. 35-36; Pet. App. 117. Unlike litigation focused on one or two institutions, pre-suit investigation of a foster-care system is a time-consuming undertaking because foster children reside in a variety of settings, including foster homes that house a small number of children; relatives' homes; group homes, institutions, and shelters that may be run by the State or a private entity on behalf of the State; supervised independent living arrangements; and trial visits at home. *See* J.A. 36.

Although the suit was initially filed in state court, the State removed the case to federal court. Plaintiffs then sought expedited discovery and moved for a preliminary injunction against the State's continued operation of two emergency

shelters in which children endured truly dangerous conditions. Pet. App. 98-99. Following a four-day evidentiary hearing and testimony by many fact and expert witnesses, the district court found that plaintiffs had "established numerous major deficiencies in the foster care system in general and in the emergency shelters in particular." *Id.* at 99, 120. Among other things, the emergency shelters subjected children to violence, sexual assault, gang activity, illicit drug use, overcrowding and unsanitary conditions, and almost complete lack of adult supervision. At the hearing, defendants agreed to close the two dangerous shelters. *Id.* at 99, 119-20. The consent decree ultimately entered in this case includes "significant protection against the risk of future peril from the improper use of emergency shelters." *Id.* at 99, 120; *see also* J.A. 124.

Although the preliminary injunction hearing focused on deficiencies in the emergency shelters, the remainder of the litigation addressed system-wide problems. Defendants raised a number of threshold issues. First, they argued that the federal court to which they had removed the case should abstain under *Younger v. Harris*, 401 U.S. 37 (1971). Next, they argued that the court should dismiss the complaint for failure to state a claim in light of an Eleventh Circuit precedent dismissing a child-welfare class action, *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003). Plaintiffs successfully defeated those motions. *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 284-289 (N.D. Ga. 2003). Plaintiffs also defeated defendants' challenge based on the commonality and typicality

requirements for class certification under Fed. R. Civ. P. 23. *Kenny A.*, 218 F.R.D. at 299-302; *see also* Pet. App. 99-100.

Discovery concerning Georgia's child welfare system was a labor-intensive and time-consuming endeavor. The district court recounted the obstacles plaintiffs faced during discovery, finding that defendants' "strategy of resistance undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." Pet. App. 96; *see also id.* at 171. In one instance, the district court "was forced to admonish State Defendants for 'relying on technical legal objections to discovery requests in order to delay and hinder the discovery process.'" *Id.* at 100 (citation omitted). In all, class counsel reviewed and analyzed nearly half a million pages of documents, and the parties took and defended more than 60 depositions. *Id.* at 121; *see also* J.A. 53.

The State rejected a cost-saving proposal to conduct a joint record review. Pet. App. 121-22. Such reviews collect information from a random sample of children's case records to demonstrate that the harms experienced by the named plaintiffs are pervasive throughout the foster care system. After the parties had exchanged extensive expert reports and completed expert discovery, defendants filed a voluminous motion for summary judgment. As the district court noted, the motion "was supported by a 74-page memorandum and a 126-page Statement of Undisputed Material Facts consisting of 612 separately number[ed] paragraphs, as well as a 48-page Statement of

Legislative Facts consisting of 74 separately numbered paragraphs," along with six affidavits and three volumes of appendices. *Id.* at 101. Defendants followed that motion with a motion to exclude the reports and testimony of all of plaintiffs' experts. *Id.* In mid-2004, in light of the passage of time, the district court authorized updated fact and expert discovery. *Id.* at 102.

In October 2004, with a February 2005 trial date approaching, the district court appointed a mediator and directed the parties to explore settlement. *Id.* In December 2004, the district court denied defendants' motions for summary judgment and to exclude the reports and testimony of plaintiffs' experts. *Id.* at 103; *see also Kenny A. ex rel. Winn v. Perdue*, No. 1:02-cv-1686, 2004 WL 5503780 (N.D. Ga. Dec. 13, 2004). Defendants moved to amend that order and for certification of an immediate interlocutory appeal. Pet. App. 103. "While that motion was pending, efforts at mediation began in earnest," with the parties engaging in 18 mediation sessions over four months. *Id.*

2. In July 2005, the parties presented the court with a proposed consent decree. *Id.* at 103-04. After directing notice to the class, conducting the requisite fairness hearing, and considering comments received from interested parties, the district court granted final approval to the class-wide settlement and entered the consent decree as an order of the court. *Id.* at 104.

The consent decree was designed to eliminate the worst abuses of Georgia's foster care system,

while attempting to facilitate the goal of minimizing a child's time in the foster care system by maximizing the prospect for timely reunification or adoption. J.A. 99-101. The district court explained that "[t]he Consent Decree provides sweeping relief to the plaintiff class, the scope of which can only be fully appreciated by summarizing its provisions." Pet. App. 152. The decree's "centerpiece 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." *Id.* "The outcome measures, many of them requiring phased-in results over a two-year period, seek to improve performance in the following areas: timely commencement and thorough completion of investigations of reported abuse or neglect, regular visits of foster children by case workers; approval and licensure of foster homes and other placements, the percentage of children who are victims of substantiated maltreatment while in foster care, the percentage of children in foster homes that exceed their licensed capacity, the percentage of children who have experienced multiple moves while in foster care; and periodic judicial reviews of the safety and status of foster children." *Id.* at 152-53.

The decree also "requires comprehensive and periodic delivery of medical, dental, and mental health services to foster children; a detailed process for improved goal-setting, case planning and periodic reviews of children's status while in foster care; limits on the placement of children in emergency shelters and group homes and

institutions, and protections against overcrowding in foster homes; and the establishment of reimbursement rates to adequately compensate providers for caring for foster children." *Id.* at 153. In addition, the "State Defendants commit to reduced caseloads for all case managers and supervisors; a fully implemented single statewide automated child welfare information system; and maintaining or establishing placements and related services identified in a 'needs assessment' to be conducted by a neutral expert." *Id.*

Finally, the decree "includes processes for the supervision of private contract agencies that provide homes and services for foster children, improvements in foster parent screening, licensing and training, as well as foster parent support and communication, improvements in case manager training, improvements in processes for addressing suspected abuse or neglect and suspected corporal punishment of children in foster care, and improvements in efforts to maximize available federal funding." *Id.*

3. The parties agreed that plaintiffs were entitled to a reasonable attorney's fee under 42 U.S.C. § 1988, but could not agree on the amount. Pet. App. 104; *see also* J.A. 184-85. Plaintiffs then filed a motion with supporting evidence for an award of reasonable attorney's fees. Pet. App. 104-05; *see also* J.A. 27-91.

The district court employed a two-step analysis by first determining the number of hours reasonably expended by plaintiffs' counsel multiplied by reasonable hourly rates and then

"consider[ing] whether any adjustment to the lodestar is appropriate in this case." Pet. App. 111 (citing *Blum v. Stenson*, 465 U.S. 886, 897 (1984)).

In calculating the total hours reasonably expended, the district court reviewed 15 categories of work performed by plaintiffs. *Id.* at 116-40. Having determined that some reductions were appropriate for duplicative, excessive, or unclear billing entries, the court made an across-the-board 15-percent reduction in plaintiffs' billable hours for all non-travel-related fees. *Id.* at 145. In calculating reasonable hourly rates, the district court found that defendants had offered "no evidence to rebut the *prima facie* proof of prevailing market rates submitted in connection with plaintiffs' fee application." *Id.* at 142. Plaintiffs' evidence included the sworn declarations of co-lead counsel for plaintiffs, *see* J.A. 27-59, as well as "the sworn affidavits of several highly experienced and well-respected members of the Atlanta bar, each of whom states that the rates requested are 'reasonable and solidly within the range of hourly rates currently prevailing in the Atlanta market and customarily charged to and collected from clients for legal services requiring comparable skill, judgment, professional reputation and experience.'" Pet. App. 142 (citations omitted); *see also* J.A. 60-91. The court concluded that the rates presented by plaintiffs were "fair and reasonable," and "[i]f anything, they are too low." Pet. App. 144.

Multiplying the allowed hours by those rates, the district court calculated an initial lodestar of $6,012,802.90. *Id.* at 144-45. The court noted that this amount was "commensurate with" the $6.1

million value of defendants' own legal expenses "if they had been required to pay for their legal services in this case at standard hourly rates in the private marketplace." *Id.* at 148, 149 & nn.6 & 7.

The district court then addressed plaintiffs' request for an upward adjustment, the first such request that counsel for Children's Rights had ever made, despite their involvement in numerous similar suits. *Id.* at 150-55. In finding that an upward adjustment was necessary to yield a reasonable fee, the court reviewed the specific evidence submitted by plaintiffs, including approximately 2,500 pages of time and expense records, the declarations of co-lead counsel, and those of four Atlanta attorneys, each of whom was "well known to the court and well respected in the Atlanta legal community," and possessed "extensive experience in complex class action litigation." *Id.* at 155; *see also* J.A. 60-91.

Each of those four attorneys opined that the fees and expenses plaintiffs sought were reasonable and that an award limited to the lodestar would be unreasonable and would *undercompensate* plaintiffs' counsel. Pet. App. 155. Three of the attorneys testified that an upward adjustment of one-and-a-half to two times the lodestar was necessary to yield a reasonable fee consistent with the prevailing prices in the Atlanta market for services of comparable value. *Id.* A fourth recommended a multiplier of up to five. *Id.* Defendants did not submit any rebuttal evidence on this issue.

Based upon its review of the evidence, its first-hand observation of the proceedings, and its own experience, the district court concluded that an upward adjustment was necessary to provide a reasonable fee. *Id.* The court found, based on the evidence, "that the superb quality of [plaintiffs'] representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar," *id.* at 151, rates the court had previously found to be, "[i]f anything . . . too low." *Id.* at 144. The court also found that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the court has seen displayed by the attorneys in any other case during its 27 years on the bench." *Id.* at 151-52.

The district court further found that "the evidence established that plaintiffs' success in this case was truly exceptional." *Id.* at 152. After reviewing the consent decree's numerous specific provisions, the court concluded that "the settlement achieved by plaintiffs' counsel is comprehensive in its scope and detailed in its coverage." *Id.* at 154. "After 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.*

In addition to those factors, the district court noted class counsel's "extraordinary commitment of capital resources." *Id.* at 151. In particular, counsel "were required to advance case expenses of $1.7 million over a three-year period," "were not paid on an ongoing basis," and were not assured of

compensation. *Id.* All told, plaintiffs' counsel expended over 30,000 hours on this contentious case over four years, and shouldered over $1.65 million in taxable and non-taxable expenses. *Id.* at 169.

The court concluded that a 1.75 upward adjustment to the initial lodestar was the "minimum . . . necessary to reasonably compensate plaintiffs' counsel for their exceptional work and the exceptional result they achieved in this case." *Id.* at 155. Multiplying the lodestar by that amount, the fee award totaled $10,522,405.08. *Id.* at 154-55.

4. The Eleventh Circuit unanimously affirmed. *Id.* at 1-93. The court of appeals found no abuse of discretion in the district court's determination of the number of hours or the hourly rates used to calculate the lodestar, and no abuse of discretion in the district court's decision to apply an upward adjustment. *Id.*

With respect to the enhancement, Judge Carnes wrote separately to make clear that his vote to affirm was based solely on binding circuit precedents with which he disagreed. *See id.* at 17-70 (Carnes, J., concurring) (Part VI). Judge Wilson wrote separately and opined that the enhancement was appropriate not only under binding circuit precedent, but also under this Court's decisions. *Id.* at 71-93 (Wilson, J., concurring). Judge Hill concurred in the judgment, without "add[ing] anything to my colleagues' discussions." *Id.* at 93 (Hill, J., concurring).

5. The court of appeals denied rehearing *en banc*. *Id.* at 174. In a concurring opinion, Judge Wilson explained that "[s]everal decades of established Supreme Court precedent make it clear that district judges are vested with discretion to enhance a fee in accordance with a federal fee-shifting statute, in the 'rare' and 'exceptional' case, when there is specific evidence in the record to support an exceptional result and superior performance." *Id.* In Judge Wilson's view, "*Kenny A.* is that case." *Id.* at 180. Judge Tjoflat authored a dissenting opinion, *id.* at 180-202, as did Judge Carnes, *id.* at 202-223.

SUMMARY OF ARGUMENT

A. Petitioners' proposed categorical, no-enhancements rule cannot be reconciled with Congress' decision to authorize "reasonable" fees or with any indicia of congressional intent. Although that word choice does not eliminate all ambiguity, it provides *no* support for petitioners' proposed bright-line rule. Moreover, petitioners' proposal cannot be reconciled with either Section 1988's legislative history or the legal backdrop against which Congress legislated. The House and Senate committee reports both make clear that Congress knew enhancements had traditionally been awarded based on superior performance and results and intended to continue that practice. Both reports explain that fees had traditionally been awarded under a multi-factor approach that looked in part to quality of work and results obtained, *not* pursuant to a rigid lodestar calculation. Moreover, the Senate Report identifies three exemplary cases in which a reasonable fee was "correctly"

calculated, and two of the three cases awarded enhancements above the lodestar figure based on exceptional work and results. S. Rep. No. 94-1011, at 6 (1976). This Court has repeatedly relied on, and considered authoritative, this very legislative history.

The committee reports go on to explain that Congress wanted to ensure parity between fee awards in civil rights cases and those in other types of complex federal litigation, such as antitrust cases. Because enhancements were and remain common in those other contexts, petitioners' no-enhancements position cannot be squared with Congress' intent.

Petitioners insist that the committee reports' disapproval of "windfalls" supports their position. But the Senate Report specifically pointed to the exemplary cases, two of which involved enhancements, as awards that did "*not* produce windfalls to attorneys." *Id.* (emphasis added). Petitioners' effort to equate enhancements with windfalls is fundamentally mistaken. Moreover, other limits on the recovery of fees, including this Court's holdings that risk of nonpayment and expert fees are not compensable, eliminate any concern that civil rights counsel will receive windfalls.

B. This Court has already rejected the no-enhancements position now espoused by petitioners, and petitioners do not even attempt to justify overruling this Court's precedents. Beginning in 1983, this Court has always treated the lodestar as a "useful starting point" while

expressly acknowledging the availability of enhancements based on factors such as the "results obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 434 (1983). In *Blum v. Stenson*, 465 U.S. 886, 901 (1984), this Court was squarely presented with the same question presented here, and it explicitly answered the question by holding that enhancements *are* permissible in rare cases based on superior quality and exceptional results. While some Members of Congress sought to overrule *Blum* by proposing legislation that would have barred all enhancements, that legislative effort failed.

This Court's decisions since *Blum* acknowledge the availability of enhancements and do not purport to overrule *Blum*. That some of those cases rejected *other* bases for enhancements only underscores the need to retain enhancements based on exceptional quality of work and results. This Court has long recognized that Congress intended to permit enhancements at least in some cases. Petitioners' no-enhancements rule would completely unmoor this Court's jurisprudence from that intent.

C. Petitioners are mistaken in arguing that the lodestar necessarily takes into account superior performance and results. Reasonable rates are forward-looking, whereas enhancements look back on actual performance and results. Nor does the lodestar always reflect the value of a lawyer's services because brilliant insights and critical maneuvers sometimes matter far more than hours worked or years of experience. Thus, in the competitive marketplace, highly sophisticated

clients that are not interested in bestowing windfalls nonetheless sometimes agree to pay enhanced amounts above hourly rates and billable hours. In any event, a conclusion that enhancements are incompatible with petitioners' lodestar model would be an indictment of that model, not of enhancements, because Congress clearly intended to permit enhancements and nowhere expressed an intent to adopt a lodestar-only (or lodestar-and-only-reductions) approach.

D. Petitioners' no-enhancements position not only elevates their view of good policy over Congress' intent, it also makes for bad policy. Petitioners would turn adjustments into a one-way ratchet, with the lodestar acting not as a presumptive starting point but as a ceiling. The best attorneys could hope to recover would be their normal rate for cases in which payment does not depend on success. And attorneys would have every expectation of receiving less because of the numerous grounds for reducing an award or denying recovery altogether. That could not help but undercompensate civil rights counsel.

ARGUMENT

SECTION 1988 DOES NOT CATEGORICALLY BAR ENHANCEMENTS FOR EXCEPTIONAL PERFORMANCE AND RESULTS

The district court faithfully followed this Court's decision in *Blum* by holding that, while "most of the factors relevant to calculating a reasonable fee award are already reflected in the lodestar amount," "upward adjustments of the lodestar figure are still permissible 'in the rare case where

the fee applicant offers specific evidence to show that quality of service was superior to that one should reasonably expect in light of the hourly rates charged and that the success was "exceptional."'" Pet. App. 150 (quoting *Blum*, 465 U.S. at 899). Applying that correct legal standard to the facts here, the court awarded an enhancement based on its thorough analysis of the record and familiarity with the conduct of this litigation. *Id.* at 154-55.

The district court explained that respondents' "counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the court has seen displayed by the attorneys in any other case during its 27 years on the bench." *Id.* at 151-52. And "[a]fter 58 years as a practicing attorney and federal judge," the court was "unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." *Id.* at 154.

By expressly and unabashedly advocating a categorical no-enhancements rule, petitioners implicitly recognize that if any case justifies an enhancement based on superior work and exceptional results, this is it. *E.g.*, Pet. Br. 13. Likewise, this Court, by limiting its grant of certiorari "to Question 1 presented by the petition," 129 S. Ct. 1907, has made clear that the sole question remaining in this case is whether Section 1988 *ever* permits enhancements based on quality of work and results obtained. *See* Pet. (i); Pet. Br. (i). Yet this Court has already squarely rejected the categorical argument that Section 1988 forbids upward enhancements for superior work and

results in *Blum*, and it has repeatedly held out the availability of such enhancements in the rare case. The reason for the Court's treatment of such enhancements is straightforward: petitioners' proposed categorical rule is irreconcilable with the text, legislative history, and legal backdrop of Section 1988. Petitioners' resort to policy arguments to defend their proposed categorical rule cannot justify disregarding this Court's precedents or the manifest intent of Congress, and it is misguided in any event.

I. THE TEXT, LEGISLATIVE HISTORY, AND LEGAL BACKDROP OF SECTION 1988 CONFIRM THAT CONGRESS DID NOT INTEND TO FORECLOSE ALL ENHANCEMENTS

Section 1988 permits a court to award a "prevailing party, other than the United States, a *reasonable attorney's fee* as part of the costs" of prosecuting a successful claim under certain civil rights statutes. 42 U.S.C. § 1988(b) (emphasis added). The statute's text does not, however, define the term "reasonable" or offer specific textual directions as to how to calculate a reasonable attorney's fee. *See Blanchard v. Bergeron*, 489 U.S. 87, 91-93 (1989); U.S. Br. 11. Nevertheless, the one thing the word "reasonable" does not suggest is a categorical, bright-line rule. As this Court has observed in other contexts, such as the Fourth Amendment's prohibition against unreasonable searches and seizures, reasonableness inherently turns on all of the facts and circumstances, as opposed to bright-line rules. *United States v. Banks*, 540 U.S. 31, 35-36 (2003) (citing cases).

An *authorization* for "reasonable" fees would seem to be an exceedingly unlikely textual basis for a categorical *bar* on enhancements. That reality is amply demonstrated by the text Congress employed when it adopted petitioners' favored approach. In the attorney's fee provision of the Individuals with Disabilities Education Act (IDEA), Congress adopted petitioners' position, not based on a general authorization for reasonable fees, but through the precise textual device one would expect for such a bar: an express prohibition on the use of a bonus or multiplier. Specifically, the statute states that "[n]o bonus or multiplier may be used in calculating the fees awarded under this subsection." 20 U.S.C. § 1415(i)(3)(C). The conference committee report for that legislation makes clear that Congress understood that enhancements were permitted under Section 1988, but intended to adopt a different, more restrictive approach in the IDEA: "The conferees want to make it clear that the inclusion of the prohibition against calculation of fees using bonuses and multipliers is limited to cases brought *only* under part B of the Education of the Handicapped Act. The conferees do not intend in any way to diminish the applicability of interpretation by the U.S. Supreme Court regarding bonuses and multipliers to *other* statutes such as 42 U.S.C. 1988." H.R. Conf. Rep. No. 99-687, at 2 (citing, *e.g.*, *Hensley*, 461 U.S. 424; *Blum*, 465 U.S. 886) (emphasis added). Congress understood that authorizing a reasonable attorney's fee would permit rather than preclude enhancements, and it chose to add an additional provision prohibiting them in the IDEA but *not* in Section 1988.

Petitioners complain that Section 1988 does not use the words "enhancement" or "bonus," Pet. Br. 19, but when Congress sought to forbid enhancements, it used those terms in a prohibition; it did not rely on a general authorization of reasonable fees. Moreover, Section 1988 clearly does not refer to "lodestars," billing rates, or hours worked. Petitioners bear the burden here of identifying a categorical bar to enhancements, and the word "reasonable" provides no support for such a per se rule. The most that could be said about the statute's lack of specificity as to how to calculate a reasonable attorney's fee is that there is some ambiguity on this point.

That is not, of course, a license for freewheeling judicial policymaking, divorced from the legislature's intent. *See*, *e.g.*, *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1472 (2009). Instead, the Court must resolve any ambiguity in light of other indications of congressional intent, including legislative history and the context in which Congress legislated. *See*, *e.g.*, *Bennett v. Spear*, 520 U.S. 154, 163 (1997). As this Court has explained, "it 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," not the courts, "to determine." *Alyeska Pipeline Svc. Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1975) (emphasis added).

Here, both the legislative history and the legal backdrop against which Congress legislated point in the same direction. As this Court has observed, "Congress was legislating in light of experience when it enacted" Section 1988. *Blum*, 465 U.S. at

894 n.10. The committee reports make clear that Congress knew that enhancements had traditionally been granted based on exceptional work and results, and that Congress intended to continue that practice under Section 1988.

A. The Legislative History Makes Clear That Enhancements Are Permissible Under Section 1988

1. While Members of this Court have disagreed on the relevance of legislative history, the Court has always held that such history is relevant to the interpretation of ambiguous statutes. *See*, *e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508-09 (1989); *Blum*, 465 U.S. at 896. And if ever a statutory term called out for resort to legislative history, it is a term like "reasonable." Not surprisingly, then, in construing Section 1988, including its unadorned reference to "a reasonable attorney's fee," the Court has repeatedly relied on—and placed significant weight on—Section 1988's legislative history, especially the House and Senate committee reports. *See Blanchard*, 489 U.S. at 91-93 & n.6; *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986) ("*Delaware Valley I*"); *Blum*, 465 U.S. at 893-96; *Hensley*, 461 U.S. at 429-31.

Committee reports are the most authoritative source of legislative history. *See*, *e.g.*, *Garcia v. United States*, 469 U.S. 70, 76 (1984). And here, they directly address and answer the question presented. *See Seals v. Quarterly County Court*, 562 F.2d 390, 394 (6th Cir. 1977). Thus, if the question presented is to be answered by reference

to what the Congress that enacted Section 1988 intended, the reports supply the answer: upward enhancements are permitted.

2. As this Court has noted, the committee reports confirm that Congress enacted Section 1988 to respond to this Court's decision in *Alyeska,* which required specific congressional authorization to justify an award of attorney's fees. H.R. Rep. No. 94-1558, at 2-3 (1976); S. Rep. No. 94-1011, at 1; *see also Hensley*, 461 U.S. at 429. Until *Alyeska*, federal courts had awarded reasonable fees to prevailing parties in civil rights and other cases pursuant to a common law approach, and had generated a substantial body of law concerning the appropriate standards for setting reasonable fees. *See*, *e.g.*, *Lee v. So. Home Sites Corp.*, 444 F.2d 143, 143 (5th Cir. 1971); *see also* pp. 25-29, *infra*. The committee reports make clear that Congress sought to reinstate the pre-*Alyeska* regime by "direct[ing] that attorney's fees be calculated according to *standards currently in use* under other fee-shifting statutes." *Blum*, 465 U.S. at 893 (emphasis added).

Both the Senate and House Reports identify the "appropriate standards" as those listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). S. Rep. No. 94-1011, at 6; H.R. Rep. No. 94-1558, at 8. *Johnson* lists 12 factors to be considered, including "the results obtained" and the "ability of the attorneys"—*i.e.*, the very factors the district court relied on to support the enhancement

here. *Hensley*, 461 U.S. at 430 n.3 (citing *Johnson*, 488 F.2d at 717-19).[1]

The Senate Report went even further in clarifying the proper method for calculating a reasonable attorney's fee by giving three examples of cases that "correctly applied" the *Johnson* factors. S. Rep. No. 94-1011, at 6 (citing *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975)). These exemplars of the proper calculation of a reasonable attorney's fee confirm that enhancements for exceptional work and results are permitted under Section 1988. Indeed, in two of the three cases, the properly calculated fee included such an enhancement. *Stanford Daily*, 64 F.R.D. at 687-88; *Davis*, 8 E.P.D. ¶ 9444, at 5048. And in the third, the court considered the "results obtained" and "exceptional" ability of the plaintiffs' counsel, among other factors, in setting the fee. *Swann*, 66 F.R.D. at 484, 486.

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[1] The *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

In *Stanford Daily*, the court awarded a reasonable attorney's fee to plaintiffs who prevailed on a Fourth Amendment claim. 64 F.R.D. at 681. The court found that counsel devoted 750 hours to the case and should receive a $50 average billing rate. *Id.* at 687-88. But rather than award a fee simply by multiplying the hours worked by a reasonable hourly rate, the court instead increased the base figure of "hours worked times average billing rate" by more than 25 percent in light of "the attorneys' work, and the results which they obtained through their work." *Id.* at 687-88.

Similarly, in *Davis*, the court awarded a reasonable attorney's fee to plaintiffs who prevailed on a Title VII claim. 8 E.P.D. ¶ 9444, at 5047. The court reduced the number of hours to be compensated and the overall award by more than $1,000 for some duplicated effort and timekeeping deficiencies. *Id.* at 5048. Nevertheless, due in part to the achievement of "excellent results" and the "conduct of plaintiffs' attorneys throughout the case," the court increased the award "above the normal hourly rates" by approximately $7,000, for a total award of $60,000. *Id.*

Thus, petitioners' contention that "there is no indication from . . . the legislative history that any type of enhancement can be added to a fee award based on results obtained or quality of representation," Pet. Br. 19, is simply mystifying. By stressing that the exemplary cases "correctly applied" the *Johnson* factors, S. Rep. No. 94-1011, at 6, the Senate Report confirms that Congress intended to permit enhancements based on superior work and results. That intent controls,

and squarely refutes petitioners' position that Section 1988 prohibits "any type of enhancement to the attorney's fee award." Pet. Br. 13.

Indeed, this Court has previously relied on the committee reports for this very point. The Court rooted its two-step approach—a lodestar calculation followed by upward or downward adjustments—in "the cases cited in the legislative history." *Blum*, 465 U.S. at 897 (citing *Hensley*, 461 U.S. at 434-35). Quoting widely from the Senate Report, *Hensley* highlighted congressional approval of the *Johnson* factors and noted that the Senate Report "cited approvingly" to three district court cases that "correctly applied" *Johnson*. 461 U.S. at 429-30 & n.4. Likewise, in *Blum*, which expressly rejected the categorical approach petitioners urge, *see* pp. 42-45, *infra*, the Court again quoted the Senate Report for the proposition that *Johnson*, *Stanford Daily*, *Davis*, and *Swann* "resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." 465 U.S. at 893-94 (quoting S. Rep. No. 94-1011, at 6); *see also id.* at 897 ("[T]he Senate Report identified four cases that had calculated correctly a reasonable attorney's fee."). In *Blanchard*, moreover, the Court reaffirmed that "*Johnson* provides guidance to Congress' intent" and that *Stanford Daily*, *Davis*, and *Swann* each correctly applied the *Johnson* factors. *Blanchard*, 489 U.S. at 91-92; *cf. id.* at 99 (Scalia, J., concurring in part and concurring in the judgment) (criticizing majority for "treating

Johnson and the District Court trilogy as fully authoritative").[2]

The cases cited in the Senate Report and relied on in this Court's decisions were not outliers. At the time of Section 1988's enactment, other courts of appeals had adopted a similar approach of starting with a lodestar and then "inject[ing] flexibility into the fee-setting process by requiring that the value of the services be finally determined by consideration of . . . additional factors," including "the quality of the work performed" and "the recovery obtained." *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 168 (3d Cir. 1975); *see also Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir. 1976) (en banc) ("*Lindy II*"); *accord Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 128 (8th Cir. 1975); *City of Detroit v. Grinnell*, 495 F.2d 448, 470-71, 473 (2d Cir. 1974); *see also Parker v. Matthews*, 411 F. Supp. 1059, 1067-68 (D.D.C. 1976) (citing *Johnson* and awarding "an incentive fee of twenty-five per cent" in a Title VII case).

In light of the legislative history and legal backdrop, it is simply not tenable to attribute to Congress an intent to prohibit all enhancements through the peculiar mechanism of *authorizing*

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[2] While *City of Burlington v. Dague*, 505 U.S. 557 (1992), rejected a ground for enhancement—risk of loss—that was mentioned in some of the cases in the Senate Report, it did not repudiate or even address the Court's prior reliance on the Senate Report and the cases cited therein. Instead, as discussed below, *Dague* is best understood as construing the statute's requirement that fees be awarded only to prevailing parties. *See* pp. 49-51, *infra*.

reasonable attorney's fees. The lodestar methodology—a rote calculation of hours worked multiplied by a reasonable hourly rate—was not unknown to the Congress. Yet the legislative history and backdrop make clear that Congress contemplated a multi-factor inquiry, not a simple mathematical calculation with no possibility for upward adjustments. Thus, while the lodestar provides a useful starting point for analysis, petitioners' attempt to make it the alpha as well as the omega would sever this Court's jurisprudence from the text and every indicia of congressional intent. Such a lodestar-only (or lodestar-and-downward-adjustments-only) approach to attorney's fees might (or might not) be a defensible policy choice, *but cf.* pp. 58-62, *infra*; it is manifestly *not* the approach adopted by Congress in Section 1988.

B. Congress' Intent To Adopt The Same Standards Used In Commercial Litigation Further Supports Enhancements

The committee reports not only clearly embrace enhancements as an integral aspect of the *Johnson* approach, they also express Congress' intent "that the amount of fees awarded under [Section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." S. Rep. No. 94-1011, at 6 (quoted in *Blanchard*, 489 U.S. at 95). Simply put, "civil rights plaintiffs should not be singled out for different and less favorable treatment" relative to

antitrust and other commercial plaintiffs. H.R. Rep. No. 94-1558, at 8-9.

Significantly, the prevailing practices in antitrust and securities cases at the time of Section 1988's enactment and ever since allow for exactly the type of enhancement that the district court awarded here. By seeking to limit awards in civil rights litigation to the lodestar, petitioners would categorically cap such awards below those awarded in other complex litigation, and thereby eviscerate yet another of Congress' stated goals.

1. At the time of Section 1988's enactment, fee enhancements in commercial cases were accepted and widespread—and sometimes much higher than the multiplier here. For example, in *Arenson v. Board of Trade*, an antitrust suit, the district court awarded "four times the petitioning attorneys[']normal hourly rate" based in part on "the significant result achieved." 372 F. Supp. 1349, 1358 (N.D. Ill. 1974). According to the court, the "award of four times the hourly rate of the plaintiffs' attorneys is meant to adequately compensate them for initiating this significant litigation and negotiating such a beneficial settlement for the class; yet at the same time this award is not meant to provide a wind fall to the plaintiffs' attorneys." *Id.* at 1359; *see also In re Gypsum Cases*, 386 F. Supp. 959, 967, 969, 978-79 (N.D. Cal. 1974) (calculating a reasonable fee in an antitrust case by applying "weighted factor" between 1.75 and 3 to the hourly rates of many of the attorneys who were entitled to fees).

Similarly, in *Wynn Oil Co. v. Purolator Chem. Corp.*, 391 F. Supp. 522, 523-24 (M.D. Fla. 1974), which involved an award of fees under an antitrust fee-shifting statute, 15 U.S.C. § 15, the court approvingly cited *Johnson*. Based on "the nature of the issues, the character and extent of opposition encountered, the exceptional experience and trial skill of counsel on both sides, the effective presentation of plaintiff's case, the amounts involved and those recovered for plaintiff," the court awarded an enhancement of approximately 50 percent. 391 F. Supp. at 528. There are many similar cases in the antitrust, securities, and other commercial contexts.[3]

2. To be sure, many (though not all) of the non-civil rights cases involved fees paid out of common funds, such as damages awards, rather than by defendants pursuant to fee-shifting statutes. As

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[3] *See*, *e.g.*, *Pete v. United Mine Workers of Am. Welfare & Ret. Fund of 1950*, 517 F.2d 1275, 1289-90 (D.C. Cir. 1975) (affirming incentive premium of "ten percent"); *Barr v. WUI/TAS, Inc.,* 1976-1 Trade Cases ¶ 60,725, 68,119 (S.D.N.Y. 1976) (awarding 20 percent "premium" in antitrust case); *Federman v. Empire Fire & Marine Ins. Co.*, Fed. Sec. L. Rep. ¶ 95,418, 99,116 (S.D.N.Y. 1976) (awarding "a premium of 25% over [the attorneys'] normal fee" in securities case); *Rota v. Bhd. of Ry., Airline & S.S. Clerks*, 78 Lab. Cas. ¶ 11,318 & app. (N.D. Ill. 1975) (awarding "a one-third premium" to the attorneys' hourly rate in labor-law case); *United Fed'n of Postal Clerks, AFL-CIO v. United States*, 61 F.R.D. 13, 19 (D.D.C. 1973) (awarding "incentive premium of 15%" in labor case); *Larionoff v. United States*, 365 F. Supp. 140, 147 (D.D.C. 1973) (awarding "a 10% premium" in a Tucker Act case); *Blankenship v. Boyle*, 337 F. Supp. 296, 302 (D.D.C. 1972) (enhancing award from $661,000 to $825,000 in breach of trust case).

this Court has observed, the two contexts are not identical. *Blum*, 465 U.S. at 900 n.16. Nonetheless, common-fund cases are instructive because they too involve the award of only "reasonable" attorney's fees. Moreover, Congress intended to ensure parity between awards in civil rights cases and other complex commercial cases where common-fund awards were (and remain) common, and expressly intended to avoid lower awards to civil rights vindicators "because the rights involved may be non-pecuniary in nature." S. Rep. No. 94-1011, at 6. After all, both sets of cases have common pre-*Alyeska* roots, and awards in both sets of cases must be "reasonable." *See*, *e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Moreover, whatever subtle differences may exist between common-fund fee awards and civil rights attorney's fees, there is no plausible argument that "reasonable" in one context includes substantial enhancements while the same term in the other context categorically excludes any upward enhancement. That is especially true considering that Congress sought to preserve the pre-existing legal backdrop in Section 1988 and to ensure similar treatment for civil rights and other complex civil litigation. S. Rep. No. 94-1011, at 6.

Common-fund fee awards are determined in one of two ways: as a percentage of the recovery or via the lodestar method. Because courts often "crosscheck" the reasonableness of percentage-of-recovery awards by calculating the lodestar, the lodestar is relevant under either approach. The common-fund lodestar approach historically mirrored its counterpart under fee-shifting

statutes. *See Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973) ("*Lindy I*"); *Grinnell*, 495 F.2d at 473. That approach has historically permitted upward adjustments for, *inter alia*, "the quality of an attorney's work." *Lindy I*, 487 F.2d at 168. While petitioners question *Lindy I*'s relevance because of its common-fund subject matter, Pet. Br. 30-31 n.15, they fail to note that courts of appeals used *Lindy I*'s approach in both fee-shifting and common-fund cases at the time of Section 1988's enactment. *See Merola v. Atlantic Richfield Co.*, 493 F.2d 292, 298 (3d Cir. 1974); *Grunin*, 513 F.2d at 128.[4]

The percentage-of-recovery method is prevalent in common-fund cases. *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 732 (3d Cir. 2001). Even under that approach, courts frequently use the lodestar formula as a "crosscheck" to ensure the reasonableness of an award. *See*, *e.g.*, *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006); *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996). In the crosscheck process, the district court calculates the lodestar and then divides the percentage-of-recovery award by the lodestar. Courts have frequently determined that

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[4] Petitioners attribute the inspiration for *Hensley*'s lodestar approach to *Lindy I* yet attempt to minimize the latter case's value. Pet. Br. at 30 & n.15. If indeed this Court took inspiration from *Lindy I*, then the case's reasoning surely bears on the question presented. And given the courts of appeals' adoption of *Lindy I* in fee-shifting cases, *Lindy I*'s common-fund heritage is not a sufficient ground to disregard the case.

lodestar multipliers between 1 and 4 represent "reasonable" attorney's fees. *See In re Prudential Insurance Co. Am. Sales Practice Litigation Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) (citation omitted). Courts have also approved even higher multipliers. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6 & app. (9th Cir. 2002).

To reject all enhancements in the civil rights context, while enhancements remain common in complex civil litigation, would completely unmoor the Court's treatment of attorney's fees from congressional intent. Petitioners themselves suggest that the divergence in methods between the common-fund and fee-shifting cases arose only after this Court's decision in *Blum*—and, hence, did not form part of the legal backdrop against which Congress legislated when it expressed an intent to treat civil rights cases like other complex federal litigation. *See* Pet. Br. 30-31 n.15. To the extent that the dichotomy between common-fund and other cases was less pronounced at the time Congress legislated, that only strengthens the case for not eliminating enhancements altogether under Section 1988. It is clear that enhancements were available in both civil rights cases and complex commercial cases when Section 1988 was enacted and that Congress wanted to maintain parity between the two sets of cases. Allowing enhancements in commercial cases while categorically forbidding them under Section 1988 would thus completely sever this Court's jurisprudence from the legislative history and the legal backdrop against which Congress legislated.

C. Petitioners' "Windfall" Argument Misconstrues Congressional Intent

Against all the legislative history clearly indicating that Congress intended for enhancements to be available in "correctly" calculating a reasonable attorney's fee, petitioners point to a single word to support their contrary reading of the legislation: "windfall." Indeed, they invoke "windfalls" no fewer than 15 times in their brief. *See* Pet. Br. 13, 19-20, 24, 25, 28, 43, 53, 60. Petitioners' argument amounts to a faulty syllogism: Congress did not want windfalls; enhancements are windfalls; therefore, Congress did not want enhancements. But that syllogism rests on a flawed premise. Of course, Congress did not want windfalls—windfalls, like overcharges, "excessive fees," and "profiteering," are loaded words and undesirable. But petitioners' effort to equate enhancements with windfalls totally ignores what the legislative history actually says about enhancements, windfalls, and the policies underlying Section 1988.

1. While petitioners are correct that the committee reports frown on windfalls, *see* S. Rep. No. 94-1011, at 6; H.R. Rep. No. 94-1558, at 9, petitioners simply assume that all enhancements are windfalls. In doing so, they ignore the fact that the Senate Report cites cases in which enhancements were awarded—*Stanford Daily* and *Davis*—not only as exemplars of the correct calculation of a reasonable attorney's fee, but specifically as cases "which do *not* produce windfalls to attorneys." S. Rep. No. 94-1011, at 6 (emphasis added). As the report explains, "[t]hese

cases have resulted in fees . . . which *do not produce windfalls* to attorneys." *Id.* (emphasis added). That is utterly fatal to petitioners' argument that the committee reports' concern with windfalls means that no enhancements may be awarded.

Although petitioners quote in full the House Report's anti-windfall language, they only paraphrase the crucial portion of the Senate Report. Pet. Br. 20 (quoting H.R. Rep. No. 94-1558, at 9; citing S. Rep. No. 94-1011, at 6). And they assert that "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" *Stanford Daily* and *Davis*. Pet. Br. 24 (emphasis in original). That assertion is disingenuous because the report did more than cite *Stanford Daily* and *Davis*: it expressly stated that the awards there did "not produce windfalls."

Petitioners similarly assert 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." Pet. Br. 27. That statement is true as far as it goes. But the Senate Report went further and stated that those cases "correctly applied" the *Johnson* factors and did "not produce windfalls." S. Rep. No. 94-1011, at 6.

Indeed, in rejecting a different artificial effort to limit attorney's fees, this Court observed in *Blum* that "[w]e cannot assume that Congress would endorse the standards used in *Johnson*, *Stanford*

Daily, *Davis*, and *Swann* if fee awards based on market rates were viewed as the kind of 'windfall profits' it expressly intended to prohibit." 465 U.S. at 895. That precise logic applies equally to enhancements. Because the Senate Report is so explicit about the absence of windfalls in its three exemplary cases, the methodology for correctly calculating an attorney's fee in those cases—including enhancements for superior performance and results—cannot produce a windfall that Congress intended to prohibit.

Petitioners' fixation on Congress' interest in avoiding windfalls suffers from a deeper flaw. Congress' desire to avoid windfalls reveals very little about the proper calculation of an attorney's fee that avoids windfalls. An award that produces a windfall is no more or less than an award that is *not* reasonable. The remainder of the legislative history is what makes clear whether a fee is a windfall or reasonable, and with respect to the specific question presented here—whether enhancements are categorically unreasonable windfalls—the answer is clear. As noted, Congress pointed to three exemplary cases, intended to ensure civil rights plaintiffs access to counsel, and wanted to ensure parity for attorney's fee awards in civil rights and other complex cases. *See* pp. 20-31, *supra*. Whatever the House and Senate Reports meant by windfalls, they surely did not mean that all enhancements are windfalls, that the enhancements in *Stanford Daily* and *Davis* were windfalls, or that enhancements routinely applied in complex commercial litigation are windfalls. To the contrary, those awards, including the

enhancements, were appropriate, correct, and necessary to attract high-quality counsel to civil rights cases.

2. In the end, petitioners' windfall argument represents nothing more than their view of good policy. But the answer to the question presented lies in ascertaining Congress' intent, not in devising an attorney's fee policy without regard to what Congress intended in enacting Section 1988. *See*, *e.g.*, *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 568 n.27 (1990). The Court has recognized that point in numerous other contexts, including questions arising under closely related statutes where the statutory text provides even less guidance. *See*, *e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) ("Our role [in defining the contours of immunity not mentioned in the statutory text] is to interpret the intent of Congress in enacting [42 U.S.C.] § 1983, not to make a freewheeling policy choice." (alteration, citation, and quotation marks omitted)). Indeed, *Alyeska*, which prompted Section 1988's enactment, specifically acknowledged 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," not the courts, "to determine." *Alyeska*, 421 U.S. at 262 (emphasis added).

Petitioners' policy argument that the lodestar should control except for the possibility of downward adjustments is especially illegitimate because it focuses on developments *after* Section 1988's enactment. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 595-96 & n.19 (1987). As petitioners

and this Court have acknowledged, although Congress was certainly aware of the possibility of calculating attorney's fees by multiplying hours worked by a reasonable hourly rate, the lodestar did not become firmly entrenched until *after* Congress enacted Section 1988. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002); Pet. Br. 26-27. There is no justification for asserting that Congress actually adopted the lodestar as the exclusive basis for a "reasonable" fee, when the methodology gained traction only after the statute's enactment.

3. However, to the extent that post-enactment developments are relevant, the Court's subsequent clarifications of the meaning of prevailing parties ameliorates any concern that civil rights plaintiffs will be receiving windfalls. This Court has long made clear that fees are awarded only if a plaintiff prevails, and only *to the extent* that a plaintiff prevails on particular claims. *Hensley*, 461 U.S. at 434-36. More recently, the Court clarified that even if a lawsuit succeeds in inducing a defendant to change its conduct, the plaintiff will not receive fees if the defendant capitulated before the court entered a judgment on the merits or a consent decree. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 600 (2001). When a plaintiff survives those hurdles, fee awards are still not fully compensatory, let alone windfalls. Fee awards do not take into account the fact that attorneys whose payment is conditioned on success generally charge a higher rate than the lodestar allows in light of the risk of non-payment. *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992). And fee awards

do not compensate for some necessary costs, such as expert fees. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 102 (1991). Here, plaintiffs' counsel had to bear more than $800,000 in expert fees. Pet. App. 169. Concerns that civil rights counsel are receiving windfalls, thus, can safely be put aside.

The "strong presumption" that the lodestar represents a reasonable attorney's fee, *see Dague*, 505 U.S. at 562, makes petitioners' policy concerns with windfalls even more fanciful. As this Court has made clear, there are numerous factors, such as contingency, that are not valid bases for enhancements. *Blum*, 465 U.S. at 898; *Dague*, 505 U.S. at 567. Moreover, under *Blum*, enhancements are permitted for superior work or results only "in the rare case where the fee applicant offers specific evidence to show that quality of service was superior" and "that the success was 'exceptional.'" *Blum*, 465 U.S. at 899 (citation omitted). In other words, it takes a rare case like this one—the highest degree of success and professionalism witnessed in the district court's nearly three decades on the bench, *see* Pet. App. 151-52—to secure an enhancement.

4. There was clearly no windfall on the facts of this case, although that issue is not properly before the Court. As noted, the question presented is whether a fee award can *ever* be enhanced for exceptional work and results. *See* p.16, *supra*. If so, the district court found that this is the rare case that warrants an enhancement, Pet. App. 154-55, and the court of appeals upheld that fact-bound determination, which is reviewed only for abuse of discretion, *id.* at 12-13. Under the "two-court rule,"

this Court does not ordinarily review factual determinations of both lower courts, and there is no reason to depart from that practice in this case. *See, e.g., United States v. Ceccolini*, 435 U.S. 268, 273 (1978); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). Indeed, this Court denied the second question presented in the petition, which asked whether the fee award was justifiable here in light of the district court's decision not to award fees for approximately 15% of the hours recorded by class counsel. *See* p. 16, *supra*. Especially in light of that limited grant, there is no reason to review the district court's fact-specific determination that this is the rare case.[5]

It is worth noting, however, that while petitioners repeatedly invoke the size of the fee award in this case, *see*, *e.g.*, Pet. Br. 26 n.13, 50-51, that award simply reflects the enormous effort and expense involved in litigating this case. This case was an enormous undertaking. The burden

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[5] Notwithstanding this Court's denial of the second question presented, petitioners argue that the district court's reduction in compensable hours is incompatible with its conclusion of superior performance and results. Pet. Br. 38-39. That question is clearly not before the Court. Moreover, there is no inherent tension between a reduction in hours and a finding of exceptional results, as exemplified by the legislative history's approval of *Davis*, in which the district court made a similar adjustment and enhancement. *See Davis*, 8 E.P.D. ¶ 9444, at 5048. Imprecise billing and excellent work product and results are simply different matters. Petitioners' reliance on *Delaware Valley I* is misplaced because the Court there cut the number of hours nearly in half—far in excess of the 15 percent reduction here. *Delaware Valley I*, 478 U.S. at 566-67.

inherent in child-welfare litigation becomes even greater when, as here, the opposing party fights vigorously on almost every imaginable issue. *See* Pet. App. 96; J.A. 37. As the district court explained, petitioners and respondents devoted comparable amounts of resources to the case. Pet. App. 148-49. Accordingly, this is precisely the kind of resource-intensive case where the attraction of quality counsel is a challenge and concerns about windfalls are wholly misplaced.

What the fee award really shows is that respondents' trial counsel had to make enormous outlays, both in time and out-of-pocket expenses, to mount this enormously successful effort. And as the district court observed, they have been required to bear those costs for years, and with no assurance of compensation. Pet. App. 151. While risk of nonpayment is not a basis for enhancing a fee award, *Dague*, 505 U.S. at 565, it surely blunts concerns about "windfalls," and the need to devote enormous resources in hopes of receiving reimbursement for a subset of expenses years later is a tremendous disincentive to accept a case like this. That disincentive is especially great in the biggest, most expensive cases like this one. Greater investments tend to impose greater opportunity costs on firms and reduce firms' willingness to handle such cases. *See* J.A. 58-59, 74-75. "If no compensation were provided for the delay in payment, the prospect of such hardship could well deter otherwise willing attorneys from accepting complex civil rights cases that might offer great benefit to society at large." *Missouri v. Jenkins*, 491 U.S. 274, 283 n.6 (1989). Petitioners'

obsession with "windfalls" simply ignores the reality of this and similar cases.[6]

Petitioners also argue that respondents should not receive an enhancement because they achieved their outstanding results through a consent decree. Pet. Br. 48-49. That decree, however, was the product of an enormous litigation effort, including more than 25,000 hours of time that the district court found to be fully compensable.

II. THIS COURT HAS ALREADY REJECTED PETITIONERS' NO-ENHANCEMENTS POSITION

Petitioners' position that Section 1988 prohibits "any type of enhancement to the attorney's fee

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[6] Petitioners argue that delay in payment is generally compensated by using current hourly rates as opposed to attorneys' hourly rates at the time they performed the work. Pet. Br. 56-57 (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989)). That question is not directly presented here because the court of appeals affirmed solely on the basis of the exceptional quality of work and results obtained, and this Court limited its review to that question. Pet. App. at 70 (Carnes, J.); Pet. (i); *see also* U.S. Br. 25. Nonetheless, using current hourly rates is not the *only* permissible method of compensating for delay. *See* Pet. App. 85 (Wilson, J., concurring). This Court has authorized "an appropriate adjustment for delay in payment—whether by application of current rather than historic hourly rates *or otherwise*." *Jenkins*, 491 U.S. at 283-84 (emphasis added). Especially as some lawyers' hourly rates are *dropping* in this recession, it would make little sense to treat current rates as the only permissible way of compensating for delay. Moreover, using current rates does not account for delay in payment of reimbursable out-of-pocket expenses, which were significant here.

award," Pet. Br. 13, cannot be reconciled with this Court's case law. This Court heard and expressly rejected the categorical no-enhancements position that petitioners resurrect in this case. *See Blum*, 465 U.S. at 897, 901. That was not mere dictum: the rejection at the threshold of the categorical argument that enhancements are never available for superior performance or results was the necessary predicate for the remainder of the Court's opinion. Moreover, over the course of several cases, this Court has consistently confirmed that calculation of the lodestar does not end the inquiry, and that enhancements are available in the rare case. *See*, *e.g.*, *Evans v. Jeff D.*, 475 U.S. 717, 738 n.26 (1986); *Blanchard*, 489 U.S. at 94; *Delaware Valley I*, 478 U.S. at 566-68. Contrary to petitioners' assertion, Pet. Br. 32, the Court's pronouncements in those cases are not stray dicta but represent both the holding in *Blum* and a measured and reasoned rejection of arguments actually presented to the Court. Numerous courts of appeals have read this Court's decisions in that manner. Pet. App. 177-78 (Wilson, J., concurring in denial of rehearing) (citing cases). To accept petitioners' proposed ban on enhancements would require the Court to overrule *Blum*—an extreme position petitioners have not even attempted to justify by reference to considerations of *stare decisis*.

A. This Court Held In *Blum* That Enhancements, Like Downward Adjustments, Are Appropriate At Least In Rare Cases

1. Beginning with *Hensley* in 1983, the Court adopted the lodestar calculation as a "useful starting point" and "an objective basis on which to make an initial estimate of the value of a lawyer's services." 461 U.S. at 433. In keeping with the clear import of the committee reports, however, the Court stressed that calculating "reasonable hours times a reasonable rate does not end the inquiry. There 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 434 (emphasis added). The Court reiterated that "in some cases of exceptional success an enhanced award may be justified." *Id.* at 435.

Although the facts of *Hensley* involved only a downward adjustment, the Court carefully established the analytical approach it has used ever since. And the Court's recognition that the lodestar was a "starting point" that may be either enhanced or reduced was by no means superfluous to its decision. As noted, the availability of enhancements (and reductions) is necessary to make this Court's lodestar jurisprudence a valid exercise of statutory construction, as opposed to an exercise in policy making divorced from Congress' intent. The committee reports, which *Hensley* carefully reviewed and followed, 461 U.S. at 429-31, 434-35, make clear that the inquiry is a multi-factored one in which the lodestar is not dispositive.

For essentially these reasons, in *Blum* the Court expressly rejected the contention that lodestars may never be enhanced. *Blum*, 465 U.S. at 897, 901. The district court in that case awarded a 50 percent enhancement "because of the quality of the representation, the complexity of the issues, the riskiness of success, and the 'great benefit to the large class' that was achieved." *Id.* at 891. The petitioner in *Blum* challenged the fee on two grounds: first, that "any upward adjustment of [the lodestar] is improper"; and second, that the 50 percent enhancement was unreasonable on the facts of the case. *Id.* at 896. Relying on *Hensley* and the Senate Report, the Court definitively rejected the first, categorical argument: "In view of our recognition that an enhanced award may be justified 'in some cases of exceptional success,' we cannot agree with petitioner's argument that an 'upward adjustment' is never permissible." *Id.* at 897. Rather, the lodestar may "result[] in a fee that is either unreasonably low or unreasonably high." *Id.*

After rejecting the *Blum* petitioners' categorical argument, the Court went on in a separate section of the opinion to reverse the enhancement in that case because the record "contain[ed] no evidence supporting an upward adjustment." *Id.* at 898. Importantly, though, the Court expressly held that quality of representation "may justify an upward adjustment . . . 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 (citing *Hensley*, 461 U.S. at 435).

Blum cannot be dismissed as mere dictum. The very issue in *Blum* was "*whether*, and under what circumstances, an upward adjustment of an award based on prevailing market rates is appropriate under § 1988." 465 U.S. at 889 (emphasis added). Presented squarely with the "whether" question, the Court answered it in the affirmative by "reject[ing] petitioner's argument that an upward adjustment to an attorney's fee is never appropriate under § 1988." *Id.* at 901.

Nor was that a passing reference. The Court carefully considered—in a separate section of the opinion—petitioner's argument that all enhancements were verboten. And just as carefully, the Court reasoned that fee enhancements are a permissible, if relatively rare, feature of the attorney's fee regime Congress enacted. *Id.* at 897. The Court then went on to formulate the legal standard for when enhancements on the basis of quality of representation and results obtained are appropriate, and to specify the nature of the evidentiary showing necessary to support such an enhancement. *Id.* at 899. That the award in *Blum* failed to meet that standard does not render the Court's rejection of the no-enhancements position, and adoption of a controlling legal standard for awarding enhancements, dictum. To the contrary, the Court's rejection of the fee award there was an application of the holding of the case allowing such enhancements but only in specific circumstances with sufficient evidentiary support.

2. Acceptance of petitioners' position would require the Court to overrule *Blum*, but petitioners neither acknowledge the need for *Blum*'s overruling nor seek to justify that extreme step. Petitioners are not the first to disagree with *Blum*, but at least those who took issue with *Blum* earlier acknowledged the need to overrule or supersede it and directed their argument to Congress, the proper body to provide relief from decisions of this Court interpreting statutes.

In the wake of *Blum*, Congress twice recognized its significance. When Congress enacted a new fee provision governing claims brought under the IDEA, it specifically prohibited enhancements. 20 U.S.C. § 1415(i)(3)(C). The conference committee report makes clear that Congress understood that enhancements were permitted under *Blum* and *Hensley*, and that it sought to preclude them under the new IDEA provision but did "not intend in any way to diminish the applicability of interpretation by the U.S. Supreme Court regarding bonuses and multipliers to *other* statutes such as 42 U.S.C. 1988." H.R. Conf. Rep. No. 99-687, at 2 (citing, *e.g.*, *Hensley*, 461 U.S. 424; *Blum*, 465 U.S. 886) (emphasis added).

Some Members of Congress did introduce legislation to change the rule under Section 1988 and overrule *Blum* by providing that "multipliers shall not be used in calculating awards of attorney's fees." Legal Fee Equity Act, S. 2802, 98th Cong. § 6(a)(2) (1984); *see also Legal Fee Equity Act: Hearing on S. 2802 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 98th Cong. 4-5 (1985) (prepared

statement of Sen. Orrin G. Hatch) (stating that existing fee-shifting statutes have "resulted in the award of excessive fees . . . some courts have even used 'multipliers' to double or triple an attorney's customary hourly rate"). But that legislation, unlike Section 1988 and the IDEA, was not enacted into law. The enactment of the IDEA provision, and the introduction and rejection of legislation that would have overruled *Blum,* confirm that petitioners seek relief that is contrary to *Blum* and would require either this Court to overrule *Blum* or Congress to amend the statute.

Petitioners do not ask this Court to overrule *Blum*, let alone seek to justify that result. Presumably, that is because any effort to justify overruling a statutory interpretation decision of this Court would founder on the heavy preference for *stare decisis* and continuity in statutory cases. *See*, *e.g.*, *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 756 (2008). *Hensley* and *Blum* are decades old, and there is no indication that they have proven to be unworkable. Upward enhancements have remained confined to "rare" cases and have not proven difficult to administer. There is no justification for this Court to overrule *Blum*. Those who disliked *Blum* immediately after it was issued picked the right forum (Congress) for voicing their policy arguments and seeking to have the rule of *Blum* replaced. That effort having failed, there is no justification for this Court to overrule *Blum* at this late date.

B. Decisions After *Blum* Do Not Undermine Its Holding Or The Validity Of Enhancements

This Court's decisions after *Blum* only reinforce *Blum*'s holding that upward enhancements for superior work and results are permissible in rare cases when supported by specific evidence. The subsequent cases repeated this Court's holdings that enhancements are permissible in such circumstances, and did not overrule them.

While petitioners argue that *Delaware Valley I* precluded such enhancements, that case simply reaffirmed *Blum* and held that an enhancement was not appropriate on the facts of that case. 478 U.S. at 566-68. Petitioners quote out of context the Court's statement that *Blum* had held that "the 'quality of representation,' and the 'results obtained' from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award." *Id.* at 565. Read in isolation, that statement appears self-contradictory because it first notes that quality and results are only "presumably," as opposed to invariably, reflected in the lodestar (as *Blum* had held), but then goes on to suggest that an enhancement is never appropriate on that basis. When considered in the context of *Blum*, however, the Court's admonition is clear: enhancement based on those factors, because they are presumably compensated by the lodestar, depends on specific evidence and detailed findings. Indeed, the opinion immediately goes on to confirm that "upward adjustments of the lodestar are still permissible . . . in certain 'rare' and 'exceptional'

cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Id.* (quoting *Blum*, 465 U.S. at 898-901).

Then, when the Court specifically turned to considering an enhancement based on exceptional performance—*i.e.*, when the Court actually addressed the question relevant here—it explained 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." 478 U.S. at 566 (emphases added). The Court then determined that an enhancement was inappropriate on the record of *that* case because there was no "evidence" that the lodestar failed to reflect the quality of performance, there was no "specific evidence" that the results were "outstanding," and the district court made no "detailed findings as to why the lodestar amount was unreasonable." *Id.* at 567-568. That inquiry would have been unnecessary and inappropriate if the Court had meant that quality and results are always reflected in hourly rates and never warrant an enhancement. Thus, the *Delaware Valley I* Court's articulation of the controlling legal standard and its application of that standard to the facts of that case are fully consistent with the district court's articulation and application of the same standard in this case. Indeed, *Delaware Valley I* involves an application of the legal standard adopted in *Blum*. Certainly, nothing in *Delaware Valley I* either overrules *Blum* or suggests that the presumption in favor of the

lodestar is not only strong in theory, but also fatal to any enhancement in fact. *Cf. Johnson v. California*, 543 U.S. 499, 514 (2005) (noting that even "[s]trict scrutiny is not 'strict in theory, but fatal in fact'" (citation omitted)).

This reading of *Delaware Valley I* is confirmed by subsequent decisions. For example, three years later, the Court reiterated that "courts may . . . adjust this lodestar calculation by other factors" in rare cases when supported by specific evidence. *Blanchard*, 489 U.S. at 94 (noting "[t]he *Johnson* factors may be relevant in adjusting the lodestar amount").

Similarly, in *Dague*, the Court eliminated contingency as a basis for enhancing a fee award, but confirmed that fee applicants may obtain "more than" the lodestar figure in appropriate cases. *See Dague*, 505 U.S. at 562. While petitioners rely heavily on *Dague*, it does not support their position. *Dague* preserved enhancements on grounds other than contingency, *see id.* at 562, which, of course, excused the Court from the impossible task of explaining how a regime of no enhancements for any reason could be squared with either Congress' intent or *Blum*. Though *Dague* assessed the reasonableness of fees, its analysis builds on *Hensley* and the meaning of "prevailing party" under Section 1988. If a party cannot recover for unsuccessful claims in an otherwise successful litigation, *see Hensley*, 461 U.S. at 435-36, it certainly cannot recover fees to compensate for unsuccessful claims in *other* cases, which is essentially what the Court viewed a contingency

enhancement as permitting. *Dague*, 505 U.S. at 565.

As *Dague* explained, "[a]n attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail." *Id.* at 565 (emphasis in original). Thus, "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." *Id.* (citing *Hensley*, 461 U.S. at 435).[7]

Dague also recognized that permitting enhancements for contingency would be an exception that swallowed the rule. In any Section 1988 case, contingency is "a factor that *always* exists (no claim has a 100% chance of success), so

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[7] The Court also reasoned that its decision in *Blanchard* counseled against permitting contingency enhancements. *Blanchard* held that the lodestar controls a fee award, even where a plaintiff's contingency agreement with his counsel would have provided a lower fee. 489 U.S. at 96. Allowing contingency enhancements, the Court concluded, would have "concoct[ed] a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it." *Dague*, 505 U.S. at 566. So too here, petitioners' approach would concoct a similarly asymmetrical and hybrid scheme that would permit reductions but not enhancements to the lodestar. *See* pp. 58-60, *infra*.

that computation of the lodestar would never end the court's inquiry in contingent-fee cases." *Id.* at 563 (emphasis in original). Recognizing an automatic contingency enhancement, thus, would be in tension with *Hensley* and *Blum*'s reservation of enhancements for rare cases. Enhancements for superior work and results obviously do not share that defect. Because contingency is different in kind from superior representation and outstanding results, *Dague* does not call *Blum* into question, much less overrule it.

C. This Court's Rejection Of Some Kinds Of Enhancements Makes It Imperative To Reject Petitioners' Categorical Approach

Because Congress clearly contemplated enhancements, as discussed above, the Court's rejection of some bases for enhancements only underscores the need to retain others, lest the Court's attorney's fees jurisprudence become completely unmoored from Congress' intent. For example, *Blum* rejected "complexity" and "novelty of the issues" as grounds for enhancing the lodestar figure, 465 U.S. at 898-99, and *Dague* eliminated contingency as a factor, 505 U.S. at 567. Petitioners suggest that this Court should continue that trend by precluding *all* enhancements. Pet. Br. 42, 51-52. Perceived momentum in this Court's jurisprudence is not, however, a decisional principle. And, indeed, continuing the trajectory of recent decisions to the point of precluding all enhancements based on exceptional quality or results would produce an attorney's fees regime that cannot be reconciled with Congress' intent.

As discussed above, Congress expressly embraced fee enhancements at least in some circumstances. Thus, even as this Court has adopted a strong presumption that the lodestar is a reasonable fee, it has always recognized that enhancements are permissible at least in rare cases. As noted above, that recognition is necessary to remain faithful to congressional intent, which is why the lodestar system, from *Hensley* through today, has always permitted some enhancements. *See* pp. 41-51, *supra*.

If fee enhancements are appropriate in some circumstances, the most logical bases for enhancements are superior representation and outstanding results. The legislative history endorses those very bases for enhancement. Quality and results are what clients care most about. And this Court has repeatedly held these factors out as the appropriate bases for enhancement. *See* pp. 43-44, 47-48, *supra*.

The United States attempts to finesse congressional intent by suggesting that enhancements may be appropriate for attorneys who represent uniquely unpopular clients. U.S. Br. 30. Limiting enhancements to that vanishingly small class of cases is no more consistent with congressional intent than eliminating them altogether. And it is equally unfaithful to *Blum*. Nothing in the legislative history or legal backdrop of the legislation suggests that enhancements are appropriate in that situation and only that situation. Instead, the examples of enhancements in the Senate Report include *Stanford Daily* and *Davis*, both of which awarded enhancements for

superior representation and outstanding results—and it is hard to imagine that the Stanford Daily qualifies as an unpopular client. There is no basis for limiting enhancements to the miniscule (if not entirely hypothetical) remnant the United States finds acceptable.

D. Superior Representation And Outstanding Results Are Not Necessarily Taken Into Account In The Lodestar Calculation

Petitioners argue that the lodestar is conclusive here because it necessarily takes into account superior performance and results. Pet. Br. 43-44, 54-55. That is incorrect as a factual matter and irrelevant as a legal matter. It clearly provides no basis to overcome this Court's cases and Congress' manifest intent to permit enhancements based on those criteria.

1. First, the reasonable rate component of the lodestar is generally based on *expectations*, not results. Prevailing rates are a forward-looking measure that represents the attorney's experience and the level of skill expected. Skill and experience, however, do not necessarily translate into superior representation—a factor measurable only *after* the representation has occurred. *See*, *e.g.*, *Merola*, 493 F.2d at 298 ("The end result—an amalgam of expected value and delivered performance—represents a reasonable fee under normal circumstances."). Hence, *Blum* recognized that quality of representation "may justify an upward adjustment" where "the quality of service rendered was superior to that one reasonably

should expect in light of the hourly rates charged . . . ." 465 U.S. at 899 (emphasis added); *see also Lindy*, 540 F.2d at 117-18. The reality is that not all lawyers who charge the same rate deliver the same quality of representation, and that even the same lawyer does not obtain equivalent quality or results in all cases.

Petitioners argue that, if performance exceeds expectations, the hourly rate (and not the lodestar) should be adjusted upward. Pet. Br. 54-55. Under that approach, a court would evidently enhance the hourly rate before calculating the "lodestar" (really, a pre-enhanced lodestar), instead of calculating the lodestar and then applying an enhancement. But the end result would be the same—whether the hourly rate or the lodestar is enhanced, there is still an enhancement.

Thus, the only practical consequence of petitioners' proposed alternative would be to make the fee calculation less transparent. To promote objectivity, this Court has long required use of "the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895. Enhancing those rates instead of enhancing a traditional lodestar calculation would only make the process more opaque, which would benefit no one. In any event, class counsel certainly cannot be faulted for following the traditional approach of requesting an enhancement to the lodestar as opposed to their hourly rates.

2. A lodestar-only approach would also ignore the reality that the lawyer's practice is often one of creativity and imagination. The most difficult legal

problems cannot be solved by blunt force or endurance. "The value of a lawyer's services is not measured by time or labor merely. The practice of law is an art in which success depends as much as in any other art on the application of imagination—and sometimes inspiration—to the subject-matter." *Woodbury v. Andrew Jergens Co.*, 37 F.2d 749, 750 (S.D.N.Y. 1930). Brilliant insights and timely maneuvers are not always time consuming. Moreover, pathmaking and uniquely successful litigation may be the product of critical insights, not long hours or senior lawyers. *Cf. Heller v. Dist. of Columbia*, No. 03-cv-00213-EGS (D.D.C. May 6, 2009) (fee proceedings stayed pending this Court's decision in this case).

Thus, fee agreements entered into between highly sophisticated clients and counsel do not universally call for billing based solely on hourly rates. Instead, retention agreements sometimes call for increased payments, in addition to hourly rates, in the event that the lawyers perform especially good work or find a way to succeed in an especially efficient manner. *See*, *e.g.*, "Sample Engagement Agreement," *available at* http://www.mlmins.com/Documents/SiteContent/f18ec30b-7e26-4c75-b887-7ece040256aa.pdf (last visited Aug. 18, 2009). This practice pre-dates Section 1988, *see*, *e.g.*, *Knapp v. McFarland*, 457 F.2d 881, 883 (2d Cir. 1972) (quoting fee agreement providing for adjustment based on good results), and the trend is clearly toward the greater use of such enhancements. Indeed, the word on the street is that the billable-hour model is either dead or seriously wounded. *See* Steven T. Taylor, *Creative,*

Trail-Blazing Chicago Firm Seeks to Banish the Billable Hour, Of Counsel, August 2009, at 3; Jim Hassett, *Hybrids and the Future*, Of Counsel, May 2009, at 5; Johnathan D. Glater, *Billable Hours Giving Ground at Law Firms*, N.Y. Times, Jan. 30, 2009, at A1.

To be sure, Section 1988 does not replicate private fee arrangements in all respects. *Delaware Valley I*, 478 U.S. at 565. But such arms-length agreements, of highly sophisticated parties, demonstrate that quality of work is not always encompassed in rates and hours worked.

3. Likewise, outstanding results do not necessarily factor into the lodestar. While petitioners repeatedly contend that hourly rates reflect results obtained, *see*, *e.g.*, Pet. Br. 43-44, clients can only wish that were universally true.

Moreover, there is no dispute that adjustments are permitted based on results obtained because this Court has held that *limited* success may warrant a *downward* adjustment of the lodestar. *Hensley*, 461 U.S. at 436. Parallelism demands that the "results obtained" factor not be a one-way ratchet. *Cf.* pp. 20-26, *supra*. Courts should have discretion to increase as well as decrease the lodestar when the results warrant an adjustment.

The marketplace again reflects that reality. Fee arrangements between sophisticated clients and counsel sometimes provide for payment beyond hourly rates for achieving remarkable results, as well as superior work. *See*, *e.g.*, "Sample Engagement Agreement," *available at* http://www.mlmins.com/Documents/SiteContent/f1

8ec30b-7e26-4c75-b887-7ece040256aa.pdf (last visited Aug. 18, 2009).

4. In any event, the fact remains that a lodestar-only system (or, more accurately, a lodestar-and-only-downward-adjustments system) is not consistent with Congress' manifest intent. Even if a lodestar-only approach were a brilliant and perfect method of determining fees (which it is not), Congress chose instead to ratify the pre-existing legal regime, which permitted enhancements. Significantly, the lodestar was never considered a single-step inquiry, and at the time of and shortly after Section 1988's enactment, *every court* applying the lodestar formula permitted upward or downward adjustments. *See*, *e.g.*, *Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir. 1980) (stating lodestar "is adjusted upward or downward"); *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc) (noting "the 'lodestar' may be adjusted up or down to reflect 'the quality of representation'").

Consistent with Congress' intent and the legal backdrop against which Congress legislated, this Court has found the lodestar to be an efficient way to capture most of the *Johnson* factors most of the time. But categorically precluding enhancements based on exceptional quality and results would completely sever this Court's lodestar jurisprudence from congressional intent.

III. PETITIONERS' POSITION IS PROFOUNDLY MISGUIDED

Although ultimately irrelevant to the question presented to this Court and better directed to

Congress, petitioners expend considerable effort extolling the policy benefits of their proposed categorical approach. *E.g.*, Pet. Br. 47-51. In fact, petitioners' favored approach is not only not the policy Congress enacted in Section 1988, but bad policy in any event.

1. The most obvious consequence of petitioners' approach is to turn adjustments into a one-way (downward) ratchet. Under that approach, the lodestar would represent not a presumptive starting point but a ceiling. The best an attorney could reasonably hope for would be to recover the hourly rate normally charged in cases where payment is not contingent on success. And the attorney would have every expectation of recovering less, based on the numerous bases for reducing an award or denying recovery altogether. *See* pp. 36-37, *supra*. That approach could not help but systematically undercompensate civil rights counsel.

Petitioners are correct that a lawyer who takes on representation of a civil rights plaintiff has an ethical duty to provide the best service possible. A lawyer does not, however, have an ethical obligation to expand a representation of an individual plaintiff into a class action that seeks system-wide reform. And ethical obligations hardly translate by their own force into top-flight representation. It is no secret that some lawyers are better than others and that lawyers, like everyone else, perform better on some occasions than others. Moreover, ethical duties attach only *after* representation begins, a fact petitioners overlook. The imbalance in incentives would surely

affect the number and quality of attorneys who offer their services in civil rights litigation. It would also affect the mix of cases lawyers accept. A skewed regime of systematic undercompensation will make it particularly difficult to take on the enormous burden that successful vindication of the rights of children in a child welfare system necessarily entails.

Petitioners assert that as long as the class here obtained counsel, no enhancement is necessary. But that ignores the fact that enhancements for exceptional work and results *are* available under existing law (and clearly were available in the Eleventh Circuit, *see* Pet. App. 57-63 (Carnes, J.)). In any event, it is immaterial that any given civil rights plaintiff has found competent counsel; those who do not secure counsel will not come to the judicial branch's attention.

It is true that enhancements are never guaranteed at the outset of a case, but the possibility of securing one provides an additional incentive for counsel to take a case—an incentive that helps offset the disincentives created by the multiple limitations on recovering even a lodestar amount. Indeed, any fee recovery is speculative because it depends on prevailing through final judgment and other matters that cannot be known ex ante. *See* pp. 36-37, *supra*. Thus, the fact that an enhancement (or any other aspect of recoverable fees) is speculative ex ante hardly negates its ability to provide an incentive to handle civil rights cases, especially extraordinarily expensive ones like this.

The bottom line, however, is that *Congress* already determined that enhancements *are* appropriate to help attract counsel in these cases. It is not for petitioners to question Congress' determination.

2. Petitioners' contentions that enhancements would discourage settlements and are otherwise problematic have nothing to do with ascertaining congressional intent and are wrong in any event. The availability of an enhancement does not depend on whether a plaintiff prevails in a consent judgment or after trial. And a pre-trial settlement like the one in this case *reduces* fee awards by bringing the litigation to a close before the substantial expenses of a trial.

Administrability cannot be the primary consideration in determining what is reasonable. If it were, the simplest approach would be to remove all discretion from a district court and adopt a flat fee for civil rights cases. Instead, Congress authorized "reasonable" fees and embraced the *Johnson* factors. Neither action suggests an obsession with administrable bright-line rules. *See* pp. 17-19, *supra*. Moreover, concerns about administrability lose considerable steam given that the "strong presumption" attached to the lodestar makes enhancements available only in rare situations. *See Blum*, 465 U.S. at 897. For over three decades since the passage of Section 1988, courts have calculated the lodestar amount, considered whether other factors warranted an upward or downward adjustment, and occasionally enhanced a fee award based on those

considerations. Petitioners point to no discernible damage to the legal system from such awards.[8]

3. Finally, it bears emphasis that petitioners' categorical approach would enshrine the billable hour *über alles* at precisely the moment that the legal profession is moving away from it. Billing by the hour is certainly not inherent in the practice of law. Instead, as this Court has acknowledged, the lodestar achieved ascendance only recently, and only *after* Section 1988's enactment. *See Gisbrecht*, 535 U.S. at 801. And the heyday of the billable hour appears to have already passed. The legal profession is increasingly moving away from the billable hour, and accounts of the billable hour's demise are prevalent, if perhaps a bit premature. *See* p. 56, *supra*. The inflexible approach taken by petitioners would carry Section 1988 against this tide, revealing the dangers of basing statutory interpretation on policy preferences or temporarily prevailing practices among attorneys rather than Congress' intent at the time it enacted the legislation.

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[8] Petitioners argue that enhancements pose a "candor issue" because, for example, a defendant might argue during the underlying litigation that it was clearly right and then argue during the fee litigation that it had been clearly wrong and that the result was nothing special. Pet. Br. 45-46. That "side-switching" phenomenon is inherent in the attorney's fee context and is not unique to enhancements. Lodestar disputes about how many hours a prevailing party should have worked on opposing a motion involves the exact same incentives.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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