In The
Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

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

2.

Is an enhancement to the lodestar based on quality of representation and results obtained contrary to this Court's decisions in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), particularly after the lodestar has been reduced for excessive hours billed?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Defendants-Appellants and Petitioners: Sonny Perdue, in his official capacity as Governor of the State of Georgia; Georgia Department of Human Resources; B.J. Walker, in her official capacity as Commissioner of the Georgia Department of Human Resources; Fulton County Department of Family and Children Services; Dannette Smith, in her official capacity as Director of the Fulton County Department of Family and Children Services; DeKalb County Department of Family and Children Services; and Walker E. Solomon, II, in his official capacity as Director of the DeKalb County Department of Family and Children Services.

Plaintiffs-Appellees and Respondents: Kenny A., by his next friend Linda Winn; Kara B., by her next friend Linda Pace; Maya C., by her next friend Linda Pace; Phelicia D., by her next friend Theresa Roth; Sabrina E., by her next friend, Rebecca Silvey; Korrina E., by her next friend Rebecca Silvey; Tanya F., by her next friend Carol Huff; Priscilla G., by her next friend Roslyn M. Satchel; and Briana H., by her next friend Linda Pace, on their own behalf and on behalf of all others similarly situated.

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PETITION FOR A WRIT OF CERTIORARI

Governor Sonny Perdue and the other Petitioners respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The panel opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated July 3, 2008, is officially reported at 532 F.3d 1209 (11th Cir. 2008) and is reproduced at Appendix A, at App. 1-93.

The fees opinion and order of the U.S. District Court for the Northern District of Georgia, dated October 3, 2006, is officially reported at 454 F. Supp. 2d 1260 (N.D. Ga. 2006) and is reproduced at Appendix B, at App. 94-172.

The en banc opinion of the U.S. Court of Appeals for the Eleventh Circuit, denying further review and the dissents thereto, dated November 5, 2008, is officially reported at 547 F.3d 1319 (11th Cir. 2008) and is reproduced at Appendix C, at App. 173-223.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on July 3, 2008. The order denying rehearing en banc was entered on November 5, 2008. The petition is

timely under 28 U.S.C. § 2102(c) and Supreme Court Rules 13.1 & 13.3 because it is being filed within 90 days after the denial of a timely petition for rehearing. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision involved is 42 U.S.C. § 1988(b), which states as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 13981 of this title, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

On June 6, 2002, a class action complaint was filed on behalf of 3,000 foster children against numerous State of Georgia officials alleging both constitutional and statutory violations and seeking injunctive relief to alter the State's administration of the foster care system in two metropolitan Atlanta counties. After a period of initial discovery, the denial of Plaintiffs' motion for a preliminary injunction after a hearing, the denial of Defendants' motion to dismiss, and both lay and expert discovery, the District Court referred the parties to mediation. The mediation lasted four months and resulted in a consent decree approved by the District Court on October 27, 2005, which contained a comprehensive agreement on all pending issues except the amount of attorney's fees and expenses to award to Plaintiffs as prevailing parties pursuant to 42 U.S.C. § 1988.

On December 9, 2005, Plaintiffs' counsel filed their application for award of attorney's fees and expenses, claiming that they expended nearly 30,000 hours on the case resulting in a lodestar of $7,171,434.30, but seeking an enhancement of twice the purported lodestar, or a total fee award of $14,342,868.60. Defendants opposed the application, asserting in part that the lodestar should be reduced due to excessive hours and that the enhancement was not authorized based on the existing precedent of this Court.

The District Court, after finding that many of Plaintiffs' counsel's entries were "vague," "noncompensable," "excessive," and "unreasonable," reduced Plaintiffs' lodestar through a fifteen percent reduction in hours claimed, resulting in a monetary reduction of over $1,000,000 in the lodestar amount to $6,102,802.90. *Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1274-77, 1279-81, 1283, 1286 (N.D. Ga. 2006). However, even after recognizing that "most of the factors relevant to calculating a reasonable fee are already reflected in the lodestar amount" and should not serve as grounds for increasing the lodestar, the District Court nevertheless adjusted the lodestar upward by a 1.75 multiplier, for a total fee award of $10,522,402.08. *Id.* at 1288, 1290.

The District Court justified its enhancement to the lodestar for three reasons. First, the District Court concluded that the quality of service was "far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect to receive for the rates used in the lodestar calculation," which ranged from $215 to $425 per hour. *Id.* at 1287-88. This conclusion was supported, according to the District Court, because: (1) class counsel were required to advance case expenses of $1.7 million over a three-year period, (2) class counsel were not paid on an ongoing basis while the work was being performed, and (3) class counsel's ability to recover fees was contingent on the outcome of the case. *Id.* at 1288.

Second, the District Court found that the "superb quality" of class counsel's representation "far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar." *Id.* at 1288-89. In the District Court's view, Plaintiffs' counsel "brought a higher degree of skill, commitment, dedication, and professionalism" to the litigation than the District Court had observed by any other lawyers "in any other case during its 27 years on the bench." *Id.* at 1289.

Third, the District Court viewed Plaintiffs' success, achieved only by Defendants' agreement to a consent decree after court-ordered mediation, as "truly exceptional" and providing "sweeping relief to the plaintiff class." *Id.* The District Court observed 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 1290.

A panel of the Eleventh Circuit Court of Appeals affirmed the decision of the District Court. *Kenny A. v. Perdue*, 532 F.3d 1209 (11th Cir. 2008). In recognizing this Court's decisions "that bend[ ] decidedly against enhancements" of the lodestar,[1] one of the panel members concluded that "[t]he district court's

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[1] *See City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) ("*Delaware Valley I*"); *Blum v. Stenson*, 465 U.S. 886 (1984).

$4.5 million enhancement to the $6 million lodestar in the present case cannot be squared with the Supreme Court decisions we have discussed." *Id.* at 1221, 1225 (Carnes, J., concurring). According to Judge Carnes, none of the factors relied upon by the District Court (quality of service, contingency, and results obtained) justified the boosting of the award. *Id.* at 1225-31.

Nevertheless, the panel as a whole concluded that they were "not free to decide the enhancement issue" based upon the Eleventh Circuit's earlier decisions in *NAACP v. Evergreen*, 812 F.2d 1332 (11th Cir. 1987), and *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292 (11th Cir. 1988), both of which "were issued after the Supreme Court last spoke on the subject of enhancements for quality of representation and superior results, which was in the *Delaware Valley I* case." *Kenny A.*, 532 F.3d at 1236-37. In *NAACP* and *Norman*, the Eleventh Circuit vacated district court orders denying enhancements for superior results and issued remand instructions which left open the possibility that superior results coupled with superior performance could serve as the basis for an enhancement to the lodestar. *See NAACP*, 812 F.2d at 1336-37; *Norman*, 836 F.2d at 1302, 1306. As a later panel, Judge Carnes concluded that the panel was bound to follow *NAACP* and *Norman* based on the prior panel precedent rule, notwithstanding his conclusion that those holdings were wrong and conflicted with this Court's relevant

precedents.[2] *Kenny A.*, 532 F.3d at 1238 (Carnes, J., concurring). Judge Carnes concluded by stating:

> Of course, this Court sitting en banc, or the Supreme Court, can overrule any prior decisions of this Court. Unless and until this Court does overrule *NAACP* and *Norman*, we are constrained to let stand the $4,500,000 enhancement to the lodestar amount that is included in the district court's judgment in this case.

Id. at 1242.

The subsequent petition for rehearing en banc was denied by a 9-3 vote. *Kenny A. v. Perdue*, 547 F.3d 1319 (11th Cir. 2008). Judge Carnes, joined by Judges Tjoflat and Dubina, authored a dissent from the denial of rehearing en banc for "the first time in sixteen years on the bench," opining that this was "an important question of federal law that has not been, but should be, settled by [the Supreme] Court." *Id.* at 1331 (Carnes, J., dissenting from the denial of

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[2] Judge Wilson agreed that the panel was bound by the prior panel precedents of *NAACP* and *Norman*, but believed that those precedents correctly held that enhancements of the lodestar amount should be permitted for quality of representation and the results obtained. *Kenny A.*, 532 F.3d at 1242 (Wilson, J., concurring). Judge Hill also agreed that they were bound by these prior panel precedents, and expressed his view that the opinions of Judges Carnes and Wilson were scholarly and "will be of interest to jurists who might wish to pursue the matter in further proceedings, should any arise." *Id.* at 1251 (Hill, J., concurring).

rehearing en banc) (citing Sup. Ct. R. 10(c)). Judge Carnes stated that the question of "whether a district court can [] increase the award beyond that reasonable amount [reflected in the lodestar] based on its finding that the attorney's performance was of superior quality and the results achieved were exceptional" is one that affects "at least one hundred federal fee-shifting statutes that allow the prevailing party to recover a reasonable attorney's fee from the losing party." *Id.* at 1331-32, 1337-39. Judge Carnes summed up the critical importance of this appeal as follows:

> The record in this case and the facts and findings drawn from it present this important, unresolved issue as well as any case will and better than almost any other case can. It presents an opportunity for the Supreme Court to reach the issue it could not reach in *Blum* and *Delaware Valley*: Under the federal fee-shifting statutes can a reasonable attorney's fee be enhanced based on extraordinary effort or results where some evidence and findings support the enhancement, or are all of the factors that lead to the quality of the performance and the results obtained already covered in the lodestar calculation, as the opinions in *Delaware Valley* and *Dague* imply?

Id. at 1337.

Judge Tjoflat authored a separate dissent from the denial of rehearing en banc, reasoning in part that "it can never be appropriate to enhance the

attorney's fees in a case seeking injunctive relief on the basis of 'exceptional' or 'superior' results." *Id.* at 1330 (Tjoflat, J., dissenting from the denial of rehearing en banc). Judge Tjoflat concluded that, "I believe that a lodestar hourly rate that is already at the top of the relevant market is simply ineligible for an additional enhancement." *Id.* at 1330-31.

REASONS FOR GRANTING THE PETITION

In affirming the District Court's enhancement of a lodestar amount based on superior results, quality of representation, and the contingent nature of the case, factors that are normally subsumed within the lodestar calculation, the Eleventh Circuit has decided an important federal question in a way that conflicts with this Court's decisions regarding the application of federal fee-shifting statutes.

To the extent that the decisions of this Court have been interpreted by United States Courts of Appeals to permit an increase of an award of attorney's fees beyond the lodestar amount based on superior quality of representation and exceptional results, this is a question of federal law that has not been, but should be, settled by this Court in order to provide definitive and final guidance on this issue.

This Court should grant certiorari to address an issue affecting over one hundred federal fee-shifting statutes to enable uniform application with respect to

the manner in which petitions for enhancements to lodestar amounts are considered by trial courts.

A. An Enhancement to the Lodestar Based on Quality of Representation and Results Obtained, Particularly When the Lodestar Is Reduced for Excessive Hours Claimed, Has Not Been Favored in Prior Decisions of This Court.

Under the "American Rule," the prevailing litigant ordinarily is not entitled to collect a reasonable attorney's fee from the losing party unless there is an exception to the rule, such as a specific statutory authorization to the contrary. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 270 (1975). Following this Court's decision in *Alyeska*, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, to authorize courts to award a reasonable attorney's fee to a prevailing plaintiff in a civil rights action. *See* H.R. Rep. No. 94-1558, p. 1 (1976); S. Rep. No. 94-1011, p. 4 (1976). In determining the factors that should be considered in determining a reasonable fee, the legislative history of this enactment referred to the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974),[3] which

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[3] The *Johnson* factors are as follows:

(1) time and labor required;

(2) novelty and difficulty of the questions;

(Continued on following page)

included factors such as "the skill requisite to perform the legal service properly," "whether the fee is fixed or contingent," and "the amount involved and the results obtained." *Id.* at 718; *see also* H.R. Rep. No. 94-1558, p. 8 (1976); S. Rep. No. 94-1011, p. 6 (1976).

This Court first established the framework and methodology for calculating a reasonable attorney's fee award to a prevailing party pursuant to 42 U.S.C. § 1988 in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The "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." *Id.* at 433. The product of this calculation is commonly referred to as the "lodestar." *Pennsylvania v. Delaware Valley Citizens' Counsel for*

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(3) skill requisite to perform the legal service properly;
(4) preclusion of other employment by the attorney due to acceptance of the case;
(5) customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) amount involved and the results obtained;
(9) experience, reputation and ability of the attorneys;
(10) "undesirability" of the case;
(11) nature and length of the professional relationship with the client; and
(12) awards in similar cases.

Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds*, *Blanchard v. Bergeron*, 489 U.S. 87, 91-94 (1989).

Clean Air ("*Delaware Valley I*"), 478 U.S. 546, 563 (1986). In *Hensley*, this Court indicated that the lodestar calculation "does not end the inquiry" and that there were other considerations "that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained,'" although it was also noted that many of the *Johnson* factors "usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 & n.9. This Court concluded the discussion of the issue of potential enhancements to the lodestar by stating that an enhanced award may be justified "in some cases of exceptional success." *Id.* at 435.

The issue of a potential enhanced award of attorney's fees next appeared in *Blum v. Stenson*, 465 U.S. 886 (1984), where a fee applicant was awarded a 50 percent upward adjustment over the lodestar to compensate for the complexity of the case, the novelty of the issues, and the "great benefit" achieved. *Id.* at 891. This Court held that these reasons did not support the increase to the lodestar, concluding that factors such as "complexity of the issues," "quality of representation," and "results obtained" are "normally" or "generally" reflected in either the number of billable hours or the hourly rates charged and should not usually provide an independent basis for increasing the fee award. *Id.* at 898-900. While the Court rejected the argument "that an upward adjustment to an attorney's fee is never appropriate under § 1988," it held that the evidence in *Blum* failed to establish

that an enhancement was needed to provide reasonable compensation for services rendered. *Id.* at 901.

This Court next considered the propriety of an enhancement of an award of attorney's fees in a fee-shifting statute in *Delaware Valley I*. Prior to considering the plaintiffs' request for "multipliers" to adjust the lodestar amount upward, the district court there in fact eliminated a significant number of hours claimed because they were not documented in sufficient detail or were excessive. 478 U.S. at 554. The district court nevertheless applied a multiplier of two to raise the lodestar based upon the contingent nature of the case and the superior quality of representation, which was affirmed by the Third Circuit. *Id.* at 555-56. This Court reversed. First, this Court held that it was error to increase the fee award based upon the "superior quality" of the attorneys' performance "[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate," and the overall quality of a lawyer's performance "ordinarily should not be used to adjust the lodestar." *Id.* at 566. Importantly for the case at hand, this Court stated that "[t]he District Court's elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive is not supportive of the court's later conclusion that the remaining hours represented work of 'superior quality.'" *Id.* at 566-67. As there were no detailed findings of why the lodestar amount did not reflect the quality of representation or why the results were so superior,

this Court found no reason to increase the fee award for quality of representation. *Id.* at 568. This Court then withheld a decision as to whether an upward adjustment to the lodestar could be made based on the risk of loss and scheduled reargument. *Id.*

The question of whether an enhancement based upon the contingent nature of a fee is appropriate was initially left unresolved in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) ("*Delaware Valley II*"), but then was definitively resolved in *City of Burlington v. Dague*, 505 U.S. 557 (1992). This Court again stated that there is a "strong presumption" that the lodestar represents a reasonable fee and that the burden was on the fee applicant to establish that an upward adjustment "is *necessary* to the determination of a reasonable fee." *Dague*, 505 U.S. at 562 (emphasis added) (citing *Delaware Valley I* and *Blum*). The Court found that the difficulty of establishing the merits of a case, one of the factors to consider for risk of loss, is normally subsumed in the lodestar "either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." *Id.* The Court also found that the relative merits of the claim, the other factor in a contingent fee determination, should play no part in the calculation of a fee award. *Id.* at 563-65. "[W]e hold that enhancement for contingency is not permitted under the [federal] fee-shifting statutes at issue." *Id.* at 567.

Consequently, this Court has held that an enhancement to a lodestar amount for the contingent nature of the case is absolutely prohibited and that upward adjustment based upon superior performance and the results obtained should not usually be awarded, because these factors are normally subsumed within the lodestar calculation of the product of hours claimed multiplied by the hourly rate. Although it remains undefined what exceptional circumstances would justify an enhancement to the lodestar based upon superior performance and success obtained, it appears that the reduction of the hours claimed based upon vague, duplicative, and excessive entries would belie any contention that an upward adjustment based upon superior performance should be permitted.

B. This Court Should Grant Certiorari To Determine Whether a Reasonable Attorney's Fee Award Can Be Enhanced for Results Obtained or Quality of Performance and, If So, Whether Such an Enhancement Would Still Be Unauthorized When the Lodestar Is Reduced for Excessive Hours Billed.

The record in this case presents a clear opportunity to resolve the issue which this Court could not reach in *Blum* and *Delaware Valley I*: Can a reasonable attorney's fee award be enhanced for results obtained or quality of performance, or are those factors already subsumed into the lodestar, as *Delaware*

Valley I and *Dague* appear to indicate? *See Dague*, 505 U.S. at 562-63 (stating that the difficulty of establishing the merits of the claim "is ordinarily reflected in the lodestar – either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so" and cautioning that "[t]aking account of it again through lodestar enhancement amounts to double counting"); *Delaware Valley I*, 478 U.S. at 565-66 (citing *Blum* for the proposition that "the 'quality of representation,' and the 'results obtained' from the litigation are presumably fully reflected in the lodestar amount" and explaining that "[c]alculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance"); *see also Kenny A.*, 547 F.3d at 1337 (Carnes, J., dissenting from the denial of rehearing en banc) ("[This case] presents an opportunity for the Supreme Court to reach the issue it could not reach in *Blum* and *Delaware Valley*: Under the federal fee-shifting statutes can a reasonable attorney's fee be enhanced based on extraordinary effort or results where some evidence and findings support the enhancement, or are all of the factors that lead to the quality of the performance and the results obtained already covered in the lodestar calculation, as the opinions in *Delaware Valley* and *Dague* imply?").

Petitioners respectfully contend that this issue has caused confusion in its application by district courts and review by the Courts of Appeals, and this case presents the best opportunity to resolve it. As Judge Carnes explained in his dissent from the denial of rehearing en banc, joined by Judges Tjoflat and Dubina, "[t]he record in this case and the facts and findings drawn from it present this important, unresolved issue *as well as any case will and better than almost any other case can.*" *Kenny A.*, 547 F.3d at 1337 (Carnes, J., dissenting from the denial of rehearing en banc) (emphasis added).

The record shows that the District Court in this case itself reduced Plaintiffs' purported lodestar by more than $1 million for the excessive hours billed in order to arrive at a reasonable lodestar of $6 million, but the District Court then immediately turned around and enhanced its own reasonable lodestar determination by a 1.75 multiplier for a total fee award (not including expenses) of $10.5 million. *Kenny A.*, 454 F. Supp. 2d at 1266, 1286, 1290. The District Court based its enhancement on contingency and delay of payment (in contravention of *Dague*[4]),

[4] The District Court interpreted this Court's decision in *Dague* as holding merely that "a lodestar enhancement cannot be based on contingency alone." *Kenny A.*, 454 F. Supp. 2d at 1288 n.8, *cited in Grable v. Gregory J. Barro, PLC*, 1:05-CV-3133-JEC, 2007 U.S. Dist. LEXIS 19709, at *14 n.8 (N.D. Ga. Mar. 19, 2007) (refusing, in contrast to *Kenny A.*, to grant an enhancement and stating that "in this case the reasoning of the Supreme Court for not enhancing an award applies").

the results obtained, and the superior quality of Plaintiffs' counsel's legal performance. *Id.* at 1288-89. The current state of the law is confusing to the Courts of Appeals and district courts as to whether an enhancement is ever appropriate based on results obtained or the quality of the performance, but it certainly makes no sense that an enhancement for results obtained or superior performance should be awarded when the district court itself determines the fee applicant's purported lodestar should be *reduced*, as the District Court in this case explained throughout its decision:

> *Billing Judgment Generally:* "The Court has reviewed the entries cited by State Defendants and agrees that many of the entries are too vague to permit the Court to determine whether the time was reasonably expended. Many of the entries also reflect purely administrative tasks that are non-compensable."
>
> *Complaint and Mandatory Disclosures:* "[B]ased on its experience in other complex class actions, 1,648.41 hours is excessive for pre-suit investigation and drafting the complaint and mandatory disclosures."
>
> *Document Production and Analysis:* "[T]he Court finds that more than 7,100 hours expended on document review and analysis over the two-and-one-half years between the filing of the complaint and the commencement of the mediation is unreasonable. That is the equivalent of more than one full-time

employee reviewing and analyzing documents continuously for that entire period."

Discovery Motions: "It was clearly unnecessary to have spent in excess of 60 hours preparing this response. The Court also agrees with State Defendants that an unreasonable number of plaintiffs' attorneys attended many of the discovery and status conferences conducted by the Court."

Intra- and Inter-Office Conferences and Correspondence: "[T]he Court believes that the very large number of attorneys and paralegals who worked on this case inevitably resulted in some duplication of effort. This is reflected by the fact that more than 8% of all the time expended on the case was devoted to communications among counsel. While some of this time was undoubtedly reasonable and necessary, the Court finds this percentage somewhat high even for a complex class action such as this."

Expert Witnesses and Reports: "[S]ome time entries by attorneys reflect time spent drafting and revising expert reports, work which should have been done by the experts themselves. Likewise, many of the paralegals' time entries reflect that the work performed was administrative and secretarial in nature."

Motion for Summary Judgment: "[T]he number of hours expended was unreasonable. One need only consider the fact that 1,720 hours is the equivalent of one attorney working full time for nearly an entire year to

> conclude that no response to a motion for summary judgment justifies such an expenditure of time."
>
> *Trial Preparation:* "[T]he Court cannot agree that it was reasonable to spend more than 2,000 hours on this task [for a trial which never occurred]."

Id. at 1274-75, 1277, 1279-81, 1283.[5]

A review of cases from the Courts of Appeals and various district courts shows the confusion that exists in this area. Judge Wilson in his concurring opinion in the denial of rehearing en banc maintains that there is no Circuit split on this issue. *See Kenny A.*, 547 F.3d at 1321 (Wilson, J., concurring in the denial of rehearing en banc) (citing *Kenny A.*, 532 F.3d 1209,

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[5] This case also demonstrates vividly the penalty that an enhancement can impose on a government agency that settles a case. The District Court indicated that "if plaintiffs had prevailed in a trial of this case, it is doubtful that they would have obtained relief 'as intricately detailed and comprehensive' as that contained in the Consent Decree." *Kenny A.*, 454 F. Supp. 2d at 1289-90. It only was through the efforts of Plaintiffs' counsel and Petitioners that this settlement was ever reached.

The District Court's enhancement of the lodestar effectively results in a penalty upon the State of Georgia and its officials for settling this case. If the District Court's award of attorney's fees and expenses is allowed to stand, the message to governments which have to defend similar class action claims will be clear: settlement of claims could result in the government getting assessed with a larger award of attorney's fees than if the case goes to trial and a "lesser" result is mandated. This will result in fewer consent agreements and more trials on the merits.

1242 (11th Cir. 2008); *Geier v. Sundquist*, 372 F.3d 784, 794-95 (6th Cir. 2004); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1046 (9th Cir. 2000); *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 425 (2d Cir. 1999); *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 531-32 (8th Cir. 1999); *Hyatt v. Apfel*, 195 F.3d 188, 192 (4th Cir. 1999); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1233 n.8 (10th Cir. 1997); *Shipes v. Trinity Indus.*, 987 F.2d 311, 320 (5th Cir. 1993)).

However, unlike the cases cited by Judge Wilson where circuit courts have interpreted this Court's decisions as permitting an enhancement to the lodestar based upon quality of performance and results obtained, other circuit and district courts have concluded otherwise. *See, e.g., Jordan v. Multnomah County*, 815 F.2d 1258, 1262 n.6 (9th Cir. 1987) ("Among the *Johnson* factors that cannot serve as independent bases for adjusting fee awards are: (1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, and (4) the results obtained.") (citing *Blum* and *Delaware Valley I*); *In re Burlington Northern, Inc. Employment Practices Litig.*, 810 F.2d 601, 607-08 (7th Cir. 1986) ("Finally, one can question whether enhancement for exceptional success is *ever* appropriate. 'The lodestar figure includes most, *if not all*, of the relevant factors comprising a "reasonable" attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure

legal assistance.'") (quoting *Delaware Valley I*) (emphasis added); *Shakman v. City of Chicago*, No. 69 C 2145, 2008 U.S. Dist. LEXIS 21431, at *20-21 (N.D. Ill. Mar. 18, 2008) ("[T]he Seventh Circuit has questioned whether 'an enhancement for exceptional circumstance is *ever* appropriate' in fee-shifting cases.") (citing *Burlington Northern*); *Lorillard Tobacco Co. v. Engida*, No. 06-CV-00225-LTB, 2008 U.S. Dist. LEXIS 62862, at *9 (D. Colo. July 30, 2008) (stating that novelty, difficulty, and result achieved are "presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award") (quoting *Delaware Valley I*); *Nintendo of Am., Inc. v. NTDEC*, 822 F. Supp. 1462, 1467 (D. Ariz. 1993) ("Specifically, the subsumed factors are: the novelty and complexity of the issues, the special skill and experience of counsel, the quality of the representation, the results obtained and the superior performance of counsel."); *Campbell v. Kansas State Univ.*, 804 F. Supp. 1393, 1396 (D. Kan. 1992) ("The novelty and complexity of the issues, the special skill and experience of counsel, the quality of representation, and the results obtained from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent reasons for increasing the fee award."); *Cary v. Chicago Hous. Auth.*, No. 87 C 6998, 1992 U.S. Dist. LEXIS 6176, at *19-22 (N.D. Ill. Apr. 29, 1992) (refusing enhancement on one hand because "the Supreme Court found in [*Delaware Valley I*] that upward adjustments of the lodestar for the 'superior quality' of counsel's performance were redundant to factors in

the lodestar calculation, and impermissible," but then granting enhancement on grounds that "the *Delaware Valley I* court did hold out the possibility that an upward adjustment to the lodestar may be obtained in cases of 'exceptional' results"); *Americans United for Separation of Church & State v. Sch. Dist. of Grand Rapids*, 717 F. Supp. 488, 502 (W.D. Mich. 1989) ("*Blum* states explicitly that the results obtained do not justify enhancing an otherwise reasonable fee."); *Bishop v. Osborn Transp., Inc.*, 687 F. Supp. 1526, 1533 (N.D. Ala. 1988) ("From a reading of [*Hensley*, *Blum*, and *Delaware Valley I*], the *Johnson* factors 1, 2, 3, 5, 8 and 9 are clearly subsumed within the initial calculations of hours reasonably expended at a reasonable hours rate.").

In Judge Carnes' opinion, there are two contradictory ways to read *Delaware Valley I*, and he respectfully encourages that the correct reading should be made clear by this Court. One way to read *Delaware Valley I* is holding that "an enhancement for superior representation and exceptional results *is never permitted*; and *even if it were*, there was insufficient evidence or findings of anything special in that case." *Kenny A.*, 547 F.3d at 1334 (Carnes, J., dissenting from the denial of rehearing en banc) (emphasis added). The other way to read the decision is that such enhancements are allowed, but only with "*specific evidence and findings* to support the conclusion that the quality of representation and results obtained were truly special." *Id.* (emphasis added).

Whichever method is correct, the fact remains that attempts by the Courts of Appeals to provide guidance have only further confused rather than clarified the issue for district courts. As just one example, in *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983), the Tenth Circuit tried to define with particularity what can constitute superior performance worthy of a lodestar enhancement:

> [W]e think that this genius factor diminishes and eventually disappears as the number of hours expended on the case increases. A brilliant idea may shortcut one aspect of the case and save many hours, but in protracted litigation a lawyer is also likely to pursue blind alleys and expend many unproductive hours. In a case such as the one at bar, in which more than 9000 hours were reported, we do not believe that any adjustment for extraordinary performance could be warranted. We also believe that the greater the number of attorneys involved on a side, the less likely it is that an extraordinary performance bonus is appropriate. Here the plaintiffs utilized 12 attorneys, 5 of whom expended more than 200 hours. In such a case it is unlikely that the genius of one lawyer will so affect the case that a bonus would be warranted. Furthermore, in awarding a genius bonus the district court should take care not to duplicate the skill reflected in the attorney's billing rate. Thus, we believe that bonuses or multipliers of the normal fee because of the extraordinary skill of counsel should be rarely awarded, and should be confined to

> cases in which the bulk of the work was done by a single attorney who exhibits extraordinary skill or to cases in which the work was done well in a relatively short time given the complexity of the task.

Id. at 557.[6] Highlighting the confusion in this area and the various applications of this Court's instructions, this aspect of the *Ramos* decision has both been questioned by at least one district court from another Circuit in light of subsequent Supreme Court precedent,[7] and more recently, it has been followed by a district court in the same Circuit.[8]

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[6] In this case, "[t]he time records submitted in support of plaintiffs' fee application show that plaintiffs' [thirty-eight] attorneys, paralegals, and legal interns devoted a total of 29,908.73 hours to this litigation," far more than the number of timekeepers and hours for which fee recovery was sought in *Ramos. Kenny A.*, 454 F. Supp. 2d at 1273-74.

[7] *See Liberles v. Daniel*, 619 F. Supp. 1016, 1019 (N.D. Ill. 1985) ("*Ramos* was decided a year before *Blum*, and its explanation of 'exceptional success' has been limited to some extent by the Supreme Court. In particular, the Supreme Court rejected (in most cases) one of the two primary reasons offered by the Tenth Circuit for enhancing a fee: the results achieved in the case.").

[8] *See Johnson v. City of Tulsa*, No. 94-CV-39-H(M), 2003 U.S. Dist. LEXIS 26377, at *34-35 (N.D. Okla. Aug. 29, 2003) ("Like *Ramos*, this case is protracted litigation involving thousands of attorney hours. The case did not establish new law or result in a total victory. It instead resulted in a compromise that achieved excellent results for Plaintiffs' clients and the City of Tulsa as a whole. Although Plaintiffs did have to battle larger law films and endured a period of significant discovery disputes, these disputes were of a kind to be anticipated in such litigation

(Continued on following page)

As the Second Circuit Court of Appeals explained in a 2007 decision, with former Justice O'Connor sitting by designation, "[o]ur fee-setting jurisprudence has become needlessly confused," and it respectfully laid some of the responsibility with this Court for never fully resolving the interplay between the lodestar method and the *Johnson* factors:

> And the Supreme Court has not yet fully resolved the relationship between the two methods. In cases decided after *Hensley* and *Blum*, it has both (1) suggested that district courts should use the *Johnson* factors to adjust the lodestar, *see, e.g., Blanchard*, 489 U.S. at 94 (stating that the district court should arrive at an initial estimate and then "adjust this lodestar calculation by other factors"); *see also id.* ("The *Johnson* factors may be relevant in adjusting the lodestar amount. . . ."); *Pierce v. Underwood*, 487 U.S. 552, 582-83 (1988) (Brennan, J., concurring) (suggesting that factors might exist "that would justify an enhancement of the lodestar"), and (2) reiterated its holding in *Hensley* and *Blum* that "many of the *Johnson* factors 'are subsumed within the initial calculation.'" *Del. Valley I,* 478 U.S. at 564.

Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 484 F.3d 162, 163 (2d Cir. 2007); *see also Norwood v. Charlotte Mem'l Hosp. & Med.*

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and Plaintiffs' counsel is being fully compensated for that time.").

Ctr., 720 F. Supp. 543, 547 (W.D.N.C. 1989) (stating that the difficulties courts experience in applying the "instructions" for attorney's fee awards result from misunderstanding regarding proper application of the *Johnson* factors).

As recently as this summer, Judge Lamberth of the District Court for the District of Columbia attempted to divine this area of the law and ultimately concluded that "the lodestar, calculated using counsel's established billing rates, adequately reflects this superior quality of representation." *Miller v. Holzmann*, 575 F. Supp. 2d 2, 54 (D.D.C. 2008). The court noted that the District of Columbia Circuit had years ago lamented in *Donnell v. United States*, 682 F.2d 240 (D.C. Cir. 1982): "district courts' increasing predilection for 'adjust[ing] the lodestar upward to reflect what the courts [subjectively] view as a high . . . quality of representation,' . . . 'should stop.' It stops here." *Miller*, 575 F. Supp. 2d at 54 (quoting *Donnell*, 682 F.2d at 254) (brackets in original). Moreover, specifically citing this case, Judge Lamberth "agree[d] with Judge Carnes of the Eleventh Circuit Court of Appeals that 'bad and excessive billing is inconsistent with superb lawyering'" and emphasized that "[a]nalogously, routinely devoting excessive manpower to tasks is inconsistent with efficient case management" and should prohibit any enhancement of the lodestar. *Id.* at 49 n.76 (quoting *Kenny A.*, 532 F.3d at 1229).

This case starkly shows the confusion and inconsistent application of this Court's existing attorney's

fee precedent. The District Court's award lays bare the substantial costs that can be imposed on a government defendant when misapplication occurs, especially when the district court concludes on the one hand that the purported lodestar is excessive and reduces it, but then nevertheless with the other hand provides a fee enhancement. *See Kenny A.*, 547 F.3d at 1335 ("The bottom line for certiorari review purposes, however, is that the law of the Eleventh Circuit permits this kind of enhancement, and *that law was applied to permit a $4.5 million enhancement of the lodestar amount in this case.*") (Carnes, J., dissenting from the denial of rehearing en banc) (emphasis added).

The important unresolved question presented by this case is whether "no evidence or findings can ever justify an enhancement on performance and results grounds because the lodestar already takes into account all of the factors that go into how well an attorney performs and the result obtained." *Id.* at 1336. Certainly, some federal judges believe that "[t]he decisions in *Dague* and *Delaware Valley* imply as much." *Id.* If so, as the Court of Appeals and District Court decisions in this case show, "the Supreme Court needs to tell those . . . on the lower courts because that point has not gotten across." *Id.*

Given the confusion over the proper application of results obtained and superior performance in calculating attorney's fee awards pursuant to federal fee-shifting statutes, Petitioner respectfully requests that this Court grant certiorari to resolve finally

whether results obtained or quality of performance can provide an appropriate basis for enhancing the lodestar, or whether these factors are always subsumed in the lodestar such that providing an enhancement based on these factors is impermissible. *See Blum*, 465 U.S. at 899 (stating that "the District Court's rationale for providing an upward adjustment for quality of representation is a clear example of double counting"). Even if this Court concludes that enhancement for results obtained and quality of representation is still possible, this Court should further decide whether such enhancement is ever appropriate if the lodestar has been reduced due to excessive hours billed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

SONNY PERDUE, in his official capacity as Governor of the State of Georgia, *et al.*,

Petitioners,

v.

KENNY A., by his next friend Linda Winn, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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