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.

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

BRIEF FOR LAW AND ECONOMICS SCHOLARS LUCIAN A. BEBCHUK, ALBERT CHOI, ANDREW F. DAUGHETY, JOHN J. DONOHUE III, THEODORE EISENBERG, BRUCE L. HAY, AVERY W. KATZ, HERBERT M. KRITZER, JENNIFER F. REINGANUM, AND KATHRYN SPIER AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are professors who teach and write on law and economics, with particular scholarly interests in the economics of litigation and the economics of the attorney-client relationship. Amici are concerned that the rule advocated by petitioners will, at least in some cases, preclude the appropriate determination of the "reasonable attorney's fee" permitted by 42 U.S.C. § 1988(b). Because the conventional "rates times hours" calculation does not necessarily take sufficient account of the actual quality of performance or result, permitting consideration of those factors, in appropriate cases, will further the purpose of Section 1988. It will provide incentives for the lawyers best suited to represent clients in civil rights cases to take those cases, will encourage lawyers to focus on results, and will discourage inefficient expenditures of time.

Amici do not take a position on when such enhancements are appropriate or what kind of evidence should be required to justify an enhancement.

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

Indeed, some amici scholars believe that the circumstances warranting such an enhancement may be infrequent. But amici are unified in the belief that there should not be a categorical prohibition on enhancements for the quality of performance or result.

The amici law and economics scholars are as follows:

Lucian A. Bebchuk is William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics, and Finance at Harvard Law School. He has published widely on the economic and empirical study of litigation and settlement, and of compensation structures in firms and markets.

Albert Choi is Professor of Law at the University of Virginia Law School. He has published numerous works on the economics of contracts, compensation systems in organizations, and attorney's fee arrangements.

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John J. Donohue III is Leighton Homer Surbeck Professor of Law at Yale Law School. He has published numerous works on the economic and empirical study of employment and civil rights laws, as well as on attorney's fee-shifting.

Theodore Eisenberg is Henry Allen Mark Professor of Law and Adjunct Professor of Statistical Sciences at Cornell University. He has published extensively on the empirical analysis of civil rights litigation, class actions, and remedies.

Bruce L. Hay is Professor of Law at Harvard Law School. He has published widely on the economics of litigation, settlement, attorney's fees, and the market for legal services.

Avery W. Katz is Milton Handler Professor of Law at Columbia Law School. He has published widely on the economics of contract arrangements, legal remedies, and attorney's fees.

Herbert M. Kritzer is Marvin J. Sonosky Chair of Law and Public Policy at the University of Minnesota Law School. He has published extensively on the impact of legal fees in litigation as well as a wide range of other topics on civil litigation and legal practice.

Jennifer F. Reinganum is Bronson Ingram Professor of Economics and Professor of Law at Vanderbilt University. She has published widely on the economics of litigation, settlement, and remedies, and the analysis of business organizations and market competition.

Kathryn Spier is Domenico de Sole Professor of Law at Harvard Law School. She has published numerous articles on the economics of litigation, settlement, remedies, and attorney's fee arrangements.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988) amended Section 1988 to provide that in actions to enforce the civil rights laws, "the court, in its discretion, may allow the prevailing party, other than the United States, a *reasonable attorney's fee* as part of the costs." 42 U.S.C. § 1988(b) (emphasis added). The purpose of this fee-shifting statute is "to make it possible for those who cannot pay a lawyer for his time and effort to obtain competent counsel." *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*, 483 U.S. 711, 725 (1987). To achieve that purpose, the fees awarded under Section 1988 must provide lawyers the opportunity to earn remuneration comparable to what they could earn in other matters, and should provide them with the incentive to accept meritorious cases and resolve those cases in the most efficient manner.

The legal rule urged by petitioners, which would prohibit courts from taking into account the actual quality of performance and result achieved, would severely undermine the statutory objective. First, it would discourage lawyers from taking civil rights cases because they would not have the opportunity to earn, on average, remuneration comparable to what they could earn in other matters. Second, when compensation is based in part on the quality of performance and result, lawyers who are best suited to handle meritorious cases will have an increased

economic incentive to accept those cases; petitioners' rule would reduce that incentive. Third, rewarding actual performance and result encourages lawyers to pursue the most efficient means to resolve a matter successfully, rather than, as under petitioners' approach, the means that is likely to result in the highest lodestar fee.

To provide the appropriate incentives for lawyers to accept and efficiently resolve meritorious civil rights cases, courts must have the flexibility to enhance (or diminish) the lodestar fee, in appropriate cases, to account for the quality of performance and result. That conclusion is consistent with the statutory text and purpose, this Court's cases, and sound economic principles.

ARGUMENT

SECTION 1988 PERMITS A COURT TO TAKE THE QUALITY OF PERFORMANCE AND RESULT INTO ACCOUNT IN DETERMINING A "REASONABLE ATTORNEY'S FEE"

A. The Purpose Of Section 1988 Will Be Undermined If Courts Are Prohibited From Accounting For The Quality Of Performance And Result

1. To achieve the purpose of Section 1988, a "reasonable attorney's fee" must account for output as well as input

Congress enacted the fee-shifting provision of Section 1988 to encourage lawyers to accept representations in meritorious civil rights cases. A legal rule that requires courts to measure only a lawyer's "input"—rates and hours—in calculating a fee award will undermine the statute's purpose. To ensure that lawyers have the proper incentives to accept such cases, courts must have the discretion to consider, in appropriate cases, a lawyer's "output"—the quality of his performance and the result actually achieved—in determining what constitutes a "reasonable attorney's fee." 42 U.S.C. § 1988(b).

a. Remuneration in the legal marketplace reflects the quality of performance and result achieved

In enacting Section 1988, Congress recognized that to achieve the statute's purpose, the determination of a "reasonable attorney's fee" should be "governed by the same standards which prevail in other types of equally complex Federal litigation" and calculated in a manner that "is traditional with attorneys compensated by a fee-paying client." S. Rep. No. 94-1011, at 6 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5913 ("Senate Report"). Otherwise, lawyers will not have the proper economic incentives to accept civil rights cases.

The manner in which lawyers have billed for the value of their services has varied greatly over time. For much of the twentieth century, billing arrangements that reflected the quality of performance and result were common in the legal marketplace, and in recent years clients have increasingly demanded such arrangements in place of the simple "rates times hours" approach. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 800-801 (2002) (tracing the history of lawyers' use of the billable hour); William G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* 17-22 (1996) (hourly billing became increasingly common over the course of the 1970s); Sherry L. Talton, *Time to Look Again at AFAs?*, ABA Section of Litigation, Summer 2009, at 6, 8 ("fixed or flat fees were actually the norm in the legal profession up until about 40 years ago"; in the past few years,

clients have increasingly demanded them because they are "one way to improve the quality of legal services [clients] receive").[2] Indeed, the "hours times rates" billing model has recently come under sharp attack from clients and lawyers alike, who believe that the model does not accurately capture the value provided, and encourages lawyers to prolong matters, engage in unnecessary tasks, and avoid efficient resolutions to cases. *See, e.g.*, Nathan Koppel & Ashby Jones, *'Billable Hour' Under Attack*, WALL ST. J., Aug. 24, 2009, at A1; Ben W. Heinman, Jr. & William F. Lee, *Two Veteran Lawyers Say Now Is the Time for Fixed Fees*, CORPORATE COUNSEL, Aug. 24, 2009;[3] Jonathan D. Glater, *Billable Hours Giving Ground at Law Firms*, N.Y. TIMES, Jan. 30, 2009, at A1; *see also* Kathryn E. Spier, *Litigation*, in 1 HANDBOOK OF LAW AND ECONOMICS 262, 308-309 (A. Mitchell Polinsky & Steven Shavell, eds. 2007) (summarizing scholarly research on the economics of fee arrangements).

Clients, including the most sophisticated purchasers of legal services, are increasingly demanding that lawyers bill on the basis of value rather than time. For example, the Association of Corporate

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[2] *Cf. Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718-719 (5th Cir. 1974) (attorney's fees should reflect not only "[t]he customary fee for similar work in the community," but also the "ability of the attorneys" and "the results obtained").

[3] *Available at* http://www.law.com/jsp/article.jsp?id=1202433261281 (last visited Aug. 26, 2009).

Counsel, whose members include over 24,000 in-house attorneys representing more than 10,000 companies in 80 countries worldwide, has developed a program called the "Value Challenge." That association of corporate counsel "believe[s] that many traditional law firm business models * * * are not aligned with what corporate clients want and need: value-driven, high-quality legal services that deliver solutions for a reasonable cost." Association of Corporate Counsel, Value Challenge: About.[4] The Value Challenge "supports law firm efforts to implement change, including a willingness to reward those efforts," and seeks "[a] better alignment of interests of the corporate client and the outside firms." *Ibid*.

An American Bar Association report likewise describes the "corrosive impact of emphasis on billable hours," finding that the overreliance on billable hours "may not reflect value to the client." Am. Bar Ass'n, *ABA Commission on Billable Hours Report 2001-2002*, at 5 (Aug. 2002) ("ABA Billable Hours Report").[5] The Report recommends, among other things, alternative billing methods that are designed to better capture the value lawyers provide in specific matters.

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[4] *Available at* http://www.acc.com/valuechallenge/about/index.cfm (last visited Aug. 26, 2009).

[5] *Available at* http://www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf (last visited Aug. 26, 2009).

Lawyers have responded to these marketplace demands by accepting fee arrangements that expressly reflect the quality of their performance and the result they achieve. Koppel & Jones, *supra*, at A1 ("One survey found an increase of more than 50% [in 2009] in corporate spending on alternatives to the traditional hourly-fee model."). As the managing partner of Cravath, Swaine & Moore LLP recently explained to a business audience: "Quality insurance should come in the form of a success fee. If I win, I should be rewarded. That's not only fair, it places the incentive where it belongs." Evan R. Chesler, *Kill the Billable Hour*, FORBES, Jan. 12, 2009.[6] Law firms using alternative billing arrangements include Sidley Austin LLP; Orrick, Herrington & Sutcliffe LLP; Kirkland & Ellis LLP; Morgan, Lewis & Bockius LLP; Alston & Bird LLP; and Holland & Knight LLP. *See* Koppel & Jones, *supra*, at A1.[7]

One model being used with increasing frequency is the "partial contingency" or "hybrid contingency" fee arrangement. *See* James D. Shomper & Gardner G. Courson, *Alternative Fees for Litigation: Improved*

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[6] *Available at* http://www.forbes.com/forbes/2009/0112/026.html (last visited Aug. 26, 2009).

[7] *See also* Douglas S. Malan, *Interest in Alternative Billing Arrangements Heats Up*, CONNECTICUT LAW TRIBUNE, July 8, 2009, *available at* http://www.law.com/jsp/law/sfb/lawArticleSFB.jsp?id=1202432070948&hbxlogin=1 (last visited Aug. 26, 2009).

Control and Higher Value, 5 ACCA DOCKET 18 (2000);[8] Zusha Elinson, *Are Big Firms Warming Up to Alternative Fee Deals?*, THE RECORDER, July 11, 2007 (describing performance-based hybrid contingency arrangements used by Howrey LLP and Morrison & Foerster LLP).[9] In this model, a lawyer's normal hourly rates are discounted by a percentage (usually between 10%-20%) in exchange for a performance bonus or success award (*e.g.*, one to two times the discounted amount). That success award is generally tied to particular outcomes or benchmarks (*e.g.*, if the case is dismissed, resolved on summary judgment, or settled above or below a certain amount). *See* Shomper & Courson, *supra* (discussing variations of partial contingency billing). Fees earned in today's legal marketplace, in short, reflect the quality of performance and result in appropriate cases.

b. A reasonable fee should provide compensation comparable to what lawyers could earn in other matters

Lawyers, like other service providers, operate in an economic market and are subject to the laws of supply and demand. As a general matter, a lawyer will accept a particular representation only if the lawyer expects to earn fees that are at least equal to the fees he would earn if he accepted an alternative

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[8] *Available at* http://www.dupontlegalmodel.com/online library_detail.asp?libid=96 (last visited Aug. 26, 2009).

[9] *Available at* http://www.law.com/jsp/article.jsp?id=1184058 401567 (last visited Aug. 26, 2009).

matter. For the fee-shifting provision of Section 1988 to achieve its objective, therefore, it must provide remuneration that is, on average, equal to the remuneration lawyers could earn in other matters requiring comparable skills.

As discussed above, the clear trend in the marketplace is toward greater use of performance- or result-based fee structures. *See* Glater, *supra*, at A1 ("more clients are paying Cravath * * * success fees for positive outcomes, as well as payments for meeting other benchmarks"). According to one study, the amount spent "on alternative billing arrangements has totaled $13.1 billion this year, versus $8.6 billion in the like period of 2008." Koppel & Jones, *supra*, at A1. To provide the proper economic incentives to accept civil rights cases, courts should have the flexibility to make fee awards that account for the changing market for attorney compensation. As the fraction of matters in which performance- or result-based fee structures are used changes over time, courts should be able to reflect such changes in fee awards in civil rights cases.[10]

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[10] Amicus Washington Legal Foundation is thus wrong in asserting that the opportunity to earn a performance- or result-based fee has no effect on whether attorneys will accept representations in civil rights cases. Amicus Br. of Wash. Legal Found. 13-14. Even if such fees are infrequently awarded, it is the possibility of earning them in the future that affects the attorneys' incentives. And if there is *no* opportunity to earn such fees in civil rights cases, but ample opportunity to earn them in

(Continued on following page)

In the current market, if lawyers do not have the opportunity to earn performance- or result-based fee enhancements under Section 1988, the potential remuneration they can earn from civil rights cases will be, on average, lower than what they can earn in matters requiring comparable skills. That is especially true given that, under Section 1988, lawyers must accept the prospect of fee reductions or no fee recovery at all. For example, it is not unusual for courts to reduce a lawyer's actual market rate—*i.e.*, the rate that sophisticated, paying clients are willing to pay—before calculating the lodestar. *See, e.g.*, *Hopwood v. Texas*, 236 F.3d 256, 281 (5th Cir. 2000) (affirming the reduction of Theodore Olson's hourly rate from $450 to $225), *cert. denied*, 533 U.S. 929 (2001); *Lucero v. City of Trinidad*, 815 F.2d 1384, 1385-1386 (10th Cir. 1987) (affirming reduction of law firm's hourly rates from $65-$140 per hour to $50-$75 per hour); *Daggett v. Kimmelman*, 811 F.2d 793, 799-800 (3d Cir. 1987) (affirming reduction of attorney's rate from $300 to $250 per hour); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 955-956 (1st Cir. 1984) (reducing the hourly rate for Laurence Tribe in a First Amendment case from $275 to $175). The economically rational lawyer (especially those of sufficient skill and experience to have other options) will thus be disinclined to take civil rights cases if, as petitioners contend, courts are flatly prohibited—

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other types of cases, the incentive to accept civil rights cases unquestionably will be diminished.

regardless of circumstances—from awarding an enhancement for superior performance or result.

c. Fees that account for the quality of performance and result encourage lawyers to accept matters for which they are best suited

An efficiently functioning legal marketplace will match lawyers to the cases they are best suited to handle. For example, while a lawyer may be capable of handling an antitrust case, a consumer class action, and a civil rights suit, he may be best suited for the civil rights suit, while a colleague with comparable skills and an identical billing rate may be best suited for the antitrust case. If the fees the lawyer and his colleague expect to earn in all three cases are the same, they will be economically indifferent to which of the three matters they work on. On the other hand, if the fees they expect to earn may differ based upon the quality of their actual performance and the result in the case, they will have a stronger economic incentive to accept the matter for which they are best suited.

Petitioners' legal rule would reduce that incentive, and thus interfere with the market's efficient allocation of legal resources. Under petitioners' regime, lawyers would know that they have no prospect of earning greater remuneration if they perform particularly well or achieve an extraordinary outcome. As a result, the lawyers who are best-equipped to identify and successfully resolve meritorious civil

rights cases will be less likely to accept those representations, and the purpose of the statute will be undermined.

d. Remuneration that accounts for the quality of performance and result encourages the efficient resolution of cases

This Court has recognized that the fee-shifting provision of Section 1988 should encourage lawyers to accept representations only in meritorious cases, and thus minimize the "social cost of * * * nonmeritorious claims." *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992). Consistent with that objective, Section 1988 should likewise encourage lawyers to resolve cases in the most efficient manner. *See* Amicus Br. of the State of Alabama, *et al.* 14 (State has an interest in settling litigation to effectuate good public policy); Amicus Br. of the Nat'l Sch. Bds. Ass'n 15 (civil rights laws should encourage prompt voluntary actions to address alleged violations).

If fee awards are determined using only rates and hours, there will be diminished economic incentive to resolve cases expeditiously and efficiently. The ABA Billable Hours Report found that hours-based compensation "penalizes the efficient and productive lawyer." ABA Billable Hours Report, *supra*, at 5. This is because the billable hour model provides "no concrete incentive * * * to resolve cases at an early stage, much less efficiently," as "the law firm gets paid no matter how inefficiently it performs and regardless of outcome." Shomper & Courson, *supra*.

Indeed, the *Dague* Court observed that a Federal Courts Study Committee Report had concluded that the lodestar method may "give lawyers an incentive to run up hours unnecessarily." 505 U.S. at 566 (citation omitted). These incentives are inconsistent with the purpose of Section 1988, which was "not designed as a form of economic relief to improve the financial lot of attorneys." *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*, 478 U.S. 546, 565 (1986) ("*Delaware Valley I*").

If courts have the flexibility to account for the quality of a lawyer's actual performance and the result obtained in determining a reasonable fee, they can reward lawyers who achieve outstanding outcomes in an efficient manner. That, in turn, will provide appropriate economic incentives for lawyers to consider litigation strategies that serve not only their clients' interests in obtaining redress, but also the judicial system's interest in resolving matters efficiently.

2. The conventional lodestar calculation does not take appropriate account of the quality of performance or result

a. A rigid "market rate times hours" calculation does not include actual performance or result

The conventional lodestar calculation—which is the product of hourly rate and hours billed—does not adequately account for the quality of actual performance or result obtained. The hourly rate component

simply reflects the market's expectations of the lawyer's skills. Those expectations are generally a function of the lawyer's education, substantive knowledge, reputation, and prior experience. *See Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984).

But in many cases, past performance is not a reliable predictor of future success. In any given case, a lawyer may exceed the performance expectations that are reflected in the hourly rate. That is true even in situations where the lawyer's hourly rate is at the top of the relevant legal market: even the most highly paid and experienced lawyers perform more brilliantly in some cases than in others. *See* Tony Mauro, BLOG OF THE LEGAL TIMES, *After Supreme Court Scuffle, Ted Olson Earns His Keep*, Nov. 3, 2008 ("Perhaps sharpened by the rivalry [with another lawyer in the case], Olson was at his best today, delivering a focused, simple argument on the issue before the Court * * * .").[11]

The government is thus simply wrong in asserting that the quality of representation and the result obtained "[a]re [a]lready [r]eflected [i]n [t]he [l]odestar [c]alculation." Amicus Br. of the United States 17. The conventional lodestar fee calculation—hours times market rate—does not capture the value a lawyer provides by outperforming (or underperforming) the expectations embodied in the

[11] *Available at* http://legaltimes.typepad.com/blt/2008/11/ted-olson-earns-his-keep.html (last visited Aug. 26, 2009).

hourly rate. Courts already recognize this principle when they reduce the lodestar calculation to arrive at a reasonable fee in cases where lawyers underperform;[12] they should likewise be able to recognize it in cases in which lawyers outperform. And as respondents explain, Resp. Br. 26-31, courts routinely consider the quality of representation and the result in awarding fees that exceed the strict lodestar amount in commercial cases. As a legal and economic matter, considering the quality of representation and award is reasonable under Section 1988 for the same reason that it is reasonable in those commercial cases.

To be sure, in some cases, enhanced performance and result may be the product, in part, of a greater number of hours expended on a matter. But in many cases, the reverse will be true: the quality of the lawyer's performance and the result achieved will be the product of strategic decisions, successful discovery, or outstanding advocacy that leads to an early resolution. And even in cases that involve many hours of work, the quality of performance and result in a particular case may far exceed those of other cases in which comparable time is expended. In each

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[12] For example, in *Lohman v. Duryea Borough*, No. 08-3524, 2009 WL 2183056 (3d Cir. July 23, 2009), the Third Circuit affirmed the District Court's reduction of the lodestar amount for unusually limited success where the plaintiff rejected a settlement offer of $75,000, and, after trial, was awarded only $12,205.

of those cases, the rigid "rates times hours" lodestar calculation yields an unreasonably low fee, one that does not reflect the value of the lawyer's work.

As petitioners observe, courts could account for the quality of performance or result achieved by using above-market or below-market rates in the lodestar calculation. Pet. Br. 54-55. But that approach would have no particular advantage over the enhancement used by the court below. It is no easier to administer, as it requires a court to determine an appropriate multiplier to be applied to the attorney's billing rate (as opposed to the overall fee). If anything, it is less reflective of market compensation, which is increasingly making performance- or result-based remuneration a function of the overall fee. Nor is a rate adjustment approach necessary to properly account for circumstances in which lawyers underperform. Moreover, whether courts adjust rates, or overall fees, is of no consequence as an economic matter: the critical point is that they must have the flexibility, in appropriate cases, to adjust the conventional lodestar calculation to reflect the quality of performance and result achieved in order to award a "reasonable attorney's fee."

b. Enhancements made on the basis of performance and quality are not "windfalls"

Petitioners' contention that a fee that exceeds reasonable "hours times rates" provides attorneys with an unauthorized "windfall," Pet. Br. 43, is wrong. As demonstrated above, exclusive reliance on

an "hours times rates" model will result, on average, in below-market compensation. By accounting for the quality of performance and result in appropriate cases, courts can ensure that the market provides appropriate price signals, so that lawyers know they have the opportunity to earn a competitive level of compensation when accepting a civil rights case.

Moreover, in those cases in which a performance- or result-based enhancement is awarded, there is no "windfall" precisely because the amount of the enhancement has been *earned* based on the quality of the legal services provided. The fact that sophisticated buyers and sellers in the legal services marketplace agree upon performance- and result-based enhancements proves that such awards are not "windfalls."

Nor did Congress believe such enhancements were "windfalls." The Senate Report cited three cases as illustrative of matters in which the "appropriate standards" for determining a reasonable rate were "correctly applied"—*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); and *Swann v. Charlotte-Mecklenberg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). *See* Senate Report at 6. In each of those cases, the district court specifically found that the prevailing party's counsel provided excellent service or obtained an excellent result and took that into account in affixing the fee award. *Stanford Daily*, 64 F.R.D. at 686-687 ("plaintiffs' attorneys provided excellent legal services"); *Davis*, 8

E.P.D. ¶ 9444 at para. 7 (plaintiff's counsel "achieved excellent results"); *Swann*, 66 F.R.D. at 484 (the "results obtained were excellent"). Indeed, in *Stanford Daily*—which the Senate Report cites as a case "which [did] not produce windfalls," Senate Report at 6—the district court found that "the attorneys' work, and the results which they obtained * * * merit[ed] an increase in the base figure upon which a reasonable attorneys' fees award is computed." *Stanford Daily*, 64 F.R.D. at 687. Congress thus contemplated, contrary to petitioners' claim, that courts can account for the actual quality of performance and result in determining a reasonable fee without producing windfalls.

B. Remuneration For The Actual Quality Of Performance Or Result Is Consistent With The Statutory Text And Purpose

The text of Section 1988 authorizes an award of a "reasonable attorney's fee." 42 U.S.C. § 1988(b). What is a "reasonable" fee should reflect the broader marketplace for legal services, which (as discussed above) takes into account, in appropriate cases, the actual quality of the lawyer's performance and the result obtained. The ordinary meaning of the statutory language is certainly capacious enough to permit consideration of those concepts. And reading Section 1988 to categorically bar such considerations would undermine the provision's fundamental purpose.

Indeed, at the time Congress passed this fee-shifting provision, it contemplated that those very

factors would be considered in determining a "reasonable" fee. Both the House and Senate Reports pointed to the factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as providing the "appropriate standards" for determining a fee award under Section 1988. *See* Senate Report at 6; H.R. Rep. No. 94-1558, at 8-9 (1976). Those factors include "the results obtained" and the "ability of the attorneys." *Johnson*, 488 F.2d at 717-719. Moreover, as noted above, the Senate Report favorably cited cases that awarded fees based on the fact that the attorneys actually "provided excellent legal services," *Stanford Daily*, 64 F.R.D. at 686-687, and "achieved excellent results," *Davis*, 8 E.P.D. ¶ 9444 at para. 7. Senate Report at 6. In Congress's view, such considerations were important because they were necessary "to attract competent counsel" to take on civil rights cases by producing fee awards comparable to those available in the marketplace for "other types of equally complex Federal litigation, such as antitrust cases." *Ibid.*

This Court's cases have consistently affirmed those principles. The Court has recognized that the determination of what fee is "reasonable" should take into account the broader marketplace for legal services. *See, e.g.*, *Blum*, 465 U.S. at 886; *Hensley v. Eckerhart*, 461 U.S. 424, 433-434 (1983). Such market-based considerations are the best way to

ensure that competent counsel will accept representations in meritorious civil rights cases.[13]

Moreover, while the Court has established a presumption that the "'product of reasonable hours times a reasonable rate' normally provides a 'reasonable' attorney's fee," *Blum*, 465 U.S. at 897 (quoting *Hensley*, 461 U.S. at 434); *see Dague*, 505 U.S. at 562, it has expressly rejected the notion that "an 'upward adjustment' is never permissible." *Blum,* 465 U.S. at 897. To the contrary, the Court has repeatedly affirmed the potential availability of the very type of enhancement awarded here. As the Court explained in *Blum*, "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." *Ibid.*

One such circumstance is "the important factor" of "results obtained," *Hensley*, 461 U.S. at 434, including "exceptional success." *Blum*, 465 U.S. at 897 (quoting *Hensley*, 461 U.S. at 435); *accord City of Riverside v. Rivera*, 477 U.S. 561, 568-573 (1986).

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[13] To be sure, the Court has not interpreted fee-shifting statutes "to mimic the intricacies of the fee-paying market *in every respect*." *Dague*, 505 U.S. at 566-567 (emphasis added). But, as explained above (pp. 14-16, *supra*), the rationale for not mirroring the private market for contingency fees (namely, that to do so might provide incentive and compensation to pursue non-meritorious cases) cuts the other way here. Permitting an enhancement for actual performance and actual results will provide incentives for lawyers who are the best fit for certain cases to pursue those cases and to resolve them efficiently.

Another is the actual quality of performance of counsel. While this Court has observed that a lawyer's "post-engagement performance" is "normally reflected in the reasonable hourly rate," it has never foreclosed an enhancement on that basis. *Delaware Valley I*, 478 U.S. at 566.

The Court should not do so now. For most fee awards, the lodestar method may be an appropriate measure of compensation. But it may not be an appropriate measure if a lawyer's actual performance or the outcome achieved is truly extraordinary—either extraordinarily good or extraordinarily poor. Accordingly, for all the reasons discussed above, a district court should be permitted to consider the actual quality of a lawyer's performance and the actual result obtained in arriving at a "reasonable attorney's fee," at least in exceptional cases.

CONCLUSION

For the foregoing reasons and those in respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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