THE LODESTAR RANGER: CALCULATING ATTORNEYS' FEE AWARDS IN *PERDUE v. KENNY A.*

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I. INTRODUCTION

Perdue v. Kenny A.[1] presents a unique opportunity for the Supreme Court to clarify whether fees awarded pursuant to a federal fee-shifting statute may ever be enhanced on the basis of the quality of performance and results obtained by the winning litigants' attorneys.[2] Over twenty-five years ago, Justice Brennan decried the loss of the "straightforward command [of federal fee-shifting statutes to] . . . a vast body of artificial, judge-made doctrine, . . . which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion . . . in its wake."[3] The lack of uniformity and clarity among the courts regarding what are permissible considerations when determining a "reasonable attorney's fee" demonstrates the significant impact the Supreme Court's intervention could have in taming "Frankenstein's monster" for good.

Calculation of attorneys' fees under federal fee-shifting statutes has relied heavily upon the "lodestar" method, which multiplies hours worked by an hourly rate subject to various enhancements and adjustments.[4] In *Perdue*, the Supreme Court will necessarily address two

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1. Perdue v. Kenny A., No. 08-970 (U.S. argued Oct. 14, 2009).

2. *Compare* Petition for Writ of Certiorari at i, Perdue v. Kenny A., No. 08-970 (U.S. Jan. 29, 2009), *cert. granted*, 129 S. Ct. 1907 (2009) (setting out a question presented that asks if a "reasonable attorney's fee award . . . [can] ever be enhanced based solely on quality of performance and results obtained when these factors *already are included* in the lodestar calculation") (emphasis added), *with* Brief in Opposition at i, Perdue v. Kenny A., No. 08-970 (U.S. Mar. 4, 2009) (setting out a question presented that asks if the "District Court abuse[s] its discretion in awarding an upward adjustment of the initial lodestar fee, based upon specific record findings of superior performance and exceptional success").

3. Hensley v. Eckerhart, 461 U.S. 424, 455 (1983) (Brennan, J., concurring in part and dissenting in part).

4. The term "'lodestar' stems from the figure's role as 'the guiding light of [the Court's]

related issues concerning the lodestar, and perhaps consider a third. First, the Court will consider what factors are properly included in the determination of a "reasonable attorney's fee" under the Civil Rights Attorney's Fees Award Act of 1976 ("section 1988"),[5] the federal fee-shifting statute. Second, the Court will address whether the current method for calculating fees appropriately accounts for these factors. Third, the Court may decide to consider whether a wholesale departure from the traditional approach in calculating fees might better reflect section 1988's goal of providing reasonable fees to winning litigants.

This term, the Supreme Court will hear "an unprecedented number of cases addressing fundamental aspects of professional responsibility and regulation of the legal profession."[6] As one of those cases, *Perdue* has the potential to alter an aspect of practice that not only resonates personally with all practicing attorneys, but could also provide the impetus for the entire legal community to address, head-on, the changing market for its services.

"*Perdue* arose out of Georgia's dysfunctional foster care system" and culminated in major substantive reforms intended to eliminate the system's biggest problems.[7] The district court awarded the winning litigants' attorneys $6 million plus a seventy-five percent enhancement for their services. The Eleventh Circuit upheld the lower court's award and enhancement not because it believed such an award was merited, but because it was constrained by precedent.[8] In reviewing the Eleventh Circuit's decision, the Supreme Court will likely con-

fee-shifting jurisprudence." Case Comment, *Attorneys' Fees—Fee Enhancement*, 106 HARV. L. REV. 339 n.13 (1992) (citing City of Burlington v. Dague, 505 U.S. 557, 562 (1992)).

5. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988 (West 2000) (granting a court, in its discretion, the authority to permit the prevailing party to recover "a reasonable attorney's fee as part of the costs").

6. Renee Newman Knake, *Prioritizing Professional Responsibility and the Legal Profession: A Preview of the United States Supreme Court's 2009–2010 Term*, 5 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 1 (2009) (discussing seven cases the Court had already agreed to hear regarding the "role of attorneys and the practice of law").

7. Scott Street, *Perdue v. Kenny A.: Is the "Lodestar" Approach Adequate for Calculating Attorney's Fees? (Argument Recap)*, SCOTUS WIKI, Nov. 11, 2009, http://www.scotuswiki.com/index.php?title=Perdue_v._Kenny_A.

8. Kenny A. v. Perdue, 532 F.3d 1209, 1236 (11th Cir. 2008). All three judges on the Eleventh Circuit affirmed the district court's decision. The majority opinion represents the views of Judge Carnes and Judge Hill except with respect to Part VI in which Judge Hill did not concur. The majority affirmed the district court's decision because of the "prior precedent rule," which, it stated, necessitated its affirmation despite the fact that the district court's enhancement could not "be squared with [] Supreme Court decisions." *Id.* at 1225. Judge Wilson, writing the minority opinion, found the district court's decision legally and judicially sound. *Id.* at 1242 (Wilson, J., concurring).

strue prior Court rulings to find that the district court's fee enhancement was improper and that public policy concerns regarding exorbitant fee enhancements necessitate vacating the award. This Comment argues, however, that there are sound reasons to hold the enhancement was justified and that relevant market considerations support affirming the district court's decision.

II. FACTS

What began as an effort to improve the quality of life for thousands of children in Georgia's foster care system now ends as a battle over how much to pay attorneys in *Perdue v. Kenny A*. In *Perdue*, nine foster children in the custody of the Georgia Department of Human Resources (DHR) sued the Governor of Georgia, DHR, and others on behalf of themselves and 3,000 foster children within two Georgia counties.[9] The plaintiffs alleged fifteen causes of action under state and federal law as a result of "systematic deficiencies" in the State foster care system.[10] The federal claims, alleged pursuant to 42 U.S.C.A. § 1983,[11] were for violations of the "class members' Fourteenth Amendment rights to substantive and procedural due process and their First, Ninth, and Fourteenth Amendment rights to liberty, privacy, and association."[12]

The case, which officially began in 2002, came to a head in 2005 when the district court recommended that the parties attend mediation in an effort to address the plaintiffs' complaints.[13] After four months and more than 110 hours spent in eighteen separate mediation sessions, the parties settled.[14] The settlement included thirty-one

9. *Kenny A.*, 532 F.3d at 1214–15. The other defendants are the commissioners of DHR, Fulton and DeKalb Counties, and the counties' respective departments and directors of family and children services.

10. *Id.* at 1215. Alleged deficiencies included: "(1) assigning excessive numbers of cases to inadequately trained and poorly supervised caseworkers; (2) not developing a sufficient number of foster homes properly screened to ensure the plaintiff children's safety; and (3) not identifying adult relatives who could care for the plaintiff children as an alternative to strangers or impersonal institutions," among other problems. *Id.*

11. The Civil Rights Act of 1871, 42 U.S.C.A. § 1983 (West 1996) (providing the substantive right under which a winning litigant may then pursue recovery for their attorneys' fees under section 1988).

12. *Kenny A.*, 532 F.3d at 1215. The plaintiffs also alleged state claims such as violations of their "substantive due process and equal protection rights under the Georgia Constitution," and other State statutes. *Id.* To remedy these allegations, the plaintiffs sought declaratory and injunctive relief. *Id.*

13. *Id.*

14. *Id*. The plaintiff class and Fulton and DeKalb counties settled in 2006; their agreement is not on appeal. *Id.* at 1216. The defendants involved in this settlement, and the case before the

substantive and procedural remedies to the State's foster care system, as well as recovery for the expenses of litigation and reasonable attorneys' fees and costs for the plaintiffs.[15] Despite the defendants' acknowledgement that they would bear the costs of counsel, the parties were unable to agree on "reasonable fees," and consequently filed with the district court for an awards determination.[16]

The plaintiffs' attorneys requested approximately $14.2 million in fees—$7.1 million for the 30,000 hours allegedly spent working on the case (the lodestar) plus another $7.1 million[17] as an enhancement for "achiev[ing] exceptional results vindicating the constitutional and statutory rights of thousands of children of a classwide basis."[18] The defendants objected to both the lodestar figure and the enhancement, arguing that the plaintiffs' attorneys overbilled and provided records "too vague to support a claim for compensation."[19] The defendants also alleged that an enhanced fee would result in double-counting because "the skill of the plaintiffs' attorneys in litigating the case [was already] taken into account in setting their hourly rates."[20]

The district court awarded a total of $10.5 million to the winning litigants—a $6 million fee award and a $4.5 million enhancement.[21] The court arrived at the $6 million fee by "granting in full each hourly rate requested," then reducing the number of hours reportedly spent on non-travel related matters by fifteen percent, and halving the hourly rates for time spent traveling.[22] The district court then enhanced the lodestar award by seventy-five percent because it decided that this award did not fully cover class counsels' $1.7 million advancement for expenses, their lack of payment on an on-going basis,

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Supreme Court, are the governor of Georgia, Department of Human Resources for the state of Georgia (DHR), DHR's commissioner, Fulton and DeKalb County's Department of Family and Children Services, and the respective directors of those departments. *Id.*

15. *Id.* These fees were shifted to the defendants pursuant to 42 U.S.C.A. § 1988 and FED. R. CIV. P. 23(h).

16. *Id.* at 1217.

17. *Id.* The exact amount the plaintiffs' attorneys sought was a total of $14,342,860—$7,171,434.30 in compensation for the 29,908.73 hours they (and their paralegals) claimed to have worked plus $7,171,434.30 as an enhancement.

18. Plaintiff's Brief in Support of Award Attorneys' Fees and Expenses of Litigation at 3, Kenny A. v. Perdue, No. 1:02-cv-01686-MHS (N.D. Ga. Dec. 9, 2005).

19. *Kenny A.*, 532 F.3d at 1217.

20. *Id*.

21. *Id.* at 1217–18. The exact amounts are $6,012,802.90 for the basic fee award and $4,509,602.00 as an enhancement, totaling $10,522,405.08. The district court reduced the requested lodestar by fifteen percent (or $1,158,631.40) because it found some billing entries too vague or excessive. *Id.* at 1217.

22. *Id*. at 1218.

and the "completely contingent" nature of recovery in the case.[23] Further, the court "found that 'the superb quality of [counsels'] representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the [fee]'."[24]

The Eleventh Circuit, despite expressing an unwillingness to support the fee enhancement and the lodestar award,[25] affirmed in full the district court's decision.[26] If not for controlling precedent,[27] the Eleventh Circuit majority stated, it would have reversed.[28] What now remains before the Supreme Court is to decide whether the quality of representation and results obtained are fully accounted for in the lodestar, and if they are not, if enhancement based upon these factors is proper.[29]

III. LEGAL BACKGROUND

Under the American Rule, "the prevailing party may not recover attorneys' fees as costs or otherwise."[30] A losing litigant, however, will pay the winning litigant's attorneys' fees if the action falls under one of the many statutory exceptions to the American Rule authorized by Congress.[31] If the Court decides to redefine what constitutes reason-

23. *Id.* (quoting Kenny A. *ex rel*. Winn v. Perdue, 454 F.Supp.2d 1260, 1288 (N.D. Ga. 2005)).

24. *Id.*

25. *Id.* at 1220.

26. *Id.* at 1236–37 ("Unfortunately, under the prior panel precedent rule we are not free to decide the enhancement issue, but must instead follow this Court's earlier decisions . . . ."). The Eleventh Circuit also dismissed the plaintiffs' appeal. The plaintiffs have not sought further review.

27. *See* NAACP v. City of Evergreen, 812 F.2d 1332 (11th Cir. 1987) (finding a fee award may be enhanced in some cases); Norman v. Hous. Auth., 836 F.2d 1292, 1302 (11th Cir. 1988) (remanding in part because the court failed to consider whether an upward adjustment to the lodestar was merited).

28. *Kenny A.*, 532 F.3d at 1238 ("[A]s a later panel we are bound to follow [prior Eleventh Circuit decisions].").

29. *Id.* at 1219–20. The defendants also claimed that the district court should not have compensated the plaintiffs' lawyers for all claimed photocopying expenses and that they were compensated for an unreasonable number of hours. The Eleventh Circuit affirmed the lower court's ruling with regard to these claims as well.

30. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975) (affirming the rule that parties should bear the costs of their own representation and that only Congress, not the courts, may authorize exceptions to this rule); *see* Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L. J. 435, 435 (citing Arcambel v. Wiseman, 3 U.S. 306 (1796), as the birthplace of the American Rule). The American Rule is an unusual feature of American civil litigation. "Most other countries with comp[a]rable litigation systems use some form of fee shifting." *Id.* at 435, n.1.

31. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 913 (3d ed. 2002) ("More than 180 federal statutes and 4,000 state statutes authorize awards of at-

able attorneys' fees under one of the fee-shifting statutes, then all other fee-shifting statutes will be reinterpreted accordingly.[32] One such fee-shifting statute—and the statute at issue—is the Civil Rights Attorney's Fees Award Act of 1976 ("section 1988"). Under section 1988(b), a court, "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" incurred in a federal civil rights action.[33]

Awarding a reasonable fee under the federal fee-shifting statutes is a two-step process:[34] (1) determine the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,"[35] and (2) consider whether an upward or downward adjustment is merited.[36] Beyond showing a general unwillingness to enhance attorneys' fees, the Supreme Court has never explicitly precluded courts from engaging in this process.[37] Supreme Court precedent provides for courts, "in [their] discretion," to adjust attorneys' fees so that they may in fact be "reasonable" under 42 U.S.C.A. § 1988.[38] It is less clear whether this precedent permits the courts to adjust fees based on factors that may already be considered by some to be sufficiently accounted for in the initial fee calculation.

"Congress enacted the fee-shifting provision of section 1988 to encourage lawyers to accept representations in meritorious civil rights

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torneys' fees."). Other statutory exceptions to the American Rule include the Equal Access to Justice Act, 28 U.S.C. 2412(b) and (d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k); Clean Air Act, 42 U.S.C. 7413(b), 7604(d), 7607(f), 7622(b)(2)(B); Consumer Product Safety Act, 15 U.S.C. 2060(c) and (f), 2072(a), 2073; Truth in Lending Act, 15 U.S.C. 1640(a)(3), and others. Brief for United States as Amici Curiae Supporting Petitioners at 11, Perdue v. Kenny A., No. 08-970 (U.S. June 29, 2009).

32. Case Comment, *supra* note 4, at 338 n.3 ("The Supreme Court has noted that the generally similar wording among fee-shifting statutes is a 'strong presumption that they are to be interpreted alike'." (citing Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989) (internal citation omitted)); *see* Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983) (finding "[t]he legislative history of § 1988 indicates that Congress intended that 'the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act'. The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party'.").

33. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988 (West 2000).

34. Pennsylvania v. Del. Valley Citizens' Council for Clean Air (*Delaware Valley I*), 478 U.S. 546 (1986).

35. *Hensley*, 461 U.S. at 433.

36. *See* Blum v. Stenson, 465 U.S. 886, 898 (1984) (addressing the "remaining" issue in the case—whether it is appropriate to adjust the fee); *see also Hensley*, 461 U.S. at 434 (furthering the point that the "product of reasonable hours times a reasonable rate does not end the inquiry").

37. *See Blum*, 465 U.S. at 901 (rejecting petitioner's argument that "an upward adjustment to an attorney's fee is never appropriate under § 1988.").

38. S. REP. No. 94-1011, at 1 (1976).

cases."[39] Recognizing that many civil rights litigants are people who have "little or no money with which to hire a lawyer,"[40] Congress sought to provide the monetary incentive necessary to attract competent counsel.[41] Thus, fees awarded under the federal fee-shifting statutes are supposed to be guided "by the same standards which prevail in other types of equally complex Federal litigation . . . and not [to] be reduced because the rights involved may be nonpecuniary in nature."[42]

Over the past thirty years, the Supreme Court has addressed a variety of factors that should and should not be considered when determining a "reasonable fee" under fee-shifting statutes. The Supreme Court first addressed the issue in *Hensley v. Eckerhart*.[43] In *Hensley*, the Court held that "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."[44] The Court noted that "other factors," as enumerated in *Johnson v. Georgia Highway Express, Inc.*,[45] might also be considered in determining a reasonable fee, but these other factors were likely already accounted for in the lodestar calculation.[46]

The Supreme Court gradually narrowed the spectrum of appropriate justifications for attorneys' fees enhancements over the years, finding many already accounted for in the lodestar calculation. For in-

39. Brief for Law and Economics Scholars, et al. as Amici Curiae Supporting Respondents, Perdue v. Kenny A., No. 08-970 (U.S. Aug. 28, 2009).

40. S. REP. NO. 94-1011, at 6.

41. Case Comment, *supra* note 4, at 338; *see* William R. Mureiko, *A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes*, 1989 DUKE L. J. 438, 440 ("[T]he general purpose of fee-shifting statutes [is] to provide for complete enforcement of rights Congress has deemed worthy of special protection.").

42. S. REP. NO. 94-1011, at 6.

43. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); *see* Pennsylvania v. Del. Valley Citizens' Council for Clean Air (*Delaware Valley I*), 478 U.S. 546, 563 (1986) (noting "[w]e first addressed the question of the proper manner in which to determine a 'reasonable' attorney's fee in *Hensley v. Eckerhart*").

44. *Hensley,* 461 U.S. at 433.

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

46. *Hensley,* 461 U.S., at 434 n.9. There are twelve factors listed in *Johnson v. Georgia Highway Express, Inc.* that a court should consider in making an awards determination. 488 F.2d 714, 717–19 (5th Cir. 1974). The factors are: "time and labor required;" "novelty and difficulty of the questions;" "skill requisite to perform the legal service properly;" "preclusion of other employment by the attorney due to acceptance of the case;" "customary fee;" "whether the fee is fixed or contingent;" "time limitations imposed by the client or the circumstances;" "amount involved and the results obtained;" "experience, reputation, and ability of the attorneys;" "'undesirability' of the case;" "nature and length of the professional relationship with the client;" and "awards in similar cases." *Id.*

stance, in *Blum v. Stenson*,[47] the Court held that the "novelty and complexity of the issues" were already accounted for in the lodestar and therefore should not merit a fee enhancement.[48] The *Blum* Court further limited the scope of permissible reasons for enhancing attorneys' fees when it denied an enhancement based on the contingent nature of success in the case at issue.[49] The Court, nonetheless, expressly noted that an upward adjustment of attorneys' fees might be appropriate in "certain 'rare' and 'exceptional' cases."[50] Likewise, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*,[51] the Court held that a generalized determination that counsel's performance was of "superior quality" was insufficient to justify enhancement without "specific evidence" supporting this determination,[52] but did not find enhancements to be wholly inconsistent with the award of reasonable fees under federal fee-shifting statutes.[53]

In *NAACP v. City of Evergreen*,[54] the Eleventh Circuit confronted the specific question of whether enhancements could be justified based on results achieved in a particular case. The court held that although the extent of results obtained by particular litigation usually does not merit an enhancement, one might be justified if the case was

47. Blum v. Stenson, 465 U.S. 886 (1984). In *Blum*, the district court granted the lodestar plus a fifty percent enhancement to the plaintiffs' attorneys in a civil rights action. The Supreme Court reversed the enhancement.

48. *Id.* at 898–99.

49. City of Burlington v. Dague, 505 U.S. 557, 562 (1992). This issue was addressed earlier in the plurality opinion of Pennsylvania v. Del. Valley Citizens' Council for Clean Air (*Delaware Valley II*), 483 U.S. 711 (1987), which held that multipliers for assuming the risk of loss was an impermissible consideration for adjusting an attorney's fee.

50. Pennsylvania v. Del. Valley Citizens' Council for Clean Air (*Delaware Valley I*), 478 U.S. 546, 565 (1986) (citing to *Blum* and addressing the limited circumstances in which upward adjustments are permissible).

51. Pennsylvania v. Del. Valley Citizens' Council for Clean Air (*Delaware Valley I*), 478 U.S. 546 (1986). Although *Delaware Valley I* was brought under section 304(d) of the Clean Air Act, the Court explained that the purposes behind this Act and section 1988 are "nearly identical." *Id.* at 559.

52. *Id.* at 566 (noting that the quality of the winning litigants' counsels' representation is normally reflected in the reasonable hourly rate, and that to adjust the lodestar based on this could result in double counting). The Court did not state that enhancements were always inappropriate, but, in dicta, criticized both the district court and court of appeals for failing to provide specific findings as to why the lodestar was insufficient.

53. *See Delaware Valley II*, 483 U.S. at 728 (addressing the decision to enhance based on the risk of nonpayment and finding that enhancement for such risk "should be reserved for exceptional cases"). Although the Court in *City of Burlington v. Dague* overruled *Delaware Valley II* to the extent that the lower court's enhancement was based on the contingent nature of a case, the Court still did not render a final judgment on whether enhancements are wholly impermissible.

54. NAACP v. City of Evergreen, 812 F.2d 1332 (11th Cir. 1987).

an "exceptional success."[55] Within a year, the Eleventh Circuit reaffirmed its commitment to enhancements in *Norman v. Housing Authority*,[56] noting that if the "results obtained were exceptional, then some enhancement of the lodestar might be called for."[57]

Because one of the responsibilities of the Supreme Court is to establish uniform application of federal law by the lower federal courts, the Court may find that *Perdue* provides the ideal framework to identify precisely what factors go into the calculation of attorneys' fees awarded under fee-shifting statutes. The Court, however, may decide to wholly eliminate fee enhancements, finding them beyond the scope of a "reasonable" fee, or it may seek to establish an entirely new methodology for determining awards under section 1988.

IV. HOLDING

Bound by its prior precedents,[58] the Eleventh Circuit begrudgingly affirmed[59] the district court's fee enhancement to the winning liti-

55. *Id.* at 1337. In *NAACP* the Eleventh Circuit remanded because the district court failed to properly consider whether in fact an enhancement of the lodestar was justified. It ruled that the district court should "make findings with regard to each of the grounds put forward by the [the winning litigants] as warranting an enhancement and relate those findings to its ultimate determination of the issue." *Id.*

56. Norman v. Hous. Auth., 836 F.2d 1292 (11th Cir. 1988).

57. *Id.* at 1302. The *Norman* Court followed this comment by noting that even if results obtained are "exceptional," no enhancement was justified unless the quality of "representation was superior to that which one would reasonably expect . . . ." *Id.*

58. Under the "prior precedent rule, a panel decision is the law of the circuit unless and until it is overruled by the Supreme Court or the en banc court." Gulf Power Co. v. Fed. Commc'n Comm'n, 226 F.3d 1220, 1224 (11th Cir. 2000). *See* Hurth v. Mitchem, 400 F.3d 857, 862 (11th Cir. 2005) ("[W]e are not permitted to reach a result contrary to a prior panel's decision merely because we are convinced it is wrong . . . ."). The Eleventh Circuit cited *NAACP v. City of Evergreen* and *Norman v. Housing Authority* as binding precedents in this case. *See NAACP,* 812 F.2d 1332, 1336–37 (11th Cir. 1987) (finding a fee award may be enhanced in some cases, but was inappropriate in this instance because the district court failed to find that the relief obtained was of great benefit "and represented exceptional success"); *Norman*, 836 F.2d at 1306 (remanding the case in part because the court "applied the wrong standard" and failed to consider whether an adjustment to the lodestar was merited in light of the legal significance of the case). *Kenny A. v. Perdue* was heard by three judges only, not the Eleventh Circuit en banc. 532 F.3d 1209 (11th Cir. 2008).

59. *Kenny A.*, 532 F.3d at 1238. The court opined: "[f]or the reasons we have already explained at length, we are convinced [the *NAACP* and *Norman* holdings are] wrong and conflict[] with relevant Supreme Court decisions. Nonetheless, as a later panel we are bound to follow it." *Id.* at 1238. The majority also decided not to remand the case because it considered doing so "pointless," explaining "[t]he district court was so obviously enamored with the performance of plaintiffs' counsel and . . . determined to reward them for it, that we have no doubt the court would simply reinstate the enhancement . . . . All that a remand would achieve is more delay and the generation of more billable hours." *Id*. at 1242.

gants.[60] Despite its affirmace, the majority of the Eleventh Circuit's three-judge panel rejected the district court's rationale on three grounds. First, the Eleventh Circuit regarded the Supreme Court's frequent emphasis on the "strong presumption" of the lodestar's reasonableness as meriting a reversal of the fee enhancement.[61] It emphasized the Court's discussion of the "rare" and "exceptional" nature of a case that merits an enhancement, and concluded that affirming the adjustment here would cut against that core aspect of such fee determinations.[62] Second, the appeals court rejected each of the district court's reasons for enhancing the award—the advancement of case expenses,[63] delayed payment,[64] and the contingent nature of the case[65]—as either in conflict with Supreme Court precedent or already fully reflected in the lodestar award.[66] Third, the appeals court condemned the enhancement insofar as it compensated plaintiffs' counsel for obtaining a result that went beyond a favorable ruling.[67] The purpose of fee-shifting statutes, the court explained, is not to "dazzle[] or bedazzle[] the district judge," but simply to provide "adequate representation."[68]

Concurring in the judgment only, Judge Wilson argued that Eleventh Circuit case law regarding upward adjustments of the lodestar was consistent with Supreme Court precedent, and that the enhancement here was authorized.[69] Citing *Blum*, the concurring opinion concluded that an enhancement of the lodestar was permissible insofar as

60. *Id.* at 1236. The Eleventh Circuit also affirmed the award of photocopying copying expenses and the basic lodestar award. *Id.* at 1219–20.

61. *See id.* at 1223 (concluding that the Civil Rights Attorney's Fees Award Act was designed only to provide a "reasonable fee," not "to improve the financial lot of attorneys").

62. *Id.* at 1227 (addressing that attorneys "almost always" have to advance expenses and deal with delays in reimbursement, thus awarding attorneys enhanced fees based on this would not support the Supreme Court's presumption against enhancements).

63. *Id.* The Eleventh Circuit explained that advancement of case expenses and delay in payments under section 1983 actions are "simply the nature of the beast," and rewarding the winning litigants based on these two considerations would eliminate the "exceptional" nature of lodestar adjustments.

64. *Id.* (stating that "any delays in payment for professional services rendered is offset by the fact that the hourly rates used are those that prevail at the completion of the case instead of" at the time the work was done).

65. *Kenny A.*, 532 F.3d at 1228 (addressing *Dague*'s holding that enhancements based on the contingent nature of a case are "flatly forbidden"). *See* City of Burlington v. Dague, 505 U.S. 557, 565 (1992) (barring enhancements based on contingency).

66. *Id.* at 1223, 1225.

67. *Id.* at 1230. The Eleventh Circuit argued that awarding attorneys for "merit-exceeding results" would incentivize attorneys to bring meritless claims, and therefore impose high social costs.

68. *Id.*

69. *Id.* at 1242 (Wilson, J., concurring).

it was supported by specific evidence demonstrating that the quality of legal representation went beyond what one would expect at the given hourly rate.[70] Cases that did not result in enhancements, the concurring opinion explained, failed to supply specific evidence justifying such enhancements, and for that reason were properly reversed.[71]

In *Kenny A.*, the concurring opinion found the adjustment to be appropriate because the district court provided detailed findings to support its conclusion that the lodestar alone was inadequate.[72] It also noted that "the vindication of a constitutional right against a government institution" realized by this settlement created a public benefit that further supported the enhancement.[73] Thus, unlike the majority opinion, the concurring opinion fully supported the district court's decision to enhance the lodestar award insofar as the district court did not find the unadjusted fee to be "reasonable."

V. ANALYSIS

The Eleventh Circuit stated that it upheld the lower court's decision despite its reservations because circuit precedent "control[led] the outcome of this case,"[74] and that if it remanded, only additional, unnecessary delay would result.[75] The court, however, should not have affirmed with such regret. Case law and the fee-shifting statutes permit enhancements beyond that which attorneys receive in the basic lodestar calculation on the basis of quality of representation and re-

70. *Id.* at 1242–43 (Wilson, J., concurring).

71. *Id.* at 1243–44 (Wilson, J., concurring) ("It was this lack of evidentiary support—rather than a blanket rule against consideration of the quality of representation or the results obtained—that compelled reversal [in *Delaware Valley I*], as the Court repeatedly made clear."); *see NAACP*, 812 F.2d at 1336 (critiquing the lower court for its failure to explicitly state how its "findings affected its determination regarding enhancement"); *Norman*, 836 F.2d at 1306 (also critiquing the lower court for its failure to justify a decision not to enhance "with reference to the extant substantive law").

72. *Kenny A.*, 532 F.3d at 1247 (Wilson, J., concurring). In assessing the district court's ruling, Judge Wilson relied upon the district judge's findings concerning the quality of service rendered, affidavits by four local attorneys discussing appropriate fee awards, the testimony of the litigating attorneys, and the district judge's personal observations of the attorneys' performances.

73. *Id.* at 1251 (Wilson, J., concurring).

74. *Id.* at 1242 (majority opinion).

75. *Id.* The majority noted that the tone of the district court's opinion indicated that if the case was remanded the initial decision would remain unchanged. The district court opinion stated that the "plaintiff's 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 1218. This comment was among other accolades the district court bestowed upon the plaintiffs' counsel.

sults obtained. Moreover, public policy considerations demand enhancements of the lodestar. Since adjusted fee awards more accurately reflect today's market rates, the possibility of fee enhancements provides a means to attract competent counsel in accordance with Congress's goal in enacting section 1988.

A. A Lack of Categorical Bars

One of the majority's main issues with the district court's decision was the district court's enhancement of the lodestar by over $4 million based on the "superb quality" of the attorneys' representation.[76] The Eleventh Circuit found this action to be logically inconsistent with the district court's decision to also reduce the winning litigants' requested lodestar by more than $1 million.[77] The Eleventh Circuit also noted that there was a greater likelihood of double-counting when courts considered the "quality of representation" in determining fees because this was a factor "presumably fully reflected in the lodestar amount."[78]

The Supreme Court has yet to hold that fee enhancements are categorically barred. Although the Court's record reveals a proclivity to strike enhancements, the lack of a blanket exclusion on enhancements and careful circumscription of the breadth of the Court's prior rulings to account for enhancements in rare circumstances suggest that adjustments continue to be permissible.[79] Indeed, the Supreme Court has noted that a district court's discretion to determine awards under the fee-shifting statutes is part and parcel of determining a "reasonable fee."[80]

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76. *Id.* at 1228.

77. *Id.* at 1229 (stating that "bad and excessive billing," which the plaintiffs' attorneys seemingly engaged in at least to the tune of $1 million, "is inconsistent with superb lawyering").

78. *Id.* (quoting Pennsylvania v. Del. Valley Citizens' Council for Clean Air (*Delaware Valley I*), 478 U.S. 546, 566 (1986) (internal quotation marks omitted)).

79. *See Delaware Valley I*, 478 U.S. at 565 (noting that the skill, experience, quality of representation, and results obtained are *presumably* fully reflected in the lodestar, but not necessarily); Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) ("The product of 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 . . . including the important factor of the 'results obtained'."); *see also* Brief for New York State Bar Assoc., et al. as Amici Curiae Supporting Respondents at 9, Perdue v. Kenny A., No. 08-970 (U.S. Aug. 28, 2009) (explaining that the Supreme Court's decision not to categorically bar enhancements is a decision based on the lack of a need to do so because there is "no evidence [suggesting] that the limited availability of such fee enhancements has led to the widespread 'windfalls'").

80. *See Hensley*, 461 U.S. at 433 (1983) ("It remains for the district court to determine what fee is reasonable."); Blanchard v. Bergerson, 489 U.S. 87, 96 (1989) ("It is central to the awarding of attorney's fees under § 1988 that the district court judge, in his or her good judgment,

Here, the district judge made a determination based on personal observations of the proceedings and evaluations of the results ultimately achieved.[81] The district judge assessed the case in light of his twenty-seven years on the bench and considered testimony from attorneys in the relevant legal market to determine whether an enhancement of the lodestar would reflect a "reasonable fee."[82] Although the Eleventh Circuit majority was highly critical of the district judge's reasoning,[83] the district court did not make a decision that crossed any line barring enhancements. Instead, a majority of the appellate court made a fact-intensive determination when its only charge was to review the lower court for an abuse of discretion.[84] The concurrence, in contrast, duly noted that the district court's determination was one in which it was entitled to reach and accordingly affirmed the judgment.[85]

B. The Lodestar Two-Step

Two purposes in particular drove the enactment of the Civil Rights Attorney's Fees Awards Act of 1976. First, section 1988 encourages people to bring the types of lawsuits that "vindicate [] important Congressional policies" covered by the fee-shifting statutes[86]—lawsuits that redress violations of people's civil rights. Without a statutory mechanism to ensure recovery of a reasonable attorney's fee, it would be economically infeasible for plaintiffs to bring such cases.[87] As Justice Brennan explained:

> [I]t is highly unlikely that the prospect of a fee equal to a fraction of the damages respondents might recover [in civil rights

make the assessment of what is a reasonable fee under the circumstances of the case.").

81. *Kenny A.*, 532 F.3d at 1249 (11th Cir. 2008) (Wilson, J., concurring).

82. *Id.* at 1234–35 (majority opinion); *id.* at 1249 (Wilson, J., concurring). The district judge noted that "[a]fter 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 1251 (Wilson, J., concurring).

83. *See id.* at 1231–32 (majority opinion) (addressing, among other issues, its dissatisfaction with the district court's reliance on lawyer affidavits to support its awards determination). The majority of the Eleventh Circuit argued that "the lawyers who signed the affidavits have a financial interest in keeping the fee award in this case and every case like it as high as possible" and consequently their opinions did not provide useful, unbiased insight into whether the hourly rate, without enhancement, was appropriate. *Id.*

84. *Id.* at 1218.

85. *See id.* at 1247–48 (Wilson, J., concurring) ("[I]t is the exclusive province of the judge in non-jury trials to assess the credibility of witnesses and to assign weight to their testimony." (quoting Childrey v. Bennett, 997 F.2d 830 (11th Cir. 1993))).

86. S. REP. No. 94-1011, at 2 (1976).

87. City of Riverside v. Rivera, 477 U.S. 561, 579 (1986).

> cases] would have been sufficient to attract competent counsel. Moreover, since counsel might not have found it economically feasible to expend the amount of time . . . necessary to litigate the case properly, it is even less likely that counsel would have achieved the excellent results . . . obtained here. Thus, had respondents had to rely on private-sector fee arrangements, they might well have been unable to obtain redress for their grievances. It is precisely for this reason that Congress enacted [section] 1988.[88]

Second, Congress enacted section 1988 in an attempt to reflect the full benefits these types of cases realize, which include a generalized benefit to the public at large.[89] Section 1988 recognizes that when attorneys undertake cases falling under the statute they are acting not only for themselves "but also as [] 'private attorney[s] general,' vindicating a policy that Congress considered of the highest priority."[90]

Congress limited awards by incorporating the word "reasonable" into the statute, but failed to clarify what comprises a "reasonable" fee beyond what is "adequate to attract competent counsel without producing windfalls to attorneys."[91] The Supreme Court's efforts to resolve what factors are impermissible considerations when calculating attorneys' fees have done little to elucidate what *are* permissible considerations when determining fee awards under section 1988. Thus, the district courts have been left to particularize what factors beyond the basic lodestar calculation can and should be weighed in determining attorneys' fees.

"Courts, Congress, and scholars all agree that if left to private enforcement, civil rights [would] likely be significantly underenforced."[92] By leaving what little room still remains for the district

88. *Id.* at 579–80 (footnote omitted).

89. S. REP. No. 94-1011, at 3; *see* Mureiko, *supra* note 41, at 440 (describing attorney fee shifting as "a mechanism to provide an important 'public good'"); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 662 (noting that adjustment is necessary because "[l]itigation sometimes produces benefits beyond those reaped by the successful party").

90. S. REP. NO. 94-1011, at 3 (noting that to not award attorneys' fees in these types of cases "would be tantamount to repealing the Act itself by frustrating its basic purpose"). The Senate Report also stated that "Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights." *Id.*

91. *Id.* at 6; *see generally* Blum v. Stenson, 465 U.S. 886 (1984) (explaining the extent to which "reasonable" is defined by Congress with respect to 42 U.S.C.A. § 1988); *see also* Blanchard v. Bergeron, 489 U.S. 87, 93 (1989) ("[T]he purpose of § 1988 was to make sure that competent counsel was available to civil rights plaintiffs . . . .").

92. Mureiko, *supra* note 41, at 455–56; *see also* Rowe, *supra* note 89, at 664 ("[W]hen a leg-

courts to particularize fee awards with respect to the circumstances of a specific case, the Supreme Court will preserve the incentive Congress recognized as necessary to keep lawyers interested in vindicating the public's civil rights.[93] The lodestar award, without the possibility of enhancement, does not provide this same incentive. This is partly because the "trend in the marketplace is toward greater use of performance- or result-based fee structures."[94] The basic lodestar calculation (hours worked multiplied by a reasonable hourly rate) cannot account for this trend. Therefore, without the possibility of enhancements, "the potential remuneration [attorneys] can earn from civil rights cases will be, on average, lower than what they can earn in matters requiring comparable skill."[95] If the courts are to measure a reasonable fee as that which "prevail[s] in other types of equally complex Federal litigation,"[96] but cannot provide a fee adjustment in cases that would usually receive one, attorneys may be discouraged from taking such cases, and the awards provided may ultimately reflect an unreasonable sum.[97] By permitting courts to adjust fees when it finds it necessary to do so lawyers are encouraged to take on cases Congress has identified as of particular importance, and courts can provide for fees more consistent with section 1988's goals.[98]

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islature perceives a regular imbalance, it can seek to match adversaries more evenly by adopting some form of fee-shifting to prevent disproportionate advantage in access to and use of the legal process.").

93. *See* Rowe, *supra* note 89, at 663–64 (noting that the "prospect of reimbursement" for fees incurred during the course of litigation can "stiffen the resolve of the relatively weaker side" . . . and "prevent disproportionate advantage in access to and use of the legal process").

94. Brief for Law and Economics Scholars, *supra* note 39, at 12.

95. Brief for Law and Economics Scholars, *supra* note 39, at 13.

96. S. REP. 94-1011, at 6.

97. The lodestar may not in fact be a "reasonable" fee in light of the surrounding circumstances. *See* Norman v. Hous. Auth., 836 F.2d 1292, 1306 (11th Cir. 1988) (remanding for the district court to consider "the significance of the results obtained in relation to those sought" when making its fee determination); *see also* Brief in Opposition, *supra* note 2, at 34 ("[U]pward adjustment is only appropriate where the fee as initially calculated by the lodestar would otherwise be *unreasonable*, as it was found to be in this case."). During oral arguments, Mr. Clement, counsel for the plaintiffs/respondents, highlighted this point when he stated "the lodestar is not a destination. It's not a complete calculation. The lodestar is a guiding light." Transcript of Oral Argument at 45, Perdue v. Kenny A., No. 08-970 (U.S. Oct. 14, 2009).

98. Justice Sotomayor commented to this effect, questioning the petitioner with regard to whether counsel "better than the norm" would be as likely to take on cases covered by the fee-shifting statutes and serve as private attorney generals if enhancements were impermissible. Transcript of Oral Argument, *supra* note 97, at 24. *See* Case Comment, *supra* note 4, at 343 ("fee-shifting statutes are designed" to encourage lawyers to "undertake public interest litigation" in the same way they would choose to do so in "claims for which they are paid up front"); Samuel R. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 324–25 (1977) ("The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that

C. Discretionary Awards and the Current State of the Legal Market

In a radical departure from how clients in the private sector expected to be billed in the past, clients today increasingly demand that their attorneys bill on the basis of value rather than on the basis of time spent on a particular matter.[99] Consequently, an "overreliance on billable hours 'may not reflect value to the client'",[100] and therein may not reflect market value either. Thus, if the Court is to respect both the letter and spirit of section 1988, it will need to spend more time addressing the changing nature of the legal market and less time worrying about whether enhancements will be awarded haphazardly.

The explicit purpose behind fee-shifting statutes is to "attract competent counsel" with fee awards comparable to what "is traditional with attorneys compensated by a fee-paying client."[101] Before *Blum*, most courts chose "an hourly rate in the abstract and then subject[ed] the fee to a multiplier to allow for individual factors."[102] After *Blum*, the Supreme Court gradually found considerations that might otherwise justify a fee enhancement or reduction already accounted for in hourly rates.[103] This shift was appropriate in light of clients' increasing preference for hourly-based billing during the 1970s.[104] With

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risk.").

99. Brief for Law and Economics Scholars, *supra* note 39, at 8.

100. Brief for Law and Economics Scholars, *supra* note 39, at 9.

101. S. REP. NO. 94-1011, at 6. *See also* Brief for Law and Economics Scholars, *supra* note 39, at 11–12 ("Lawyers, like other service providers, operate in an economic market . . . [and], as a general matter . . . 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 matter.").

102. LAYCOCK, *supra* note 31, at 922; Telephone Interview with Neil Williams, Managing Partner 1984–96, Alston & Bird (Oct. 19, 2009) (discussing that in the earlier days of lawyering a "reasonable fee" was discussed only after a matter closed, and then only in terms of the facts, circumstances, and results achieved by counsel, not the number of hours spent). Thus, when courts used to determine an award based on the value procured rather than hours spent multiplied by the hourly rate, judges were calculating awards in accordance with how the market compensated attorneys at that time.

103. LAYCOCK, *supra* note 31, at 922.

104. *See* Brief for Law and Economics Scholars, *supra* note 39, at 7. In 2009, THE AMERICAN LAWYER published a number of articles addressing the gradually changing nature of law firm billing practices in light of clients' and general counsels' demands for better cost-management and high quality work product. *See* Brian Baxter, *Cost Control More Important Than Compliance*, THE AM. LAWYER, Nov. 4, 2009, *available at* http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202435168836 (reporting on a study by the Association of Corporate Counsel, which found that in in-house counsels' efforts to control the costs of outside counsel the "use of alternative fee structures rose to sixty-one percent [by] in-house counsel" although hourly billing rates still remained "the norm"); Ursula Furi-Perry, *Coupons Not Required: GCs Look for Creative Ways to Save on Legal Costs*, GC MID-ATLANTIC, July 6, 2009, *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202431987114&thepage=1 (reporting that the "biggest talk of the town at corporate law de-

the economic downturn, however, the market for legal services is changing once again, and the award of reasonable attorneys' fees under section 1988 ought reflect this.[105] Should the Court decide not to follow current market trends and further remove judicial involvement from the determination of fee calculations, lawyers may be encouraged (or at least not discouraged) from "run[ning] the meter" in order to increase their awards as determined by the traditional lodestar calculation.[106] This problem may be exacerbated because, in general, enhancements are awarded sparingly,[107] yet, downward adjustments are still widely regarded as part and parcel of the judiciary's authority to cut "hours spent unnecessarily or inefficiently" when such time is included in the initial lodestar calculation.[108]

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partments is the use of alternative fee arrangements" and finding arrangements based on "value-based fees, which are based on the type of work performed and the value it has to the client, rather than a strict hourly measure" among the most common alternatives); *Law Firm Leaders Survey 2009: Billing*, THE AM. LAWYER, http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202435770978 (providing data on "all firms," in addition to firms in New York, Washington DC, and Chicago, and finding that of those firms using value-based billing, the overwhelming majority did so because clients requested it and the firms suggested it). In response to the question "approximately what percentage of your matters included a value-based/nonhourly fee component?" firms in the *Law Firm Leaders Survey 2009* responded as follows: All firms (fourteen percent); New York (nineteen percent); Washington DC (ten percent); Chicago (eleven percent). *Id.*

105. Interview with Neil Williams, *supra* note 102. Williams noted that standard billing practices will likely be modified due to increasing competitive pressures in the private legal sector and the need for budget and expense control in the corporate world.

106. Brief for Law and Economics Scholars, *supra* note 39, at 13. Justice Ginsburg touched upon the limited circumstances in which lodestar adjustments are made when she asked Mr. Shah, *amicus* for the defendants/petitioners, how it is that a judge can adjust downward for poor performance, but should not be allowed enhance the award for a superior performance. Mr. Shah, who agreed that judges should be permitted to adjust downward for poor performance, cabined his response by explaining that the situations in which this adjusting occurs should be quite limited. Mr. Shah's response supports the respondents' argument that enhancements, like reductions, should be permitted by the courts, but limited in their application. Transcript of Oral Argument, *supra* note 97, at 20–21; *see* Hensley v. Eckerhart, 461 U.S. 424, 436 (1983) ("There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.").

107. *See* Brief in Opposition, *supra* note 2, at 23 (explaining that in the past seventeen years, attorneys in sixty-seven federal cases have requested upward adjustments, but only nine enhancements have survived appeal).

108. LAYCOCK, *supra* note 31, at 922; Brief of Law and Economics Scholars, *supra* note 39, at 13 (recognizing that "it is not unusual for courts to reduce a lawyer's actual market rate . . . before calculating the lodestar"). The district judge's decision to reduce the requested lodestar by sixteen percent in *Kenny A. ex rel. Winn v. Perdue* exemplifies the discretion judges exercise when making fee determinations. 454 F.Supp.2d 1260, 1286 (N.D. Ga. 2006).

VI. ARGUMENTS/DISPOSITION

Though the question presented to the Supreme Court isolated the quality of performance and results obtained as *the* factors at issue in *Perdue*, the Justices' questions at oral argument suggested that what most concerns the Court is whether enhancements of the lodestar, in general, are *ever* permissible.[109] Because a majority of the Court seemed greatly perturbed by the possibility of exorbitant legal fees, the Court will probably reverse the Eleventh Circuit's judgment and tailor its ruling to find that the disputed factors are already adequately accounted for in the lodestar calculation.[110] In doing so, the Court will severely narrow the scope of attorneys' fee awards under federal fee-shifting statutes.

A. Redundant Compensation

The Supreme Court has eliminated possible justifications for fee enhancements point-by-point over the years, but one constant has remained—an emphasis on specific findings that support a court's decision that some particular factor was not adequately accounted for in the lodestar.[111] Indeed, the main reason the Eleventh Circuit remanded *NAACP* and *Norman* was because the district courts failed to correlate their decisions denying enhancement with specific reasons

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109. When discussing a hypothetical fee award during oral arguments, Justice Breyer commented "I am tempted to think: Well, very high is enough. You don't need very, very, very high" and expressed his concern that average people would not be able to understand "very, very, very high" fee awards. Transcript of Oral Argument, *supra* note 97, at 35. Justice Alito noted that unlike a "private litigation where the money is coming out of the pocket of the corporation," here "[i]t's coming out of the pocket of taxpayers [and] that is very troubling." *Id.* at 28.

110. *See* Tony Mauro, *High Court Justices Doubt Lawyers Should Be Paid Extra for Winning*, Nat'l L.J., Oct. 15, 2009, *available at* http://www.law.com/ jsp/article.jsp?id=1202434599147 (noting that during oral arguments the "[J]ustices seemed more worried about high legal fees than in encouraging quality lawyers to do public-minded work"); *see also* Street, *supra* note 7 ("Both points have flaws . . . [b]ut the oral argument showed that the children have greater problems to contend with."); Robert Barnes, *Justices Weigh $4.5 Million Bonus Awarded Lawyers in Ga. Litigation: Judge was Impressed by Attorneys' Work on Foster-Care Case*, WASH. POST, Oct. 15, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/ article/2009/10/14/AR2009101403768.html ("Although the winning lawyers in the case are supported . . . by an array of liberal and conservative public interest groups . . . the reaction of the justices seemed to divide into ideological camps.").

111. *See* Hensley v. Eckerhart, 461 U.S. 424, 437–38 (1983) (emphasizing the importance of clear findings that consider the "relationship between the amount of the fee awarded and the results obtained" in order for an enhancement to be justified). The *Hensley* Court reversed the lower court's decision because it held that it did not adequately answer the question of why the award was in fact "reasonable." *Id. See also* Blum v. Stenson, 465 U.S. 886, 889 (1984) (vacating the district court's enhancement for a failure to adequately justify it).

for the compensation awarded.[112] Drawing on prior similar cases,[113] the Court may choose to reverse the fee, finding that the district court in *Kenny A. ex rel. Winn v. Perdue* failed to justify its conclusion with a proper rationale for enhancing the fee award.

The district court's decision to award an enhancement was justified partially because the settlement vindicated the civil rights of so many individuals.[114] In *Blum*, for example, the district court had justified its enhancement, in part, for the same reason.[115] But, the Supreme Court found that the enhancement was unreasonable because the district court had not explained "exactly how this determination affected the fee award, . . . [and because] record evidence [failed to] show[] that the benefit achieved require[d] an upward adjustment to the fee."[116]

The district court's other reasons for supporting a fee enhancement included the attorneys' advancement of case expenses, lack of payment on an on-going basis, and the contingency of success in the case. Each of these justifications have also been addressed in prior Court cases and been found not to merit enhancements as they are presumably adequately accounted for in the lodestar[117] or strictly prohibited as a justification for enhancement.[118] At oral argument, the

112. *See* NAACP v. City of Evergreen, 812 F.2d 1332, 1336–37 (11th Cir. 1987) (finding the district court's award, which did not include an enhancement, unfounded without findings justifying its decision not to do so); Norman v. Hous. Auth., 836 F.2d 1292, 1302, 1306 (11th Cir. 1988) (remanding in part because the court "applied the wrong standard").

113. *See* City of Burlington v. Dague, 505 U.S. 557 (1992); Pennsylvania v. Del. Valley Citizens' Council for Clean Air (*Delaware Valley II*), 483 U.S. 711 (1987); Pennsylvania v. Del. Valley Citizens' Counsel for Clean Air (*Delaware Valley I*), 478 U.S. 546 (1986); Blum v. Stenson, 465 U.S. 886 (1984). None of these cases explicitly precluded fee enhancements, but, for various, related reasons, reversed fee enhancements by the lower courts.

114. Kenny A. v. Perdue, 532 F.3d 1209, 1230 (11th Cir. 2008).

115. *Blum*, 465 U.S. at 898. In *Blum*, the respondents argued that a fee enhancement was merited in part because the "results were of far-reaching significance to a large class of people." One of the reasons the district court awarded the enhancement, it stated, was because of the "great benefit" the case brought to the plaintiff class. The Supreme Court, however, held that this reasoning alone did not merit a fee enhancement. *Id.*

116. *Id.* at 900. The *Blum* Court's opinion also emphasized that nothing in the record suggested that the fee, unadjusted, would be unreasonable. *Id.* at 898. In addition, the *Blum* Court noted that the winning litigants did "not claim, or even mention, entitlement to a bonus or upward revision" in their affidavits. *Id.*

117. *See Delaware Valley I*, 478 U.S. at 564 (explaining that although *Johnson* factors may be considered when determining whether a fee should be adjusted, they are usually "subsumed within the initial calculation"). Each of the district court's reasons could potentially be recognized as fitting under one of the twelve factors listed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974).

118. *See Dague*, 505 U.S. at 567 (holding enhancement based on contingency is not permitted).

Justices expressed concern as to what enhanced compensation would actually compensate for outside of the lodestar calculation.[119] The Court could find that attorneys' hourly rates and the amount of time they spend on a matter inherently subsume all the considerations that lower courts have previously identified as independent of the basic lodestar calculation and therefore do not justify an adjustment. If the Supreme Court finds this to be the case, it could logically conclude that fee enhancements are improper because they result in double-counting.

B. A Preference for "Simple" Calculations

Perhaps one of the strongest arguments for the defendants' attorneys is the seemingly unbounded discretion afforded to the lower courts if the district court's decision is affirmed. During oral arguments Justice Alito lamented that enhancements have introduced complications into otherwise straightforward fee calculations.[120] If the Court rules that all the *Johnson* factors are already subsumed within the lodestar, then it becomes that much more difficult to determine what else could possibly justify the award of additional monies.[121] If the Supreme Court decides that attorney fee awards under section 1988 ought be determined solely by multiplying the number of hours expended by a reasonable rate, this may indeed simplify the figures that go into determining a reasonable fee and address the Court's concern regarding the possibility of "second major litigation[s]" over attorneys' fees.[122]

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119. *See* Transcript of Oral Argument, *supra* note 97, at 30–32 (comment of Chief Justice Roberts) ("I don't understand the concept of extraordinary success or results obtained. The results that are obtained are presumably the results that are dictated or command[ed] or required under the law. And it's not like, well, you had a really good attorney, so I'm going to say the law means this, which gives you a lot more, but if you had a bad attorney I would say the law has this and so he doesn't get a multiplier. The results obtained under our theory should be what the law requires, and not different results because you have different lawyers.").

120. Transcript of Oral Argument, *supra* note 97, at 27–28 (comment of Justice Alito) (pointing out that the "great advantage in doing things mechanically" is that "it provides an element of fairness," and noting that "what troubles me about" the district court's method is that "it seems totally standardless, and I see no way of policing it . . . I see a great danger").

121. Street, *supra* note 7 ("If a majority of the Justices do not believe that argument, it is difficult to see how they can overlook their other concerns and give district judges discretion to enhance fee awards based on the amorphous concepts of results obtained and quality of performance without guaranteeing years of future litigation that could drain state governments of even more money.").

122. *See Dague*, 505 U.S. at 566 (quoting Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)). Although contingency is no longer a basis for enhancement, Justice Scalia's opinion in *Dague* highlights the Court's interest in not fomenting litigation after a case has ended. Justice Scalia stated that an "interest in ready administrability" and "the related interest in avoiding burden-

The Supreme Court's distaste for case-specific adjudications may overshadow any desire to compensate based on the actual value realized in an individual case.[123] As evidenced during oral arguments, Justice Scalia voiced his concern that the district court's enhancement was more an exercise in random judicial decision-making than thoughtful, discretionary adjudication.[124] But, the extent to which a judge's decision to enhance a fee award can be deemed "random" will also call into question many other relatively discretionary determinations a judge regularly makes with only a reasonableness standard to guide his decision.[125] If the Supreme Court holds that the district court's award here was unreasonable, it will likely recalculate the fee award using the basic lodestar calculation,[126] which may signal that the Court finds itself no longer capable or willing to square judicial discretion with calculating a "reasonable attorney's fee."

VII. CONCLUSION

Given the Supreme Court's many decisions striking down fee enhancements, if it decides to follow suit in *Perdue*, the Court may soon see a noticeable drop in the number of civil rights cases litigated as economically rational lawyers decide to leave such cases to lawyers

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some satellite litigation" underlay the Court's adoption of the lodestar approach. *Id.* at 566.

123. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) ("When I was in law school, I was a great enthusiast for . . . reading the 'holding' of a decision narrowly, thereby leaving greater discretion to future courts. Over the years, however . . . I have found myself drawn more and more to the opposite view."). Scalia further noted that "[t]he trouble with the discretion-conferring approach to judicial law making is that it does not satisfy [the sense of justice as proscribed by the Equal Protection Clause] . . . . Rudimentary justice requires that those subject to the law must have the means of knowing what is prescribes." *Id.* at 1178–79.

124. Transcript of Oral Argument, *supra* note 97, at 38–39 (comment of Justice Scalia). To further his point that fee enhancements might be regarded as arbitrary, Justice Scalia explained that it seemed to him that if a new judge was on the bench, then attorneys litigating in an equally meritorious fashion to those in *Perdue* could very well not receive a fee enhancement simply because their judge might lack the experience to identify whether this is some of the best lawyering he or she might ever witness. Justice Scalia commented that you, a lawyer before a first time appointment to the bench, would have to "kiss good-bye to your . . . extra money for being excellent." *Id.*

125. For example, the reasonableness standard guides judicial determinations of general remedy-crafting, punitive damage awards, criminal sentencing, and accommodations made for religion under Title VII and disabled persons under the Americans with Disabilities Act.

126. During oral arguments, Justice Breyer calculated that if one were to break down the post-enhancement award in *Perdue* it would be equivalent to an attorney charging approximately $350 per hour. He addressed how this amount, multiplied by 2000 billable hours, would result in compensation totaling $700,000 per year for the particular attorney. He responded to his own hypothetical with a "wow!" and conveyed concern about the size of such an award. Transcript of Oral Argument, *supra* note 97, at 33–34.

whose jobs regularly involve handling such matters.[127] If, however, the Court decides it ought to follow market trends and award attorneys based on the value of the work they provide to their clients, then the number of those interested in bringing meritorious claims covered by the fee-shifting statutes may rise because pursing cases covered by section 1988 would be comparably lucrative to pursuing cases in the private-sector. Though rejecting the enhancement in *Perdue* may allow for fee determinations that seem straightforward, determining appropriate hourly rates in the relevant legal market and a reasonable number of hours may be as much an exercise in judicial discretion as the alternative. The Supreme Court, nevertheless, often prefers to rely on traditional standards and seemingly clear lines, which may seem at odds with a ruling that encourages judges to award fees based upon considerations other than the number of hours worked at a prescribed rate. Eliminating an aspect of decisionmaking in which judges might seem untethered to clear guidelines and standards could prove very alluring to the Supreme Court when it hands down its decision later this term.

127. *See* Brief for Law and Economics Scholars, *supra* note 39, at 13 (predicting that lawyers of "sufficient skill and experience" will not take cases falling under section 1988 if there is no longer the possibility of enhancement).