No. 08-970

IN THE
Supreme Court of the United States

SONNY PERDUE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF GEORGIA, *ET AL.*,

Petitioners,

v.

KENNY A., BY HIS NEXT FRIEND LINDA WINN, *ET AL.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AARP, ALLIANCE FOR JUSTICE, AMERICAN CIVIL LIBERTIES UNION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL DISABILITY RIGHTS NETWORK, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, NATIONAL URBAN LEAGUE, NATIONAL WOMEN'S LAW CENTER, AND PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

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

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INTERESTS OF AMICI

A coalition of various organizations devoted to the cause of furthering civil rights join here as amici curiae on behalf of Respondent Kenny A.[1] Amici believe that 42 U.S.C. § 1988, as well as this Court's precedent, empower district court judges to adjust the attorney fee award that would be produced by the lodestar methodology in those rare instances in which the attorneys perform superlatively well and obtain exceptionally good results.

Individual statements of interest are provided in the Appendix to the Brief.

SUMMARY OF ARGUMENT

Both 42 U.S.C. § 1988 and Supreme Court precedent empower judges to adjust fee awards in civil rights cases when the quality of the lawyers' performance is superb and the results they obtain are exceptional. Section 1988 vests judges with the discretion to award a reasonable attorneys' fee to a prevailing plaintiff. Courts throughout the country use the "lodestar" method, a calculation based on the reasonable number of hours worked multiplied by a reasonable hourly rate, which provides the starting point for determining the reasonable fees that are to be awarded to a prevailing plaintiff.

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

In most—but not all—cases, the lodestar will produce a "reasonable" fee. However, in those rare instances in which the lodestar calculation produces an unreasonable result, judges have—and should have—the discretion to adjust the lodestar in order to arrive at a "reasonable" fee. The Supreme Court has recognized that an upward adjustment such as the one in this case may be appropriate to reflect exceptional performance and results. *See Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983). Judges are well-situated to determine whether the attorneys' work and the outcome they achieved for their clients are reasonably reflected in the lodestar estimate. When they are not, adjustments can be made, and such adjustments are consistent with the legislative purpose of Section 1988, which was enacted to promote vigorous enforcement of civil rights laws.

The attorneys' work in this case certainly justifies an enhancement. The district court's 100-page decision regarding plaintiffs' application for an award of attorneys' fees and expenses included detailed findings of fact to support the conclusion that an enhancement was justified by plaintiffs' counsels' extraordinary performance and the exceptional results that they obtained. The attorneys' superlative work, which brought exceptional results for a large class of children in a deteriorating foster care system, qualifies as one of the rare situations in which the upward adjustment of the lodestar estimate is appropriate in order to provide a reasonable fee.

ARGUMENT

I. BOTH 42 U.S.C. § 1988(B) AND SUPREME COURT PRECEDENT EMPOWER JUDGES TO ADJUST FEE AWARDS UPWARDS IN CIVIL RIGHTS CASES WHEN THE QUALITY OF THE LAWYERS' PERFORMANCE IS SUPERB AND THE RESULTS THEY OBTAIN ARE EXCEPTIONAL.

42 U.S.C. § 1988(b) provides, in pertinent part, that "in any action or proceeding to enforce [various federal civil rights statutes], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Congress intended that the attorneys' fees in civil rights cases resemble those earned by private practitioners of similar experience and quality. *See Blum v. Stenson*, 465 U.S. 886, 895 (1984) ("The statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel"); *Hensley v. Eckerhart*, 461 U.S. 424, 430, n.4 ("It is intended that the amount of fees awarded . . . 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.") (quoting S. Rep. No. 94-1011, p. 6 (1976)); *City of Riverside v. Rivera*, 477 U.S. 561, 580 (1986) ("Congress intended that statutory fee awards be 'adequate to attract competent counsel . . . .'") (quoting S. Rep. No. 94-1011, p.6 (1976)).

While Congress made clear that a

"reasonable" fee may be awarded, it did not dictate how that "reasonable" fee should be calculated. Courts have applied the "lodestar" method to determine a presumptive award, calculating the product of "reasonable" hours and a "reasonable" hourly rate. *Rivera*, 477 U.S. at 468.

A. Supreme Court Precedent Makes Clear that the "Lodestar" Method Provides a Presumptively Reasonable Initial Estimate, and Additional Considerations May Lead the District Court to Adjust the Fee Upward.

The Supreme Court has stated that the lodestar method is "[t]he most useful starting point for determining the amount of a reasonable fee." *Hensley*, 461 U.S. at 433. This "calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Id.* The Court has stated repeatedly that the lodestar calculation "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.'" *Hensley*, 461 U.S. at 434. The Court has specifically noted that "in some cases of exceptional success an enhanced award may be justified." *Id.* at 435.

The lodestar method has an obvious attraction: it reduces the determination of a reasonable attorney's fee to two component questions: (1) How many hours did the attorney reasonably expend working on the case? and (2) What is a reasonable rate for the attorney to charge per hour? It is often easier to resolve each of these individual component questions than to try to arrive

at a "reasonable" fee in the abstract. To determine the number of hours that a plaintiff's attorney has reasonably spent working on a case, courts require plaintiff's attorneys to carefully document and justify their hours. The Defendant's attorney has the opportunity to challenge both the hours and the rates sought, and then Courts review these submissions to determine a reasonable fee award.

A plaintiff who applies for attorney's fees bears the burden of establishing the appropriate hourly rate and the number of hours reasonably expended. *Blum*, 465 U.S. at 897. The court then has discretion to determine whether the plaintiff's claimed hours and rates are indeed reasonable. *Id.* at 897 n.19; *Hensley*, 461 U.S. at 437. Reasonable hourly rates are typically calculated based on the prevailing market rates in the relevant community. *Blum*, 465 U.S. at 895.

A successful civil rights plaintiff should be granted a "fully compensatory fee." *Hensley*, 461 U.S. at 435. To that end, the appropriate hourly rate should reflect the attorney's experience, skill, and reputation, as well as the types of services that the attorney is providing. *Id.* n.11. The hourly rates charged in the private market for similar services by attorneys with similar levels of experience and skill should provide guidance as to the appropriate hourly rate. *Id.*; *see also Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (stating that reasonable attorneys' fees are based on "rates and practices prevailing in the relevant market, *i.e.*, in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation").

In practice, the application of the lodestar can differ significantly among jurisdictions. In the Washington, D.C. metropolitan area, for example, courts refer to a preset matrix, referred to as the "Laffey Matrix," to determine the "reasonable" hourly rate. The Laffey Matrix defines hourly rates based solely on the year that the attorney graduated from law school, assigning each attorney one of five possible hourly rates. *See, e.g.*, *Laffey v. Northwest Airlines, Inc.,* 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds,* 746 F.2d 4 (D.C. Cir. 1984), *cert. denied,* 472 U.S. 1021 (1985).[2] Many jurisdictions have adopted some variation of this matrix.[3] In these jurisdictions, such factors as the caliber of the attorney's performance in the matter at issue and the quality of the results obtained are simply not included in the "reasonable" hourly rate.[4]

"When . . . the applicant for a fee has [demonstrated] that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by § 1988." *Blum*, 465 U.S. at 897. This calculation is merely a presumption, however; the Court has consistently recognized that there are circumstances

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[2] *See also* The Laffey Matrix, http://www.laffeymatrix.com/ (last visited Aug. 26, 2009).

[3] *See, e.g.*, *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694 (3rd Cir. 2005); *Sullivan v. Sullivan,* 958 F.2d 574 (4th Cir. 1992); *Garnes v. Barnhardt*, No. 02c4428, 2006 U.S. Dist. LEXIS 5938 (N.D. Cal. Jan. 31, 2006); *North Carolina Alliance for Transp. Reform, Inc. v. United States Dep't of Transp.*, 168 F. Supp. 2d 569 (M.D.N.C. 2001).

[4] Nor, for that matter, are a number of other factors, such as the attorney's reputation, his or her level of experience with the particular types of cases at issue, the rates usually charged by such attorney, etc.

in which the lodestar estimate would not be reasonable. *See, e.g.*, *id.* ("The statute requires a 'reasonable fee,' and there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high.").

In *Blum v. Stenson*, the Court concluded that an adjustment to the lodestar estimate was not appropriate based on the facts at issue, but specifically "reject[ed] petitioner's argument that an upward adjustment to an attorney's fee is never appropriate under § 1988." 465 U.S. 886, 901 (1984). The Court reaffirmed and expanded upon the statements it made in *Hensley*. The Court held that the lodestar estimate "is presumed to be the reasonable fee" to which plaintiff's counsel is entitled. *Id.* at 897. The Court reiterated that the quality of the plaintiff's attorney factors into the lodestar calculation; however, the Court also noted that a district court may increase an attorney's fee award above the lodestar estimate "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 (quoting *Hensley*, 461 U.S. at 435). The Court explained that the superlative performance of the attorneys and the outstanding results may not be reflected in the lodestar, and therefore it would be appropriate for the court to adjust the lodestar estimate in such cases. *Id.* at 901.

In *Pennsylvania v. Delaware Valley Citizens' Council*, the Court followed its determination in

Blum that adjustments to the lodestar estimate are appropriate in the rare cases in which exceptional work by the attorneys produces an exceptional outcome. *See* 478 U.S. 546, 565-66 (1986) (stating that "ordinarily" representation should not be used to justify modification of the lodestar and that modifications are appropriate in "rare" and "exceptional" cases). The Court reviewed the particular facts at issue and determined, as it had in *Blum*, that the attorneys' performance and the outcome did not justify adjusting the lodestar estimate:

> [N]either the District Court nor the Court of Appeals made detailed findings as to why the lodestar amount was unreasonable, and in particular, as to why the quality of representation was not reflected in the product of the reasonable number of hours times the reasonable hourly rate. In the absence of such evidence and such findings, we find no reason to increase the fee award in Phase V for the quality of representation.

Id. at 568. The Court clearly implied that an increased fee award would be permissible in instances in which the lower courts made such detailed factual findings.

Changes in the market for legal services also counsel against strict reliance on the lodestar methodology in all cases. Recent commentary on the market for legal services suggests that lawyers are increasingly moving away from the traditional

hourly billing model to flat fees, retainers, partial contingencies, defendant contingencies, success fees, and other similar arrangements.[5] There may currently be legal markets (and, in the future, it seems likely that there will be) in which hourly billing is not standard and, therefore, a strict lodestar methodology, without the possibility of both upward and downward adjustments, will not produce sensible results. The significant possibility of widespread use of alternatives to the billable hour counsels in favor of not shackling judges to a strict lodestar calculation in every case. Instead, it favors giving judges the flexibility to award a "reasonable fee" by adjusting the lodestar in appropriate circumstances.

While the lodestar method has the advantage of transforming the open-ended question of what constitutes a reasonable attorney fee into two more specific inquiries, it also converts the reasonable attorney's fee calculation from a single estimate into

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[5] *See, e.g.*, Nathan Koppel & Ashby Jones, *'Billable Hour' Under Attack*, Wall Street Journal, Aug. 24, 2009 (noting a move away from billable hour arrangements to alternative arrangements, including a survey that "found an increase of more than 50% this year in corporate spending on alternatives to the traditional hourly-fee model"); Evan R. Chesler, *Kill the Billable Hour*, Forbes Magazine, Jan. 12, 2009 (advocating more widespread adoption of flat fee arrangements and success fees); Scott Turow, *The Billable Hour Must Die*, ABA Journal, Aug. 2007 ("[D]ollars times hours is . . . worse for clients, bad for the attorney-client relationship, and bad for the image of our profession."); Alan Feuer, *A Study in Why Major Law Firms Are Shrinking*, N.Y. Times, June 5, 2009 ("[T]he natural order of [New York law firms] has been set on end by the economic crisis and the possible disappearance of fixtures like . . . the billable hour itself (increasingly replaced by flat rates or retainers in a client's market).").

a product of two estimates. In estimations, inaccuracies are expected and inevitable. The lodestar calculation, which relies on such imprecise concepts as "the number of hours reasonably expended" and "reasonable hourly rate" as inputs, *Hensley*, 461 U.S. at 433, is no exception to this rule. This is compounded by the fact that "reasonable hourly rate" might itself depend on non-numerical concepts such as "skill" and "expertise." Because the lodestar method relies on multiplying inexact estimates, it can compound inaccuracies in those estimates to produce a result that is unreasonable.[6] Therefore, adjustments to the lodestar may be necessary in individual cases.

The variability of the overall lodestar estimate increases directly and dramatically with the imprecision of the component estimates, and each of

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[6] A mathematical example helps to illustrate how this concept can apply even in instances, unlike the lodestar, in which precise, objective measurement of the inputted estimates is possible. Suppose that one was tasked with estimating the size of a rectangular room. Instead of estimating the size directly, one might first estimate its width, length, and height and then multiply the three items to obtain an estimate of the volume. Suppose further that one estimates each dimension at 10 feet, but each measurement is actually 11 feet. Each of these estimates, considered on its own, seems reasonable. Combined, however, they produce an estimated room size of 1,000 cubic feet, while the actual room size is 1,331 cubic feet, nearly a third larger than the estimate. This is a considerable disparity and it shows how aggregating individually reasonable component estimates may lead to unreasonable cumulative results. As noted above, this problem is magnified considerably when the estimated individual components are not simple, easily definable items such as distance measurements, but instead such vague notions as the reasonable number of hours worked on a matter and a reasonable hourly billing rate.

the lodestar components is, by its nature, variable and imprecise. Reasonable minds may differ greatly in their opinions on how many hours it is reasonable to spend working on a given case and on what constitutes a reasonable hourly rate. Thus, adjustments to the lodestar may be needed to arrive at a reasonable fee.

B. Prohibiting Judges from Making Upward Adjustments to Fee Awards in Instances in Which The Lodestar Provides An Unreasonably Low Estimate Would Prevent Judges from Awarding "Reasonable" Attorney's Fees, Violating the Plain Text of 42 U.S.C. § 1988(B) and Thwarting Congressional Intent.

The Supreme Court has upheld fee adjustments under Section 1988 based on the quality of the results obtained. In *Farrar v. Hobby*, 506 U.S. 103 (1992), the Court ruled that a plaintiff who secured nominal damages but not compensatory damages was a "prevailing party" under § 1988, and therefore entitled to a reasonable attorney's fee. Nonetheless, the Court affirmed the judgment of the court of appeals that plaintiffs were not entitled to attorney fees. The Court reasoned that the court of appeals had been correct in overturning the district court's ruling because "the District Court awarded $280,000 in attorney's fees without 'consider[ing] the relationship between the extent of success and the amount of the fee award.'" 506 U.S. at 115-16 (citing *Hensley*, 461 U.S. at 438).

The Court's ruling in *Farrar* demonstrates that a "reasonable attorney's fee" is measured with

respect to the particular litigation at issue, retrospectively. Put another way, once the Court determined that the plaintiff was a prevailing party, the Court looked to see what was reasonable in light of the actual results of litigating the case, not what would have been reasonable for the parties to contract to beforehand. Similarly, when considering how many hours the plaintiff's attorney reasonably expended, the district court does not consider how many hours the attorney would reasonably have expected to expend on the matter, but how many hours the attorney actually reasonably spent working on the case. *See id.* at 115-16 ("[It is] the court's 'central' responsibility to 'make the assessment of what is a reasonable fee under the circumstances of the case.'") (quoting Blanchard v. Bergeron, 489 U.S. 87, 96 (1989)).

Thus, when considering whether a fee award is "reasonable" for purposes of Section 1988, the proper question is whether the fee is reasonable in light of how the attorney actually pursued the case and what results were actually obtained. By contrast, the reasonable hourly rate used for the lodestar calculation is often tied to the attorney's general level of experience and skill, which may be different from the degree of skill that the attorney actually exhibited when pursuing the case at issue. In some instances, such as in jurisdictions that rely on the Laffey Matrix, the reasonable hourly rate is solely dependent on the number of years that have passed since the attorney in question graduated from law school.[7] In these cases, the only way that

[7] It is also worth noting that the Laffey Matrix breaks lawyers into five groups based on their number of years of experience and assigns the same hourly fee to all lawyers within the same group, even if they have different levels of experience.

exceptional performance or results can be taken into account is through an adjustment to the lodestar estimate.

Accordingly, as the Court has recognized, the court may adjust the lodestar fee estimate downward in instances in which the plaintiff's attorney achieves poor results,[8] and may adjust the lodestar fee estimate upwards when the plaintiff's attorney does superlative work and achieves exceptional results.[9] Judges must be allowed to deviate from the lodestar estimate in these instances in order to comport with the statutory touchstone of reasonableness.

Thus, a "reasonable hourly rate" for a lawyer can only mean one of five rates in a particular year. Currently, those rates are $285 (1-3 years' experience), $349 (4-7 years' experience), $505 (8-10 years' experience), $569 (11-19 years' experience), and $686 (20 years' experience). Thus, a lawyer who graduated seven years ago and has spent her time litigating a particular type of civil rights case would have a 45% lower hourly rate for her work on a civil rights case than a lawyer with eight years of unrelated experience (transactional tax practice, for example) who may never before have taken a deposition, drafted a motion, or even seen a trial.

[8] *See Farrar*, 506 U.S. at 115 ("In some circumstances, even a plaintiff who formally "prevails under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party.").

[9] *See Blum*, 465 U.S. at 897.

II. INTERPRETING SECTION 1988 AS GIVING JUDGES DISCRETION TO ADJUST LODESTAR-ESTIMATED ATTORNEY'S FEE AWARDS FOR EXCEPTIONAL PERFORMANCE AND RESULTS FURTHERS CONGRESS'S INTENT AND PURPOSE IN ENACTING SECTION 1988.

Section 1988 must be construed in accordance with Congress's underlying intent in passing the statute, which was to encourage vigorous private enforcement of civil rights laws. In *Hensley*, the Court looked not only to the language of Section 1988, but also to the legislative history to give proper meaning to the term "reasonable fees." 461 U.S. at 430 n.4. Prohibiting courts from exercising their discretion to enhance fee awards in exceptional cases would contravene the congressional intent to encourage attorneys to bring civil rights cases.

Decades have passed since the Supreme Court first interpreted Section 1988 as supporting fee adjustments when the attorneys' work and the results of the litigation are exceptional, and the Court has since reiterated its initial interpretation in its subsequent opinions. During those years, Congress has not amended Section 1988 in an effort to overturn the rule clearly established by *Hensley*, *Blum*, and *Delaware Valley*. Congress's inaction constitutes tacit confirmation that the Court's interpretation of the statute is consistent with legislative intent.

A. Congress Created Section 1988's Fee Award Provisions to Improve the Enforcement of Civil Rights Laws by Encouraging Attorneys to Bring Civil Rights Cases.

In enacting Section 1988, Congress aimed to ensure that plaintiffs seeking redress for civil rights violations would be able to secure representation. *See, e.g., Newman v. Piggie Park Enter.*, 390 U.S. 400, 402 (1968) ("Congress . . . enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief . . . ."). Congress also sought to ensure that the costs of violating civil rights laws were more fully borne by the violators, not the victims. *Id.* ("If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.") Congress's ultimate goal was to reduce the frequency of civil rights violations and promote the vindication of civil rights. *See* S. Rep. No. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 1-2 (1963). Consistent with this congressional intent, the Supreme Court has recognized that "[w]hen a plaintiff brings a [civil rights] action . . . and obtains an injunction, he does so not for himself alone, but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Piggie Park Enter.*, 390 U.S. at 402 (citing S. Rep. No. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 1-2 (1963)).

The Court has been careful to interpret Section 1988 consistently with its purpose. In *Blanchard v. Bergeron*, the Fifth Circuit held that a contingent-fee contract between the plaintiff and its attorney imposed a limit on the fee award that the attorney could recover. 831 F.2d 563 (5th Cir. 1987), *rev'd* 489 U.S. 87, 96 (1989). The Supreme Court reversed the Fifth Circuit's decision, holding that "a contingent-fee contract does not impose an automatic ceiling on an award of attorney's fees, and to hold otherwise would be inconsistent with the statute and its policy and purpose." *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989). The Court reasoned:

> If a contingent-fee agreement were to govern as a strict limitation on the award of attorney's fees, an undesirable emphasis might be placed on the importance of the recovery of damages in civil rights litigation. The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief. Affirming the decision below would create an artificial disincentive for an attorney who enters into a contingent-fee agreement, unsure of whether his client's claim sounded in state tort law or in federal civil rights, from fully exploring all possible avenues of relief.

Id. at 95.

Limiting enhancements to the lodestar estimate would render the lodestar an artificial

ceiling on fee awards in the same manner, and with the same result, as the contingent-fee contract in *Blanchard*, and the Court should reject this result for the same reasons. To illustrate, if this Court holds that enhancements to the lodestar based on quality of representation and results obtained are never permissible, the lodestar would become a rigid upper limit on the compensation that civil rights lawyers would ever be able to garner from successful civil rights litigation. The Court has held that "complexity" and "novelty" of litigated issues are not permissible grounds to increase the lodestar figure, *Blum*, 465 U.S. at 898-89, and neither is contingent risk of loss. *City of Burlington v. Dague,* 505 U.S. 557, 566 (1992). To put quality of representation and results obtained in the same category as complexity of issues and risk of loss would render the lodestar a ceiling on fee awards for all practical purposes.

If there were such as ceiling, it is not difficult to imagine instances in which an attorney would have an incentive to pursue tort claims due to the potential for greater remuneration under a contingent-fee contract, and a corresponding disincentive to pursue federal civil rights claims and injunctive relief. As the Court recognized in *Blanchard*, this result was not the intent of Congress when it passed 42 U.S.C. § 1988, and thus setting the lodestar as a ceiling on fee awards should be no more permissible than setting a contingency fee as a ceiling on fee awards.

B. To Hold That Lodestar-Based Fee Awards May Never Be Increased for Quality of Representation or Results Obtained Would Defeat the Congressional Purpose of 42 U.S.C. § 1988 As Identified in *Blanchard*.

In *Farrar v. Hobby*, the Court reiterated that trial courts should "consider[] the relationship between the extent of success and the amount of the fee award," 506 U.S. at 115-116 (quoting *Hensley*, 461 U.S. at 483). *Farrar* suggests that consideration of the "results obtained" is not entirely subsumed into the lodestar but is a separate factor that courts may consider when calculating reasonable fee awards.

While *Farrar* dealt only with a reduction, and not an increase, of a lodestar-based fee award, to hold that courts' exercise of discretion in adjusting the lodestar extends only to reductions for poor results, and not to increases for excellent results, is incongruous and would defy reason. The Court recognized the undesirability of one-way discretion when it held that contingent risk of loss is not a valid basis to enhance a lodestar-based fee award in *Dague*. 505 U.S. at 566 ("To engraft [contingency enhancement] onto the lodestar model would be to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it."). In like manner, to hold that results obtained is never a permissible basis for increasing a lodestar-based fee would leave district courts with a scheme by which they could use non-lodestar factors only to reduce a fee award but not to increase it.

Empowering courts to lower fee awards, but eliminating their discretion to raise them, would be particularly inappropriate, given that Congress's goal in enacting Section 1988 was to help civil rights plaintiffs gain access to courts by increasing the incentives for attorneys to accept civil rights cases. *See Riverside v. Rivera*, 477 U.S. 561, 575-77 (1986) (citing S. Rep. No. 94-1011 (1976) and H.R. Rep. No. 94-1558 (1976) and noting the legislative intent behind Section 1988 was to encourage counsel to represent individuals in bringing civil rights cases because many such plaintiffs do not have the resources to afford competent counsel); *Hensley*, 461 U.S. at 424 ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances.") (citing H.R. Rep. No. 94-1558, p. 1 (1976)).

While it is true that Congress did not wish for plaintiffs' attorneys to receive a windfall from the statute,[10] this possibility was not Congress's primary concern, and allowing district courts to enhance fee awards above the lodestar estimate in truly exceptional cases does not present this problem. By definition, a windfall is an unearned gain; an enhancement that is awarded because an attorney performs superbly and generates extraordinary results is clearly something that must be earned. And, in any event, even a fee that is adjusted upwards must always be "reasonable."

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[10] *See, e.g.*, *Rivera*, 477 U.S. at 580 ("Congress intended that statutory fee awards be 'adequate to attract competent counsel, but . . . not produce windfalls to attorneys.'") (quoting S. Rep. No. 94-1011, p.6 (1976)).

Preventing judges from increasing fee awards in all cases would also violate the principle that trial judges must have discretion to calculate reasonable fee awards, a principle that the Court has repeatedly recognized. *See Blanchard*, 489 U.S. at 96 ("It is central to the awarding of attorney's fees under 1988 that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case."); *Blum*, 465 U.S. at 899 ("The District Court, having tried the case, was in the best position to conclude that 'the quality of representation was high.'" (quotation omitted)); *Hensley*, 461 U.S. at 437 ("We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.").

C. Allowing Courts to Adjust the Lodestar Estimate in Exceptional Cases Does Not Discourage Settlements.

The Supreme Court has long recognized a societal interest in promoting settlements of claims. *See Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("[C]ompromises of disputed claims are favored by the courts . . . ." (citation omitted)). Lodestar adjustments in rare cases will not discourage defendants from settling and will not encourage plaintiffs' attorneys to advise their clients against settlement.

The Court has made it clear that lodestar adjustments may be awarded only in rare circumstances. *See Blum*, 465 U.S. at 899 (deciding

that fee enhancements would be appropriate in the rare case of superior quality of service and "exceptional" success) (citing *Hensley*, 461 U.S. at 435); *Delaware Valley*, 478 U.S. at 565-66 (stating that modifications are appropriate in "rare" and "exceptional" cases). It seems unlikely that attorneys would put aside their ethical obligations to act in the best interests of their clients and turn down a settlement due to speculation about the slight possibility of obtaining a fee enhancement. In fact, the possibility of an enhancement did not discourage the settlement in this case.

In addition, by doing so, an attorney would delay receipt of the fee for the work he or she had done up until the settlement for the small possibility of receiving an enhancement after trial. Further, the attorney would be risking his or her fee by going to trial, since he or she would only be entitled to attorney's fees if the plaintiff were a prevailing party.

The institutions joining in this amicus brief have a substantial combined number of years of experience with civil rights litigation. In our combined experience, the possibility of a fee enhancement has not discouraged settlements. Given how rarely fee enhancements are awarded and the contexts in which they are available, enhancements do not discourage parties from reaching a settlement.

III. IN THIS CASE, COUNSEL'S EXTRAORDINARY PERFORMANCE AND THE EXCEPTIONAL RESULTS THEY OBTAINED MERIT AN ENHANCEMENT TO THE LODESTAR CALCULATION.

The district court's 100-page decision regarding plaintiffs' application for an award of attorneys' fees and expenses included detailed findings of fact in support of the conclusion that an enhancement was justified by plaintiffs' counsel's extraordinary performance and the exceptional results that they obtained.

The district court meticulously documented the massive scope of the undertaking. Children's Rights represented the plaintiffs and a putative class of all 3,000 foster children in two counties. *Kenny A v. Perdue*, 454 F. Supp. 2d 1260, 1266 (N.D. Ga. 2005). The 75-page complaint asserted fifteen causes of action based on alleged systemic deficiencies in foster care in two counties. *Id.* at 1267. Plaintiffs' counsel devoted in excess of 30,000 hours of labor over a five-year period. *Id.* at 1273. Nearly half of a million pages of documents were reviewed and analyzed. *Id.* at 1276-77. More than sixty witnesses were deposed. *Id.* Plaintiffs retained four expert witnesses. Due to the breadth of the facts, legal issues, and contentious nature of the litigation, the district court observed that it was "one of the most complex and difficult cases that the undersigned has handled in more than 27 years on the bench." *Id.* at 1266.

Even more impressive than the scope of the undertaking was the scope of relief that plaintiffs'

counsel obtained. The 47-page consent decree provides "sweeping relief" and "extraordinary benefits to the plaintiff class." *Id.* at 1282, 1289. The decree includes thirty-one outcome measures that the state agreed to meet and sustain. *Id.* at 1289. The district court judge observed, "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.* at 1290. Plaintiffs' success in this case was "truly exceptional." *Id.* at 1289.

Other courts that have awarded enhancements have applied a similarly rigorous standard and have considered the public benefit created by a lawsuit. For example, in *Hyatt v. Apfel,* the Fourth Circuit upheld an enhancement because the plaintiffs "succeeded in bringing about fundamental change to a recalcitrant agency," the challenged policy affected the determination of hundreds of thousands of disability claims, and the government promulgated new national regulations in response to the litigation. 195 F.3d 188, 191-92 (4th Cir. 1999). Furthermore, "these results were obtained in the face of monumental resistance on every claim made in this extensive and procedurally tortured class action." *Id.* at 192. In *Shipes v. Trinity Indus.,* the Fifth Circuit held that an enhancement was justified because the case resulted in not only substantial monetary awards to the plaintiffs, but also in "future protection against discrimination in the form of injunctive relief." 987 F.2d 311, 322 (5th Cir. 1993).

Similarly, in this case, plaintiffs' counsel went

above and beyond their ethical duties to their clients, working tirelessly in pursuit of the sweeping reforms that they ultimately obtained. As the district court noted, "the superb quality of their representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar." *Id.* The court noted that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to the litigation" than the court had seen in any other case. *Id.* Appropriately, the court sought to compensate counsel for their "unparalleled legal representation" and the "extraordinary level of service to their clients." *Id.*

The district court judge's detailed assessment of the case underscores the extraordinary nature of the attorneys' performance and the exceptional quality of the results obtained. These findings justify the upward adjustment of the fee award in this case.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the judgment of the Eleventh Circuit and hold that, under Section 1988, a lodestar estimate may be increased to reflect superlative performance that leads to outstanding results, and that the increase awarded in this case was appropriate.

Respectfully submitted,

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APPENDIX

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The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee advocated for the passage of 42 U.S.C. § 1988 and has remained involved in cases addressing the award of attorneys' fees, particularly in the civil rights context.

AARP, a nonpartisan, nonprofit membership organization of nearly 40 million persons age 50 or older, is dedicated to addressing the needs and interests of older people. As the country's largest membership organization, it has a long history of advocating for economic security, access to affordable health care and consumer protections important to the older population and persons with low incomes. AARP has a significant interest in this case. The issue before the Court directly affects the ability of AARP members and other older Americans to secure legal representation to redress harm resulting from, among other things, discrimination, improper institutionalization, crime, physical and emotional abuse, neglect, intimidation and financial exploitation. Court awards of attorney fees are essential to ensure adequate representation of persons harmed in the marketplace. Both AARP Foundation Litigation and AARP Legal Counsel for the Elderly,

AARP affiliated 501(c) (3) organizations, rely on such fees to augment the cost of their advocacy services to the public. The ability of the Court to adjust fee awards in civil rights cases when the quality of the lawyers' performance is superb and the results they obtain are exceptional is critical to older persons and those with limited incomes who otherwise would not be able to secure legal representation.

Alliance for Justice is a national association of over 80 organizations dedicated to advancing justice and democracy. We believe all Americans have the right to secure justice in the courts, including full and fair compensation to redress harms suffered. Many of our member organizations may be negatively affected by the Court's decision in this case. These organizations provide legal representation to a wide variety of clients, including minorities, poor persons, consumers, women, children, and persons institutionalized in mental health facilities who have traditionally lacked the resources to obtain representation to vindicate their legal rights. Because of this, Alliance for Justice actively participated in the passage of 42 U.S.C. § 1988 and has since remained committed to robust attorneys fees awards.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU and its affiliates throughout the country frequently represent clients seeking to vindicate their rights under federal fee-

generating statutes. The proper interpretation of those statutes is therefore a matter of significant interest to the ACLU, which has appeared before this Court on numerous occasions, both as direct counsel and as amicus curiae.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy, and education. MADLEF's mission includes a commitment to ensure equal opportunity in education, employment, access to public resources, voting rights, and to promote sound immigration policies. MALDEF has represented Latino and minority interests in civil rights cases in federal courts throughout the nation. During its 40-year history, MALDEF has litigated numerous civil rights cases, and has been involved in cases addressing the award of attorney fees in civil rights cases.

The National Disability Rights Network ("NDRN") is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN

supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. The P&A for the State of Georgia is a member of NDRN.

The National Partnership for Women & Families is a non-profit, non-partisan advocacy group dedicated to promoting fairness in the workplace, access to quality health care for all, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971 as the Women's Legal Defense Fund, the National Partnership has worked to strengthen civil rights laws and enhance the enforcement of those laws; the provision of reasonable attorneys' fees to the private attorneys who represent plaintiffs in civil rights cases is essential to that work.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the NWLC has worked to secure equal opportunity in education and in the workplace for women and girls through full enforcement of constitutional rights, Title IX and Title VII. The award of reasonable attorneys' fees, including the possibility of an enhancement, is important to the achievement of the NWLC's goals.

Appendix

Established in 1910, the National Urban League is the nation's oldest and largest community- based movement devoted to empowering African Americans to enter the economic and social mainstream. Today, the National Urban League, headquartered in New York City, spearheads the non-partisan efforts of its local affiliates. There are over 100 local affiliates of the National Urban League located in 35 states and the District of Columbia providing direct services to more than two million people nationwide through programs, advocacy, and research. The mission of the Urban League movement is to enable African Americans to secure economic self-reliance, parity, power and civil rights. The Urban League seeks to implement that mission by, among other things, empowering all people in attaining economic self-sufficiency through job training, good jobs, homeownership, entrepreneurship and wealth accumulation and promoting and ensuring our civil rights by actively working to eradicate all barriers to equal participation in the all aspects of American society, whether political, economic, social, educational or cultural. The National Urban League is interested in this case because the Court's decision in this matter has the potential to erode the ability of African Americans and other disadvantaged groups to enjoy the full protections and benefits of our nation's civil rights laws. Our nation has made great strides in correcting the past injustices and discrimination. Now is not the time to turn back the clock.

Appendix

Public Citizen is a nonprofit, consumer-advocacy organization founded in 1971, with approximately 100,000 members nationwide. Through its Litigation Group, Public Citizen litigates a wide range of public interest cases under statutes with fee-shifting provisions, including cases under civil rights statutes, the Freedom of Information Act, and the Administrative Procedure Act. Public Citizen has represented parties or filed amicus briefs on attorney fee issues in a number of cases, including *Richlin Security Service Co. v. Chertoff, Secretary of Homeland Security*, 553 U.S. __ (2008); *Sole v. Wyner*, 551 U.S. __ (2007); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001).