No. 08-970

In The Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the District Court abuse its discretion in awarding an upward adjustment of the initial lodestar fee, based upon specific record findings of superior performance and exceptional success?

2. Is an upward adjustment of the initial lodestar due to superior performance and exceptional success categorically precluded when a district court reduces the initial lodestar for duplicative or excessive hours billed?

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STATEMENT OF THE CASE

The District Court in this case properly applied settled law and exercised its discretion in arriving at a reasonable fee under 42 U.S.C. § 1988, by adjusting the initial lodestar calculation upward, based on specific record evidence and findings of superior performance and extraordinary results. A full statement of the facts is necessary because the Petition does not provide the Court with either a complete or fair picture of the proceedings below.[1]

I. Litigation

Plaintiffs, abused and neglected foster children in the custody of the Georgia Department of Human Resources, filed a class action complaint on June 6, 2002, in the Superior Court of Fulton County, Georgia, on

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[1] For the Court's convenience, the District Court and Court of Appeals decisions in this case are cited herein as follows: *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003) (denying motions to dismiss and granting class certification) is cited as *Kenny A. I*; *Kenny A. ex rel. Winn v. Perdue*, No. 1:02-cv-1686-MHS, 2004 WL 5503780 (N.D. Ga. Dec. 13, 2004) (denying motion for summary judgment and motion to exclude expert reports and testimony) is cited as *Kenny A. II*; *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) (denying counties' motions for summary judgment) is cited as *Kenny A. III*; *Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260 (N.D. Ga. 2006) (awarding fees and expenses) is cited as *Kenny A. IV*; *Kenny A. ex rel. Winn v. Perdue*, 532 F.3d 1209 (11th Cir. 2008) (affirming fees award), is cited as *Kenny A. V*; and *Kenny A. ex rel. Winn v. Perdue*, 547 F.3d 1319 (11th Cir. 2008) (denying rehearing en banc) is cited as *Kenny A. VI*.

behalf of themselves and a putative class of all 3,000 foster children in Fulton and DeKalb Counties, which comprise metropolitan Atlanta. Plaintiffs asserted state law claims and claims under federal law pursuant to 42 U.S.C. § 1983 against state officials, alleging system-wide failures in the foster care system that harmed foster children in state custody.[2]

The facts concerning the "enormous time and effort involved in litigating this complex matter" have been fully set forth by the District Court. *See Kenny A. IV*, 454 F. Supp. 2d 1260, 1266-70 (N.D. Ga. 2006). Class counsel devoted in excess of 30,000 hours of labor over a five-year period on behalf of the class. *Id.* at 1273. Reflecting the breadth of the facts, legal issues, and contentious nature of this litigation, the District Court observed that it was "one of the most complex and difficult cases that the undersigned has handled in more than 27 years on the bench." *Id.* at 1266.

After Defendants removed the case to federal court, Plaintiffs successfully obtained class certification and defeated Defendants' motions to dismiss. *Kenny A. I*, 218 F.R.D. 277, 305 (N.D. Ga. 2003). Early in the case, Plaintiffs also sought expedited discovery and moved for a preliminary injunction,

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[2] Separate claims were brought against and settled with Fulton and DeKalb County officials for the failure to provide children with adequate, effective, and zealous legal representation in the Juvenile Courts.

which required a four-day evidentiary hearing and the presentation of numerous fact and expert witnesses. *Kenny A. IV*, 454 F. Supp. 2d at 1267. Plaintiffs demonstrated "major deficiencies" that led to the closure of two dangerous emergency shelters in Atlanta. *Id.* at 1267-68.

The work required to gather the facts and to assess the performance of Georgia's child welfare system was labor-intensive and extremely time-consuming. Disputes over discovery were frequent, with Defendants "seeking repeatedly to limit plaintiffs' discovery efforts." *Id.* at 1266. The District Court recounted the obstacles Plaintiffs faced during discovery, observing that Defendants' "strategy of resistance undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." *Id.* In all, class counsel reviewed and analyzed nearly half a million pages of documents and more than sixty witnesses were deposed. *Id.* at 1276-77.

After the parties exchanged extensive expert reports and completed expert discovery, Defendants filed a voluminous motion for summary judgment at the close of discovery, followed by a *Daubert* motion to exclude the reports and testimony of all of Plaintiffs' experts. Plaintiffs defeated both motions.[3]

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[3] *See Kenny A. II,* 2004 WL 5503780, at *13; *see also Kenny A. IV*, 454 F. Supp. 2d at 1266-69 (Defendants' motion "was supported by a 74-page memorandum and a 126-page Statement

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II. Consent Decree

With a February 2005 trial date approaching, the District Court appointed a mediator and directed the parties to explore possibilities of settlement. *Id.* at 1269. The parties embarked on settlement negotiations that lasted over six months. On July 5, 2005, the parties presented the District Court with a proposed Consent Decree granting sweeping relief to the thousands of children in the Plaintiff Class. *Id.* at 1269, 1289-90. After directing notice to the Class, conducting the requisite fairness hearing, and considering all comments received from all interested parties, the District Court granted final approval to the class-wide settlement and, on October 27, 2005, entered the Consent Decree as an order of the District Court. *Id.* at 1269.

The result achieved for the Plaintiff Class and reflected in the Consent Decree is, as the District Court described it, "truly exceptional":

> The Consent Decree provides sweeping relief to the plaintiff class, the scope of which can only be fully appreciated by summarizing its provisions. Its centerpiece is a series of thirty-one outcome measures that State Defendants have agreed to meet and sustain for

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of Undisputed Material Facts consisting of 612 separately numbered paragraphs, as well as a 48-page Statement of Legislative Facts consisting of 74 separately numbered paragraphs" along with six affidavits and three volumes of appendices.)

at least three consecutive six-month reporting periods.

The outcome measures, many of them requiring phased-in results over a two-year period, seek to improve performance in the following areas: timely commencement and thorough completion of investigations of reported abuse or neglect; regular visits of foster children by case workers; approval and licensure of foster homes and other placements; the percentage of children who are victims of substantiated maltreatment while in foster care; the percentage of children in foster homes that exceed their licensed capacity; the percentage of children who have experienced multiple moves while in foster care; and periodic judicial reviews of the safety and status of foster children.

In addition, the Consent Decree requires comprehensive and periodic delivery of medical, dental, and mental health services to foster children; a detailed process for improved goal-setting, case planning and periodic reviews of children's status while in foster care; limits on the placement of children in emergency shelters and group homes and institutions, and protections against overcrowding in foster homes; and the establishment of reimbursement rates to adequately compensate providers for caring for foster children.

Moreover, State Defendants commit to reduced caseloads for all case managers and supervisors; a fully implemented single

> statewide automated child welfare information system; and maintaining or establishing placements and related services identified in a "needs assessment" to be conducted by a neutral expert. The settlement also includes processes for the supervision of private contract agencies that provide homes and services for foster children; improvements in foster parent screening, licensing and training, as well as foster parent support and communication; improvements in case manager training; improvements in processes for addressing suspected abuse or neglect and suspected corporal punishment of children in foster care; and improvements in efforts to maximize available federal funding.
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> . . . .
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> As the foregoing summary amply demonstrates, the settlement achieved by plaintiffs' counsel is comprehensive in its scope and detailed in its coverage. . . . After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale.

Kenny A. IV, 454 F. Supp. 2d at 1289-90.

III. Attorney's Fees

The parties did not reach agreement on fee and expense recovery. Thus, on that subject, the parties agreed that Plaintiffs were "prevailing parties" under 42 U.S.C. § 1988 and specified in the Consent Decree

a process by which the amount of recovery would be determined. The parties tried but were unable to resolve the amount of fees, and on December 9, 2005, Plaintiffs filed a motion for an award of reasonable attorney's fees and expenses, including evidentiary support, which Defendants opposed.

The District Court employed a two-step analysis in arriving at a reasonable fee under 42 U.S.C. § 1988, by "first determining the number of hours reasonably expended by plaintiffs' counsel on this litigation and then the hourly rates at which such work should reasonably be compensated," and second "consider[ing] whether any adjustment to the lodestar is appropriate in this case." *See Kenny A. IV*, 454 F. Supp. 2d at 1272-73 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 432 (1983)). In calculating the total hours reasonably expended, the District Court determined that some reductions were necessary for duplicative or excessive billing entries, and made an across-the-board cut of fifteen percent off of Plaintiffs' proposed billable hours for all non-travel-related fees. *Id.* at 1273-84.

In calculating reasonable hourly rates, the District Court found that Defendants had offered "no evidence to rebut the *prima facie* proof of prevailing market rates submitted in connection with plaintiffs' fee application." *Id.* at 1285. The District Court concluded that the rates presented by Plaintiffs were "fair and reasonable," stressing that, "[i]f anything,

they are too low." *Id.* at 1285-86.[4] Multiplying the reasonable hours by the reasonable rates, the initial lodestar calculation of fees determined by the District Court was $6,012,802.90. *Id.* at 1286. The District Court noted that the Plaintiffs' total lodestar fee was, in fact, less than the $6.1 million in Defendants' own legal expenses. *Id.* at 1286, 1288 n.7.

The District Court then addressed Plaintiffs' request for an upward adjustment of the lodestar. It reviewed specific evidence submitted by Plaintiffs, including approximately 2,500 pages of time and expense records, the declarations of Plaintiffs' counsel, and the declarations of four disinterested, "respected members of the Atlanta Bar." *Id.* at 1285, 1288-90. Among the four disinterested attorneys, each opined that the fees and expenses Plaintiffs sought were reasonable and, based on prevailing market rates of compensation for comparable work and results, that an award limited to the lodestar would be unreasonable and would *under-compensate* Plaintiffs' counsel. *Id.* Three of these attorneys testified that an upward adjustment of one-and-a-half to two times the lodestar was necessary to yield a reasonable fee consistent with the prevailing prices in the Atlanta legal market for legal services of comparable value. *Id.* A fourth went further, recommending a multiplier of up to five times the lodestar. *Id.*

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[4] The District Court compensated travel time at half the reasonable hourly rates. *See Kenny A. IV*, 454 F. Supp. 2d at 1284.

Defendants did not submit any rebuttal evidence on this issue. *See id.* at 1288-90.

Based upon its review of the evidence, the record in the case, its first-hand observation of the proceedings, and its own expertise, the District Court concluded that an upward adjustment was necessary to arrive at a reasonable fee. *Id.* at 1290. The District Court found, based on specific evidence, "that the superb quality of [Plaintiffs'] representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar." *Id.* at 1288-89. The District Court also found that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." *Id.* at 1289. After making the additional finding that "the evidence established that plaintiffs' success in this case was truly exceptional," the District Court concluded that a 1.75 upward adjustment to the initial lodestar was the "minimum . . . necessary to reasonably compensate plaintiffs' counsel for their exceptional work and the exceptional result they achieved in this case." *Id.* at 1290. Multiplying the lodestar by the 1.75 upward adjustment, the District Court's fee award totaled $10,522,405.08. *Id.*

Defendants appealed the District Court's decision on fees, and a panel of the Eleventh Circuit unanimously affirmed. *Kenny A. V*, 532 F.3d 1209, 1242 (11th Cir. 2008). The Eleventh Circuit panel found no abuse of discretion in the District Court's determination of

the hours or the hourly rates used to calculate the lodestar, and no abuse of discretion in the District Court's decision to apply an upward adjustment to arrive at a reasonable fee. *Id.*[5]

Defendants sought rehearing en banc, which was denied. *Kenny A. VI*, 547 F.3d 1319, 1320 (11th Cir. 2008). In a concurring opinion, Judge Wilson found that "[s]everal decades of established precedent make it clear that district judges are vested with discretion to enhance a fee in accordance with a federal fee-shifting statute, in the 'rare' and 'exceptional' case, when there is specific evidence in the record to support an exceptional result and superior performance." *Id.* at 1320 (Wilson, J., concurring in denial of rehearing en banc) (citing *Pennsylvania v. Del. Valley Citizens' Council for Clean Air* (*Delaware Valley I*), 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984)). Ultimately concluding that "*Kenny A.* is that case," Judge Wilson also emphasized that "[b]efore arriving at its decision in this case, the district judge set forth detailed findings to explain why the lodestar

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[5] Judge Carnes, the author of the panel's majority opinion on affirmance, also wrote separately on his own behalf to make clear that his affirmance was based solely on binding Circuit precedent on the issue of the upward adjustment awarded by the District Court. *See Kenny A. V*, 532 F.3d at 1220-42 (Carnes, J., concurring) (Part VI). Judge Wilson authored a separate opinion, specially concurring in the majority's result only. *Id.* at 1242-51 (Wilson, J., concurring). Judge Hill also authored a separate opinion, concurring in the result only. *Id.* at 1251 (Hill, J., concurring).

figure did not fully reflect the quality of representation and the results achieved." *Id.* at 1321.[6]

REASONS FOR DENYING CERTIORARI

This Court has long recognized that the purpose behind the recovery of a reasonable attorney's fee under 42 U.S.C. § 1988 is to ensure "effective access to the judicial process" for those alleging violations of their civil rights.[7] On three separate occasions, this Court has made clear that an upward adjustment may be appropriate in rare cases of superior performance or exceptional results in order to provide a reasonable fee and that district court judges are in the best position to assess whether such adjustments are appropriate in particular cases.[8]

Petitioners' principal argument in support of certiorari is that the law in this area is unresolved. To

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[6] Judge Tjoflat authored a dissenting opinion, *Kenny A. VI*, 547 F.3d at 1322-31 (Tjoflat, J., dissenting), as did Judge Carnes, who was joined by Judges Tjoflat and Dubina, *id.* at 1331-39 (Carnes, J., dissenting).

[7] *Hensley*, 461 U.S. at 429 (quoting H.R. Rep. No. 94-1558, at 1 (1976), S. Rep. No. 04-1011, at 4 (1976)) (additional citations omitted). Section 1988 provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" in civil rights cases. 42 U.S.C. § 1988.

[8] *Hensley*, 461 U.S. at 435-37; *Blum*, 465 U.S. at 888; *Delaware Valley I*, 478 U.S. at 565.

the contrary, the legal rules governing upward adjustments have been well settled and well understood for many years. It is not surprising, therefore, that Petitioners have been unable to identify any conflict among the circuits, or that the cases they cite instead are easily distinguishable.

This is a case about the facts, not the law. Upward fee adjustments are exceedingly uncommon. They occur in reported decisions on average less than once each year in the entire federal court system. The decision below represents nothing more than a fact-specific judgment based on a unique record that was thoroughly documented by the District Court in a 94-page order. In granting an upward adjustment, the District Court carefully considered the factors that this Court has articulated in its prior decisions. Petitioners clearly disagree with the application of that legal framework to these facts, but that disagreement does not warrant plenary review by this Court.

A. Settled Law Permits Upward Adjustments to an Initial Lodestar Calculation Based on Superior Performance and Extraordinary Results in the Rare and Exceptional Case.

In a line of cases beginning nearly a quarter-century ago, this Court set forth a clear set of rules to guide lower courts in considering whether to grant an upward adjustment to the initial lodestar in awarding attorney's fees. On the one hand, the Court has

rejected calls for a categorical rule barring such adjustments in all cases. On the other hand, the Court has made clear that such adjustments should be rare, and only when justified by superior performance and extraordinary results that are not reflected in the lodestar itself. That is precisely the determination that the district court made in this case.

In *Hensley v. Eckerhart,* this Court first addressed the issue of "the proper relationship of the results obtained to an award of attorney's fees." 461 U.S. 424, 432 (1983). The Court held that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988," *id.* at 440, and "indeed in some cases of exceptional success an enhanced award may be justified," *id.* at 435. It also laid out the two-step procedure now routinely employed by the federal courts to calculate an attorney-fee award: (1) calculation of the lodestar, and (2) consideration of a downward adjustment or upward adjustment in rare and exceptional cases. *Id.* at 433-34, 440.[9] With respect to the hours portion of the "initial" lodestar calculation

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[9] While "the most critical factor is the degree of success obtained," in determining whether to make an upward or downward adjustment to the lodestar "[t]he district court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), though it should note that many of these 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, 436.

under the first *Hensley* step, the Court stated that "[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly," and "[t]he district court also should exclude from this initial fee calculation hours that were not 'reasonably expended.'" *Id.* at 433-34.

In concluding that a second step is required in arriving at a reasonable fee, regardless of whether any reductions in hours occur at the first stage of the lodestar calculation, the Court in *Hensley* implicitly rejected any categorical preclusion of an upward adjustment in cases where the hours were initially reduced as excessive, duplicative, or not reasonably expended on the litigation.

Hensley was followed one year later by *Blum v. Stenson,* which addressed "whether, and under what circumstances, an upward adjustment of an award based on prevailing market rates is appropriate under § 1988." 465 U.S. 886, 889 (1984). On the first question, the Court unanimously held that district courts have the authority to award upward adjustments, even though the lodestar is calculated based upon prevailing market rates. *Id.* at 897, 901. On the second question, the Court held that superior quality of representation and exceptional results obtained could, in a rare case, justify an enhancement. *Id.* at 901. The Court stated:

> The "quality of representation," however, generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to

> show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was "exceptional."

Blum, 465 U.S. at 899 (citing *Hensley*, 461 U.S. at 434-35); *see also id.* at 897 n.14 (noting *Hensley*'s observation that "other considerations . . . may lead the District Court to adjust the fee upward or downward, including the important factor of the 'results obtained'").[10]

By recognizing that proof of superior performance and exceptional success may justify an upward adjustment to the lodestar, *Blum* directly contradicts Petitioners' central argument in support of certiorari review.

The third Supreme Court case to consider upward adjustments in depth reaffirmed *Blum*. In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, the Court noted, again, that factors such as "the special skill and experience of counsel," the "quality of representation," and the "results obtained" are "presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award" in the usual case,

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[10] The attorneys in *Blum* "offered no such evidence," and therefore were not entitled to an enhancement. 465 U.S. at 899. In this case, as the District Court found and the Court of Appeals affirmed, class counsel "identified record evidence that shows that the benefit achieved requires an upward adjustment to the fee." *Id.* at 900.

however "upward adjustments of the lodestar figure are still permissible" and are proper "in certain 'rare' and 'exceptional' cases." 478 U.S. at 565 (quoting *Blum*, 465 U.S. at 898-901).[11]

Moreover, in *Delaware Valley I*, the Court again implicitly rejected any *per se* rule precluding an upward adjustment when reductions are made in the hours billed as part of the initial lodestar calculation. Applying the *Hensley* framework, the lower court in *Delaware Valley I* eliminated a large number of hours submitted by prevailing plaintiffs for lack of detail, duplicative work, unrelated activities, and excessive time, but ultimately awarded an upward adjustment to a portion of plaintiffs' fee submission on the basis of superior quality of representation. 478 U.S. at 554-55. While the Court ultimately rejected the upward adjustment in that case, the reduction in hours in the

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[11] In *Pierce v. Underwood*, the concurring opinion of three justices reiterated the twin holdings in *Blum* that a lodestar is "presumably" a reasonable fee but that "an upward adjustment may be appropriate 'in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was exceptional.'" 487 U.S. 552, 582 (1988) (Brennan, J., concurring) (quoting *Blum*, 465 U.S. at 899). In *Blanchard v. Bergeron*, which addressed whether a contingent-fee arrangement could place a ceiling on attorney's fees recoverable under 42 U.S.C. § 1988, the Court again affirmed that, after multiplying the number of hours reasonably expended by a reasonable hourly rate, "courts may then adjust this lodestar calculation by other factors," specifying that "[t]he *Johnson* factors may be relevant in adjusting the lodestar amount." 489 U.S. 87, 94 (1989).

initial lodestar calculation was not dispositive. Instead, the Court engaged in a comprehensive analysis as to whether an adjustment was justified and based its holding on the fact that the district court made no specific findings on quality of lawyering or results. *Id.* at 568. It was only "[i]n the absence of such evidence and such findings" that the Court "[found] no reason to increase the fee award . . . for the quality of representation." *Id.* It would have been unnecessary to consider the propriety of the district court's upward adjustment if the prior reduction of the lodestar automatically foreclosed an upward adjustment. By considering whether adjustment was proper after a reduction of the lodestar, the Court implicitly rejected the categorical rule advanced by Petitioners.[12]

The Court's most recent statement on the lodestar analysis and adjustments was in *City of Burlington v. Dague*, which addressed whether the lodestar in a statutory fee-shifting case may be adjusted upward to account for contingency and the risk of nonpayment. 505 U.S. 557, 559 (1992). While the Court

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[12] Consistent with *Hensley*, *Blum*, and *Delaware Valley I*, other courts have reduced hours in the initial lodestar calculation for duplicative billing, but granted an upward adjustment to establish a reasonable fee. *See Hollowell v. Gravett*, 723 F. Supp. 107, 109-10 (E.D. Ark. 1989) (awarding an upward adjustment of 1.75 after reducing a portion of the hours in the initial lodestar calculation); *Hartman v. Duffey*, 973 F. Supp. 199, 200-02 (D.D.C. 1997) (awarding an upward adjustment of 1.25 after reducing a portion of hours in the initial lodestar calculation).

held that an upward adjustment for contingency was impermissible, it reaffirmed that upward adjustment of a lodestar may be granted on other grounds to the fee applicant who shows that "'such an adjustment is *necessary* to the determination of a reasonable fee.'" *Id.* at 562 (quoting *Blum*, 465 U.S. at 898) (emphasis in *Dague*).

Thus, *Hensley*, *Blum*, *Delaware Valley I*, and *Dague* provide clear guidance to the lower courts in determining whether to apply an upward or downward adjustment to the initial lodestar. As Judge Wilson noted, "[s]everal decades of established Supreme Court precedent make it clear that district judges are vested with discretion to enhance a fee in accordance with . . . [§ 1988], in the 'rare' and 'exceptional' case, when there is specific evidence in the record to support an exceptional result and superior performance." *Kenny A. VI*, 547 F.3d at 1320 (Wilson, J., concurring in denial of rehearing en banc).

Petitioners implicitly acknowledge the clarity of the Supreme Court's attorney-fee jurisprudence by admitting that an "upward adjustment based upon superior performance and results obtained should not *usually* be awarded, because these factors are *normally* subsumed within the lodestar. . . ." (Pet. Cert. 15 (emphasis added).) Petitioners correctly observe that, in most cases, the lodestar calculation is reasonable and not subject to adjustment because the performance of counsel and results obtained are "generally . . . reflected in the reasonable hourly rate" and the amount of time expended. *Blum*, 465 U.S. at

899. But, the presumption of reasonableness is just that – a presumption – subject to rebuttal by specific evidence of superior performance and exceptional success.

B. There Is No Circuit Split or Confusion Among the Lower Courts.

There is no split among the federal appellate courts on the question of whether *Hensley, Blum, Delaware Valley I*, and *Dague* generally authorize a district court to upwardly adjust the lodestar.[13] Moreover, "[t]he

[13] *E.g.*, *Adams v. Zimmerman*, 73 F.3d 1164, 1178 (1st Cir. 1996) (recognizing upward adjustment based on results obtained as "a 'tiny' exception to the lodestar rule") (citation omitted); *Green v. Torres*, 361 F.3d 96, 99 (2d Cir. 2004) ("[I]n some cases of exceptional success an enhanced award may be justified.") (internal quotation marks and citation omitted); *Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 677 (3d Cir. 2002) (recognizing that upward adjustment for superior representation may be justified in "very rare circumstances where the attorney's work is so superior and outstanding that it far exceeds the expectations of clients and normal levels of competence") (internal quotation marks and citation omitted); *Johannssen v. Dist. No. 1-Pac. Coast Dist., MEBA Pension Plan*, 292 F.3d 159, 181 (4th Cir. 2002) ("Grants of an enhancement are both discretionary and rare, and the applicant bears the burden of proof of an exceptional result.") (citations omitted); *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 661 (5th Cir. 2002) (stating that lodestar may be adjusted upward or downward based on factors that lodestar calculation did not take into account); *Geier v. Sundquist*, 372 F.3d 784, 793-96 (6th Cir. 2004) ("The Supreme Court has emphasized that, although application of the *Johnson* factors is limited . . . the use of the 'results obtained' and the 'quality of representation' for an upward adjustment analysis [is permissible in] 'rare' and 'exceptional' cases."); *In re UNR Indus., Inc.*, 986 F.2d 207, 210 (7th Cir. 1993) ("[F]ee enhancements may

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Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits – all of the circuits that have considered this issue – agree that a district court may provide an enhancement for exceptional performance." *Kenny A. VI*, 547 F.3d at 1321 (Wilson, J., concurring in denial of rehearing en banc) (citing cases).

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be available for quality of representation, but only in the 'rare' case where the counsel offers specific evidence that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'") (internal quotation marks and citation omitted); *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 532 (8th Cir. 1999) ("An upward adjustment to an attorney's lodestar hourly rate is permissible in certain rare and exceptional cases, supported by both specific evidence on the record and detailed findings by the lower courts.") (internal quotation marks and citations omitted); *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1046 (9th Cir. 2000) (stating that upward adjustment for quality of representation "is justified only in the rare case where there is specific evidence that the quality of service was superior in light of the hourly rates charged and the success was exceptional"); *Roe v. Cheyenne Mtn. Conf. Resort, Inc.*, 124 F.3d 1221, 1233 n.8 (10th Cir. 1997) ("The lodestar figure may be adjusted to suit the particular circumstances of the case, especially where the degree of success achieved is exceptional."); *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("[I]f the results obtained are exceptional . . . no enhancement is permissible unless there is specific evidence in the record to show that the quality of representation was superior to that which one would reasonably expect in light of the rates claimed.") (citations omitted); *In re Donovan*, 877 F.2d 982, 991-92 (D.C. Cir. 1989) (noting that "an upward adjustment to the normal award may be justified in an exceptional case.").

The court of appeals decisions invoked by Petitioners suggest neither disagreement nor confusion among the circuits, and instead help demonstrate the settled law on upward adjustments. The Ninth and Seventh Circuits' decisions in *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 & n.6 (9th Cir. 1987), and *In re Burlington Northern, Inc. Employment Practices Litigation*, 810 F.2d 601, 607 (7th Cir. 1987), each affirmed the denial of an upward adjustment and correctly emphasized that factors such as the quality of representation and results achieved are usually (but not always) reflected in the initial lodestar. The Seventh Circuit in *In re Burlington Northern* issued a subsequent order denying a rehearing, in which it stated: "[W]e wish to emphasize that our holding was a narrow one. We held only that, in light of recent Supreme Court precedent, the district court's failure to apply a multiplier to the appellants' fee award in order to compensate them for the risk of losing the case was not an abuse of discretion." 810 F.2d at 611.[14]

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[14] Petitioners also cite *Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983), which incorrectly limited the evaluation of an upward adjustment for superior performance to a "genius factor" which, the court held, results in efficiencies that diminish as hours expended increase. As noted in *Liberles v. Daniel*, a case cited by Petitioners that awarded an upward adjustment for superior performance and results, the *Ramos* decision is of limited guidance given the Court's subsequent decision in *Blum*, which did not proscribe any single set of facts that could support the rare upward adjustment for superior performance. 619 F. Supp. 1016, 1019 (N.D. Ill. 1985). If anything, Petitioners'

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Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany,[15] also cited by Petitioners, concerned the application of the "forum rule" in which hourly rates are determined for out-of-district attorneys for purposes of the initial rate-times-hours calculation. 522 F.3d 182, 190 (2d Cir. 2008). *Arbor Hill* addressed the determination of the "reasonable hourly rate" with regard to "what a reasonable, paying client would be willing to pay," *id.* at 184, after which "[t]he district court should then use that reasonable hourly rate to calculate what can properly be termed the 'presumptively reasonable fee,'" *id.* at 190. Of course, the *presumptively* reasonable fee leads to the second step in this Court's *Hensley* line of cases and the consideration of a downward or upward adjustment, which was not at issue in *Arbor Hill*.[16]

Petitioners' attempt to convey confusion among the district courts is similarly unavailing. The thousands of fee decisions subsequent to the Court's 1983 decision in *Hensley* overwhelmingly apply the settled

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reliance on a pre-*Blum* decision illustrates the challenge Petitioners have faced in locating relevant examples of purported confusion among the lower courts.

[15] The opinion cited herein superseded *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 484 F.3d 162 (2d Cir. 2007), the opinion cited by Petitioners.

[16] Petitioners do not dispute the reasonable hourly rates in the instant case, as determined by the District Court, based on the un-rebutted evidence submitted by Plaintiffs. *See Kenny A. IV*, 454 F. Supp. 2d at 1285-86.

Supreme Court standard, and upward adjustments remain truly rare. Respondents have identified 67 reported federal cases decided in the 17 years since the 1992 decision in *Dague* (other than *Kenny A. IV*) in which an upward adjustment to the lodestar based on the quality of representation, the results obtained, or both was requested by the prevailing party and ruled upon by the court. Of these, in only 9 cases did the fee applicants obtain an upward adjustment that was not overturned on appeal.[17] That amounts to less than one upward adjustment each year. Given the rarity of upward adjustments, Petitioners cannot credibly argue confusion among the district courts, or

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[17] *See, e.g., Thompson v. Connick*, 553 F.3d 836, 868-69 (5th Cir. 2008) (affirming upward adjustment of 50% in case in which attorney recovered $14 million verdict for individual who spent 18 years on death row after being wrongfully convicted of murder); *Barnes v. City of Cincinnati*, 401 F.3d 729, 745-47 (6th Cir. 2005) (affirming upward adjustment of 75% in successful sex discrimination case); *Paschal v. Flagstar Bank FSB*, 297 F.3d 431, 436 (6th Cir. 2002) (affirming upward adjustment of 50% in race discrimination suit for superior performance); *Hyatt v. Apfel*, 195 F.3d 188, 192 (4th Cir. 1999) (award of 33% enhancement appropriate for exceptional success); *Chopra v. Gen. Elec. Co.*, 527 F. Supp. 2d 230, 252 (D. Conn. 2007) (20% enhancement for "startling" success at proving age discrimination at trial); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 334 (W.D. Tex. 2007) (68% upward adjustment awarded to counsel after successful race discrimination settlement for a total fee award of $11,720,000); *Skinner v. Uphoff*, 324 F. Supp. 2d 1278, 1287-88 (D. Wyo. 2004) (25% enhancement awarded for successful challenge to prisoner safety); *Hartman*, 973 F. Supp. at 202 (25% enhancement); *United States v. Stern*, 818 F. Supp. 1521, 1522 (M.D. Fla. 1993) (50% enhancement in case brought under False Claims Act), *vacated in part on other grounds*, 932 F. Supp. 277 (M.D. Fla. 1993).

that the courts are routinely awarding windfalls to prevailing parties in fee-shifting cases. (Pet. Cert. 11.)[18]

Moreover, Petitioners' argument that the attorney fee award at issue here has the effect of penalizing early settlement is without merit because it relies on a false distinction. (Pet. Cert. 20 n.5.) A reasonable attorney's fee would almost always be larger in a case that proceeded through a full trial than in a case that settled before trial, without regard to whether any adjustment to the initial lodestar was warranted. Thus, any issues of defense strategy are separate from whether a district court adjusts, or might adjust, an initial lodestar in a particular case.

Finally, Petitioners seek to distinguish the numerous "cases cited by Judge Wilson where circuit courts have interpreted [the Supreme Court's] decisions as permitting an enhancement to the lodestar based on quality of performance and results obtained,"[19] by referring to a number of district court decisions which Petitioners argue "have concluded otherwise." (Pet. Cert. 21.) Yet most of these decisions

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[18] Petitioners quote from the decision in *Miller v. Holzmann*, which in turn quotes from a pre-*Hensley* 1982 court of appeals decision lamenting that "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." 575 F. Supp. 2d 2, 54 (D.D.C. 2008) (quoting *Donnell v. United States*, 682 F.2d 240, 254 (D.C. Cir. 1982) (brackets in original)).

[19] *See Kenny A. VI*, 547 F.3d at 1321 (Wilson, J., concurring in denial of rehearing en banc) (reviewing cases).

applied the settled law under *Hensley-Blum-Delaware Valley I*, but reached varying results, as might be expected, based on the particular facts in those cases.[20] Two cases cited by Petitioners simply misstated the law in dicta.[21]

Petitioners' strained effort to show confusion is highlighted by their reference to *Americans United for Separation of Church & State v. School District of Grand Rapids*, which observed that "an otherwise reasonable fee" cannot be adjusted upward based on

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[20] *See Lorillard Tobacco Co. v. Engida*, No. 06-cv-00225-LTB, 2008 WL 2955917 (D. Colo. July 31, 2008); *Shakman v. City of Chicago*, No. 69-C-2145, 2008 WL 754124 (N.D. Ill. Mar. 18, 2008); *Campbell v. Kansas State Univ.*, 804 F. Supp. 1393 (D. Kan. 1992); *Cary v. Chicago Housing Authority*, No. 87-C-6998, 1992 WL 91799 (N.D. Ill. Apr. 29, 1992).

[21] In *Nintendo of America, Inc. v. NTDEC*, the district court noted in dicta that several factors, among them the quality of representation and results obtained, "have been held to be subsumed in the lodestar calculation." 822 F. Supp. 1462, 1467 (D. Ariz. 1993). Similarly, in *Bishop v. Osborn Transportation, Inc.*, 687 F. Supp. 1526, 1533 (N.D. Ala. 1988) the district court noted in dicta that several *Johnson* factors, including the amount involved and results obtained, and the experience, reputation, and ability of the attorneys, "are clearly subsumed" in the lodestar. 687 F. Supp. 1526, 1533. While both courts plainly misread the *Hensley* line of cases, their errors were harmless, as the fee applicants do not appear to have requested any upward adjustment and none was granted. *See Nintendo*, 822 F. Supp. at 1466 (summarizing fee request); *Bishop*, 687 F. Supp. at 1531 (noting deficiencies in fee request). It is inevitable that district courts will make errors of law in isolated cases. But, particularly where those errors are confined to dicta, they do not provide a compelling argument for certiorari.

the results obtained. 717 F. Supp. 488, 502 (W.D. Mich. 1989). (*See* Pet. Cert. 23.) Of course, a *reasonable fee* cannot be enhanced; rather, an upward 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.

C. The District Court Did Not Abuse Its Discretion in Applying the Properly Stated Law in This Case.

With the law clearly settled, Petitioners are left with seeking certiorari review of the District Court's exercise of discretion under the facts of this case.[22] This basis for review is strongly disfavored. *See* U.S. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). The Court has strongly affirmed the importance of the district court's discretion in the context of fee awards: "We reemphasize that the district court has discretion in determining the amount of a fee award.

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[22] A district court's determination of attorney's fees is reviewed for abuse of discretion but its predicate fact finding is reviewed for clear error. *See, e.g., Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1351 (11th Cir. 2008) ("We review the award of attorneys' fees for abuse of discretion, reviewing questions of law *de novo* and reviewing findings of fact for clear error.") (citation omitted); *Thompson*, 553 F.3d at 867 ("We review the district court's determination of reasonable hours and rate for clear error and its application of the *Johnson* factors for abuse of discretion.") (citation omitted).

This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 438.[23]

The District Court properly exercised its discretion in this case. Adhering to *Hensley*, *Blum*, and *Delaware Valley I*, the District Court properly stated and applied the two-step framework for calculating a reasonable attorney's fee. *See Kenny A. IV*, 454 F. Supp. 2d at 1272-73 ("In accordance with this methodology, the Court will calculate the lodestar by first determining the number of hours reasonably

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[23] *See also Blanchard*, 489 U.S. at 96 ("Fee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered in vindication of a plaintiff's civil rights claim. It is central to the awarding of attorney's fees under § 1988 that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case."); *Kenny A. VI*, 547 F.3d at 1321 (Wilson, J., concurring in denial of rehearing en banc) (observing that "[t]he discretion to enhance an attorney's fee is a tool uniquely within the province of the district judge. The district judge has an unparalleled opportunity to observe the attorney's performance in a given case. Only the district judge can evaluate the attorney's performance from the day he or she files the complaint to the day the judge enters the order."); *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 628 (4th Cir. 1995) ("[T]he district court has a 'ringside view of the relevant conduct of the parties and of the underlying legal dispute,' and accordingly has ready access to the data that should inform a fee calculation.").

expended by plaintiffs' counsel on this litigation and then the hourly rates at which such work should reasonably be compensated. The Court will then consider whether any adjustment to the lodestar is appropriate in this case.").

After correctly setting forth the proper legal framework, the District Court proceeded to scrupulously apply it. First, the District Court scrutinized Respondents' billing judgment with respect to the hours they submitted, and "[a]fter carefully considering each of State Defendants' objections and conducting its own review of plaintiffs' counsel's time records," decided to exclude some of the hours in the fee petition. *Id.* at 1274. The District Court applied an across-the-board reduction of fifteen percent of the hours expended on non-travel-related fees. *Id.* at 1286.

The District Court then reviewed the rates requested by Respondents and the evidence submitted in support of those rates, and noted that Petitioners offered "no evidence to rebut the prima facie proof of prevailing market rates." *Id.* at 1285. The District Court concluded that "the requested hourly rates are fair and reasonable. . . . If anything, they are too low." *Id.* at 1285-86. These facts remain unchallenged in the Petition. Having identified the reasonable numbers for each of the lodestar factors, the District

Court calculated the plaintiffs' lodestar fee to be $6,012,802.90. *Id.* at 1287.[24]

Second, the District Court evaluated whether or not the lodestar yielded a reasonable fee award. The District Court once again correctly articulated and applied the proper legal standard:

> The calculation of the lodestar does not end the Court's inquiry. "There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434 (footnote omitted), *see also Blum*, 465 U.S. at 897 ("there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high"). "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee . . . , and indeed in some cases of exceptional success an

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[24] Presumably, to create the impression that the District Court's actions were contradictory, Petitioners assert that the District Court reduced the lodestar and then "immediately turned around and enhanced its own reasonable lodestar determination by a 1.75 multiplier." (Pet. Cert. 17.) Of course, the District Court subtracted some of the hours submitted to arrive at a reasonable number of hours, and then multiplied those hours by the reasonable rate to arrive at the initial lodestar, and only then engaged in the second stage of the analysis, which is the determination of whether the lodestar number was in fact reasonable.

> enhanced award may be justified." *Hensley,* 461 U.S. at 435.
>
> The Court recognizes that most of the factors relevant to calculating a reasonable fee award are already reflected in the lodestar amount .... Nevertheless, upward adjustments of the lodestar figure are still permissible "in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *The Court finds that plaintiffs have submitted such specific evidence in this case.*

Kenny A. IV, 454 F. Supp. 2d at 1288 (some internal citations omitted) (emphasis added).

Based on specific evidence presented by Respondents, a review of the record and its own expertise, the District Court concluded that "the superb quality of [counsel's] representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the lodestar," and that Respondents' success "was truly exceptional." *Id.* at 1288-90. The District Court found that the superior quality of representation and extraordinary results were not sufficiently reflected in the lodestar, and that "the lodestar should be adjusted upward by a multiplier of 1.75[.]" *Id.* at 1288-90.

The District Court concluded:

> In determining the appropriate multiplier, the Court has relied on the foregoing evidence supporting an enhancement of the lodestar, the Court's own experience and expertise in this area, and on the declarations of four disinterested Atlanta attorneys submitted by plaintiffs. . . . Considering all the evidence presented, the Court believes it has selected the minimum enhancement of the lodestar necessary to reasonably compensate plaintiffs' counsel for their exceptional work and the exceptional result they achieved in this case.

Id. at 1290.

In sum, the District Court applied the proper legal standard and concluded that an upward adjustment to the lodestar was necessary to establish a reasonable fee award in this case. *Id.* In so doing, the District Court acted within the bounds of its discretion. *See infra* n.17 (citing cases awarding upward adjustments to an initial lodestar calculation to arrive at a reasonable fee).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

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