

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SONNY PERDUE, GOVERNOR OF :

4 GEORGIA, ET AL., :

5 Petitioners :

6 v. : No. 08-970

7 KENNY A., BY HIS NEXT FRIEND :

8 LINDA WINN, ET AL. :

9 - - - - - x

10 Washington, D.C.

11 Wednesday, October 14, 2009

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:10 a.m.

16 APPEARANCES:

17 MARK H. COHEN, ESQ., Atlanta, Ga.; on behalf of the
18 Petitioners.

19 PRATIK A. SHAH, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington,
21 D.C.; on behalf of the United States, as amicus
22 curiae, supporting the Petitioners.

23 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of
24 the Respondents.

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1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 08-970, Perdue v. Kenny A.
5 Counsel.

6 ORAL ARGUMENT OF MARK H. COHEN

7 ON BEHALF OF THE PETITIONERS

8 MR. COHEN: Mr. Chief Justice, and may it
9 please the Court:

10 Plaintiff's counsel in this case earned a
11 large fee award based on prevailing market hourly rates
12 and a substantial number of hours expended.

13 However, the district court determined that
14 the \$6 million lodestar was insufficient to compensate
15 them for the quality of their representation or their
16 results obtained.

17 This Court has previously held that factors,
18 such as novelty and complexity of the issues,
19 contingency, and superior performance cannot be used to
20 increase the lodestar amount because the factors are
21 subsumed within that determination.

22 But because of this Court's indication that,
23 in rare or exceptional circumstances, upward adjustments
24 may be permissible, district courts, such as the one
25 below, have used quality and results to increase

1 lodestar awards, even though the -- the multiplication
2 of the reasonable number of hours expended times the
3 reasonable hourly rate constitutes a fully compensatory
4 fee and serves the purpose of the statute, which is to
5 attract competent counsel without providing a windfall.

6 Now, with respect to quality of
7 representation, that normally involves two factors:
8 the skill and experience of the attorney, and also the
9 effort it takes to succeed in the case.

10 In this case, the lead counsel submitted
11 affidavits indicating that they sought hourly rates that
12 were within the prevailing market rates in the Atlanta
13 market; and, in fact, lead counsel's market rate, the
14 court found, was at the upper end of that market.

15 When the district court determined --

16 JUSTICE SOTOMAYOR: I'm sorry. Could you
17 repeat what the market was? Was it the market for all
18 attorneys or only for attorneys doing this type of work?

19 MR. COHEN: It was the market for attorneys
20 with similar skill or experience doing similar work as
21 these counsel did. So what the court --

22 JUSTICE SCALIA: What is similar -- what is
23 similar work?

24 MR. COHEN: Similar work would be Federal
25 court work, where you -- involving class actions, for

1 example. But the focus is mostly on the skill and
2 experience and reputation of the attorney.

3 JUSTICE SCALIA: Okay.

4 MR. COHEN: What the court did in this case,
5 though, was, rather than take those hourly rates, which
6 were prevailing, which the record was clear were
7 prevailing, the court determined the quality factor
8 justified an increase because they advanced case
9 expenses, because they were not paid on an ongoing
10 basis, and because their fees were contingent upon the
11 success of the case.

12 JUSTICE SCALIA: Well, that has nothing to
13 do with the -- with the quality of the representation,
14 does it?

15 MR. COHEN: No, it doesn't, Your Honor.

16 JUSTICE SCALIA: Why didn't it name those
17 factors as -- as the determinative factors, instead of
18 saying, and therefore they should get more money for
19 quality?

20 MR. COHEN: Well, for whatever reason, the
21 court determined to use contingency-related factors to
22 increase the fee award based on the quality factor.

23 JUSTICE SCALIA: Okay. They advanced --
24 they advanced money for experts --

25 MR. COHEN: Correct.

1 JUSTICE SCALIA: -- during the case. The
2 contingency, which we rejected as a -- as a basis.

3 And what was the third one?

4 MR. COHEN: And the third one was that they
5 weren't paid on an ongoing basis.

6 JUSTICE SCALIA: They weren't paid on --

7 MR. COHEN: That's right. But that is not
8 a rare --

9 JUSTICE SCALIA: Isn't that -- isn't that
10 the same as contingency?

11 MR. COHEN: Yes, it is, Your Honor, and it's
12 not a rare or exceptional circumstance when you're
13 talking about a fee-shifting statute.

14 JUSTICE GINSBURG: Mr. Cohen, I thought this
15 judge, Judge Shoob, said: These lawyers were amazingly
16 good; I have never seen a better performance. So don't
17 we take him at his word? I mean, he certainly talked
18 about the quality of the performance of these lawyers.

19 MR. COHEN: He did say that they exhibited
20 the best skill and professionalism, Justice Ginsburg,
21 that he had seen in his time on the bench.

22 JUSTICE GINSBURG: Yes.

23 MR. COHEN: But I would submit to you that
24 that is not a reason to enhance the lodestar because --

25 JUSTICE SOTOMAYOR: How about you get a

1 second-year associate whose billing rate for 2 years
2 of experience is \$200, and a partner's rate is \$500, and
3 a judge says: This individual didn't perform like a
4 2-year associate; he did the quality and kind of work of
5 someone far superior in years in skill and experience.

6 That would not, under your argument, entitle
7 the court to give an enhancement?

8 MR. COHEN: No, it wouldn't, Your Honor,
9 because, if that \$200-an-hour associate was doing other
10 work for other clients, the bill would be for \$200 an
11 hour, regardless of what the result would have been or
12 how good that associate would have been.

13 It's basically --

14 JUSTICE GINSBURG: Mr. Cohen, you said in
15 your brief that, in such a case, the prevailing party
16 could argue that counsel should obtain a higher hourly
17 rate in the litigation than the customary rate he or she
18 charges in other cases, and that's the situation Justice
19 Sotomayor inquired about.

20 But that sounds to me -- you take the
21 second-year associate, pay him at the rate of the top
22 partner because her performance was so outstanding.
23 That's an enhancement, but it isn't as transparent as
24 the one that Judge Shoob gave.

25 But you -- this suggestion -- maybe you are

1 going to retreat from it -- that it would be appropriate
2 to take the second-year associate and pay at a higher
3 hourly rate than the customary rate for that associate.

4 MR. COHEN: What I meant by that position in
5 the brief, Your Honor, was that, in presenting
6 affidavits to support the hourly rate of that associate,
7 that associate may present hourly affidavits that the
8 rate was between \$200 and \$300 per hour, and the judge
9 could determine, because of how good he did, I'm going
10 to give him at the upper end of that market. And --

11 JUSTICE SOTOMAYOR: But you haven't dealt
12 with my hypothetical. He didn't perform like a
13 second-year associate. He performed like a 15-year
14 lawyer. The difference is not with respect to skill and
15 experience. It's with respect to performance.

16 And so what Justice Ginsburg was asking is,
17 what you are basically saying, the quality of that
18 representation, even though it reflected more than the
19 market one would look at objectively on the basis of the
20 years of experience, that judge can't enhance, even
21 though someone performed far above whatever else the
22 market would consider his or her skills at the moment.

23 MR. COHEN: Well, remember, Your Honor,
24 that, when the statute was enacted, it was said in the
25 congressional reports that they wanted to compensate for

1 the expenditure of time and to reimburse the plaintiff,
2 if you will, for what the plaintiff put out in terms of
3 expenses and fees.

4 Well, if you are -- if you are going to
5 basically treat that second-year associate as a 15-year
6 partner and award him a \$500-an-hour rate, what you are
7 actually doing is overcompensating that person for what
8 the expenditure of time was and for what the actual fee
9 they would have charged to their client was.

10 JUSTICE SCALIA: Well, I suppose the
11 question under the statute is whether it would be a
12 reasonable attorney's fee, and I guess one way to
13 determine that is to ask whether it would be considered
14 reasonable if a law firm that billed a client according
15 to their regular hourly rates came in and said, but
16 we're going to kick it up another -- you know, another
17 \$10,000 because this -- this second-year associate, boy,
18 he's a whiz, and he performed like a senior partner. So
19 we are going to -- we are billing him at the \$500 rate,
20 instead of the \$200. Would -- would that be considered
21 a reasonable attorney's fee?

22 MR. COHEN: No, it wouldn't --

23 JUSTICE SCALIA: I didn't think so.

24 MR. COHEN: -- and no reasonable law firm
25 would do that, which is why a judge would be beyond his

1 discretion -- or her discretion --

2 JUSTICE SOTOMAYOR: That's not true. Law
3 firms get bonuses from clients all the time. They get
4 negotiated. Some of the amici gave examples of what's
5 happening in the -- what happens in the marketplace.

6 MR. COHEN: But those are private agreements
7 that are entered into with a client.

8 JUSTICE SOTOMAYOR: So why can't the judge
9 determine a reasonable fee in the same way the market
10 does? Which is --

11 MR. COHEN: That's not the -- I'm sorry.
12 That's not the traditional market, Your Honor. The
13 traditional market is the hourly rate that's envisioned
14 by the lodestar. We don't replicate all possible
15 private fee agreements into fee-shifting statutes.
16 That's what this Court has said.

17 JUSTICE SOTOMAYOR: No, but the -- but the
18 Congress didn't use the per-hour lodestar --

19 MR. COHEN: No.

20 JUSTICE SOTOMAYOR: -- as the method. If
21 that's all it wanted, it could have, and there were
22 suggestions that it consider limiting the -- the award
23 to just a lodestar calculation. So obviously Congress
24 was thinking of something broader than just that.

25 MR. COHEN: Well, Congress was --

1 JUSTICE SOTOMAYOR: That part of the market
2 anyway.

3 MR. COHEN: I'm sorry.

4 Congress also was not thinking of
5 replicating all possible private fee arrangements
6 because they also indicated that the -- the amount of
7 the fee should not be dependent on a proportion of the
8 damage award.

9 JUSTICE SOTOMAYOR: Well, but that's why we
10 have held in our cases that it should be a rare and
11 exceptional circumstance. The difference that we are
12 engaged in is whether the quality of performance can
13 ever constitute that rare exception that would justify a
14 district court saying, you performed greater than what
15 the market would have valued you at before your
16 performance. That's really what the issue is.

17 MR. COHEN: Well, that's -- in answer to
18 your hypothetical, again, in the market where you have
19 an hourly rate for an associate, that's the hourly rate
20 that that client is going to be billed by that law firm,
21 and they are not going to have a results fee or a bonus
22 fee because that attorney happened to do better. The
23 hourly rates --

24 CHIEF JUSTICE ROBERTS: Counsel, this --
25 this brilliant second-year associate we are talking

1 about, the way these submissions to the Court are -- the
2 way they're presented, do they carve out her
3 contribution to a particular filing? To the extent I
4 have looked at them they have something like, you know,
5 draft motion to dismiss, and the associate has 40 hours
6 and the junior partner has 10 hours and the senior
7 partner has 5 hours dedicated to that.

8 I mean, if the associate is doing -- in the
9 hypothetical, is doing work at the partner level, how do
10 you know that the brilliance isn't contributed by the 4
11 hours of the partner rather than the 40 hours of the
12 associate?

13 MR. COHEN: You don't in the traditional way
14 of billing that you are talking about, Your Honor.

15 JUSTICE SCALIA: Or, indeed, you don't know
16 that the brilliance of the second-year associate enables
17 the \$500-an-hour partner to spend less time on the
18 matter. Presumably it does. It's so great when it
19 comes to him, he doesn't have to do much work.

20 MR. COHEN: Well, that's true, Your Honor.
21 The other thing to point out is that when the
22 submissions are made to the court, they are supposed to
23 be broken down by tasks actually. And here the district
24 court considered the submissions not by what lawyer did
25 what task, but how many hours were expended on

1 individual tasks.

2 And when the court determined to actually
3 lower the amount because of excessive hours, they looked
4 at tasks and said, for summary judgment, for example,
5 too many hours were expended. So they -- the court
6 doesn't normally look at lawyer doing particular tasks.
7 It looks at tasks being done by the lawyers in general.

8 JUSTICE KENNEDY: It is not clear to
9 me what the district judge should do in making the
10 lodestar calculation when he considers quality of
11 performance. I guess you are saying -- I think maybe
12 you have already said -- that he can consider quality
13 of performance, but only within the confines of what is
14 a reasonable rate.

15 MR. COHEN: That's correct, Your Honor.

16 JUSTICE KENNEDY: Because the brief for the
17 Respondent said: Well, you know, you are really
18 counting this at the front end, and if you can do that,
19 why not put it in at the back end? And I'm just having
20 problems with that still. Suppose the judge at the
21 outset said: This quality of performance is so good
22 that, so far as the lodestar is concerned, I think a
23 reasonable fee is above the usual hourly rate.

24 MR. COHEN: Well, I would submit, though,
25 that when the judge decides how to do the lodestar rate,

1 he is looking at the affidavits, talking about what the
2 range of the market is for that area. He's also looking
3 at the number of hours reasonably expended.

4 JUSTICE KENNEDY: But -- so that in
5 computing the lodestar rate, he cannot consider quality
6 of performance?

7 MR. COHEN: Quality of performance is built
8 within, I would say subsumed within, the hourly rate and
9 the number of hours expended, as this Court has said in
10 Delaware Valley I.

11 JUSTICE KENNEDY: Well, then it seems to me
12 you're saying that he does not look to actual quality of
13 performance. He just looks to market rates without
14 reference to that. I -- I --

15 MR. COHEN: Well, but --

16 JUSTICE KENNEDY: That's why I'm having --
17 I'm -- I mean, you know, the -- the question presented
18 is -- is just quality of performance and results
19 obtained; that's all we're talking about.

20 MR. COHEN: Correct. And --

21 JUSTICE KENNEDY: And I don't see why that
22 can't be considered as part of the lodestar, and if it
23 can be, then I don't see what the argument is about.

24 MR. COHEN: But superior performance is just
25 the reason that hourly rates are what they are. That's

1 what this Court said in *Pierce v. Underwood*.

2 JUSTICE GINSBURG: But not necessarily --

3 JUSTICE STEVENS: But does that -- does that
4 mean that the fee would be the same under the lodestar
5 whether the lawyer won or lost?

6 MR. COHEN: Well, no. The -- the lawyer
7 doesn't get a fee in a fee-shifting statute if he loses.

8 JUSTICE STEVENS: But if for some reason, if
9 -- if you did had some reason to calculate it,
10 theoretically it would be the same fee as if he had
11 lost?

12 MR. COHEN: That's correct. That's correct.

13 JUSTICE STEVENS: And so the quality of
14 performance really is totally irrelevant.

15 MR. COHEN: As it is for the normal lawyer
16 working on a private matter for a client.

17 JUSTICE STEVENS: Right.

18 MR. COHEN: They get paid an hourly rate and
19 it's win or lose. And what the judge tried to do here
20 is to say, well, I need to give them a little extra
21 because their winning this case was dependent upon a
22 contingency, and the factors that he built into that
23 enhancement were contingency-related factors.

24 JUSTICE GINSBURG: But we are going back to
25 the judge, who did say that this was the best

1 performance he ever saw. So I can't credit just that it
2 was just contingency.

3 But, first, you have clarified that what you
4 said in your brief meant only the top range for a lawyer
5 of this, period. So this is more limited than -- than
6 one might take it to be.

7 In some circuits, like the D.C. Circuit, the
8 rate is set by the number of years that the person is
9 out of law school, and there isn't any flexibility. I
10 mean, you give the 1-year associate so much, the 5-year
11 associate so much. So how in a system like that could
12 you take into account quality at all?

13 MR. COHEN: Well, but in the normal system,
14 Your Honor -- and I would ask to reserve some time for
15 rebuttal -- that that hourly rate that that first-year
16 or second-year associate gets is the rate that they bill
17 their clients. They don't adjust it afterwards unless
18 they have a special fee arrangement, as -- as Justice
19 Sotomayor said. They don't adjust it when they send the
20 final bill and they say: This associate is the best --
21 did the best work that you have ever seen, and we're
22 going to increase that hourly rate exponentially because
23 of that work. That's not the market with respect to
24 billable rates.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 MR. COHEN: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Shah.

3 ORAL ARGUMENT OF PRATIK A. SHAH

4 ON BEHALF OF THE UNITED STATES,

5 AS AMICUS CURIAE,

6 SUPPORTING THE PETITIONERS

7 MR. SHAH: Mr. Chief Justice, and may it
8 please the Court:

9 Section 1988 permits reasonable attorney's
10 fees. That means going above and beyond the lodestar
11 amount can be justified only if the lodestar is
12 unreasonably low. We submit that a lodestar based on
13 prevailing market rates does not require a performance
14 bonus on top of the lodestar to make an award
15 reasonable.

16 JUSTICE SCALIA: You are saying we can never
17 exceed the lodestar amount? I mean, we have said in
18 some cases that in extraordinary circumstances it can.
19 What are those extraordinary circumstances, or do you
20 think there are none?

21 MR. SHAH: There are none for attorney
22 performance, Your Honor. There may be other
23 circumstances --

24 JUSTICE SCALIA: Such as? That's what I'm
25 asking.

1 MR. SHAH: Right.

2 JUSTICE SCALIA: What are you referring to,
3 if not attorney performance?

4 MR. SHAH: Right. The government sets out
5 one example in our brief of where we think an upward
6 enhancement might be appropriate, and that's where an
7 attorney takes on a particularly unpopular client or
8 cause that causes some external harm, external to the
9 case, to his practice or income, where --

10 CHIEF JUSTICE ROBERTS: But it's one of the
11 long-standing traditions of the bar that lawyers are
12 expected to do that in the normal course. So why would
13 that be a special circumstance?

14 MR. SHAH: Well, Your Honor, I think that
15 circumstance is much more closely tied to the statutory
16 purpose of section 1988, which is to attract competent
17 counsel in this subset of --

18 CHIEF JUSTICE ROBERTS: Well, how do you
19 tell -- how do you tell whether a client is popular or
20 unpopular? I mean, a lot of unpopular clients in the
21 abstract sense are in fact -- they have a lot of support
22 in the community. I suppose one of the more unpopular
23 clients these days is a Wall Street banker.

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: But I mean, you

1 wouldn't say -- you wouldn't suggest that law firms
2 charge more when they represent them?

3 MR. SHAH: No, Your Honor. I think what our
4 -- what our enhancement would allow for, even if you
5 can't make the ex ante determination that taking on this
6 representation is going to cause me some special harm;
7 that is, all my clients will leave my firm if I take on
8 this case -- even if you don't know that before the
9 fact, the fact that there is an ability for the court to
10 give you an enhancement when that occurs -- remember,
11 this is done after -- after the case is already complete
12 is when the -- fee hearing determination is made. The
13 ability of a court to give that sort of compensation
14 would provide an insurance, a guarantee to the attorney
15 before they take on a case that if it turns out badly
16 that -- that they will still get compensated.

17 JUSTICE SCALIA: You think that's what we
18 had in mind, huh? You think that's what we had in mind
19 when we said they are extraordinary circumstances?

20 MR. SHAH: Well -- well, Your Honor, I --

21 JUSTICE SCALIA: I think it's very
22 imaginative, but I would never --

23 (Laughter.)

24 JUSTICE SCALIA: -- but I would never have
25 thought of it, and I doubt whether we did.

1 (Laughter.)

2 MR. SHAH: Well, it is -- Your Honor, it is
3 one of the 10 -- one of the Johnson factors set forth,
4 so it's not coming out of thin air. And I think it
5 is --

6 JUSTICE GINSBURG: Is -- is there another
7 example? I mean, you -- you are saying the rule isn't
8 never; it is sometimes. And you have given us one
9 sometime. Is there any other illustration?

10 MR. SHAH: Your Honor, that is the only one
11 that I think is left after this Court's fee-setting
12 jurisprudence over the last 25 years. It has
13 consistently knocked down other bases for an enhancement
14 such as complexity of issues, novelty of issues,
15 contingency risk, delayed payment. All of those other
16 grounds of potential enhancement that the legislative
17 history refers to have been categorically prohibited by
18 this Court's jurisprudence. I think that --

19 JUSTICE GINSBURG: How about a downward
20 adjustment? You have the hourly rate, the number of
21 hours, and the judge, after trimming the hours, then
22 says: This has been a case, even though they prevailed,
23 the lawyer wasn't prepared; I am not going to give the
24 hourly rate. Can a judge adjust the lodestar down for
25 poor performance?

1 MR. SHAH: Your Honor, I think the limited
2 circumstances which allow for a downward adjustment
3 would be those set forth in this Court's decision in
4 Hensley. I don't think that poor performance alone
5 would justify a downward departure --

6 JUSTICE GINSBURG: Hensley is you lost on an
7 issue, so you don't get paid for what you've done.

8 MR. SHAH: Right. So if there were certain
9 claims that the poor performance led -- led the
10 plaintiff to be unsuccessful on certain claims but not
11 all the claims, I think a downward departure would be
12 appropriate.

13 JUSTICE GINSBURG: But the plaintiff -- the
14 plaintiff prevailed on everything. It's just that the
15 judge said this was a really poor -- poor performance.

16 MR. SHAH: No, Your Honor, I don't think a
17 downward departure would be appropriate in that
18 circumstance, because that's what the -- the
19 prevailing market would not allow for a downward
20 departure. Normally, these are standard --

21 JUSTICE STEVENS: Even if the judge found as
22 a fact that this lawyer spent 50 hours doing what any
23 good lawyer could do in 5 hours?

24 MR. SHAH: Well -- well, Your Honor, that
25 would be taken care of in the setting of the lodestar

1 rate. Remember, there are two components --

2 JUSTICE STEVENS: I don't -- I don't see how
3 that is set forth in the lodestar rate.

4 MR. SHAH: Well, it -- not in the lodestar
5 rate, but in the number of reasonable -- there are two
6 components to the lodestar calculation: the number of --
7 number of hours reasonably spent on the matter and the
8 reasonable hourly rate.

9 The situation you posit would be addressed
10 by a downward adjustment of the number of hours
11 reasonably spent working on the case. If the judge made
12 a determination that any competent lawyer could have
13 done this in 10 hours, he would not credit 50 hours of
14 work. And that's -- that's how that situation would be
15 taken care of.

16 JUSTICE KENNEDY: For extraordinary
17 circumstances, what about a very, very popular cause and
18 he wins and they are beating his door down? Can we
19 reduce it for that?

20 (Laughter.)

21 MR. SHAH: No, Your Honor, that would not
22 require a reduction. That would be an extra award for
23 the attorney taking on that type of -- of case.

24 JUSTICE SCALIA: Well, I mean, what is sauce
25 for the goose is sauce for the gander.

1 (Laughter.)

2 JUDGE SCALIA: I mean, if -- if you get
3 rewarded for unpopularity, you ought to be get penalized
4 for popularity.

5 (Laughter.)

6 JUDGE SCALIA: You got a lot more clients
7 because of this case.

8 MR. SHAH: Well, Your Honor, I don't think
9 there is any basis in the -- in the private market for
10 that sort of downward adjustment.

11 Justice Sotomayor, if I can address your
12 concern about these alternative arrangements that --
13 that occur in -- that are starting to emerge -- at least
14 Respondents suggest in their brief to this Court by
15 citing a few newspaper articles and the proverbial word
16 on the street that these are an emerging trend.

17 First of all, there's no -- absolutely no
18 evidence in the record in this case that those type of
19 arrangements were available in the relevant market. But
20 even if they were, those sort of alternative
21 arrangements are essentially modified contingency
22 arrangements. And this is made most clear in
23 Respondents' own amicus brief, the brief of the law and
24 economic scholars. And this is at page 10 and 11 of
25 their brief.

1 They call these partial contingency or
2 hybrid contingency arrangements. It's not the same
3 standard hourly rate and then a client decides to throw
4 in a kicker of a million dollar bonus. Rather, these
5 are discounted rates with a success bonus, essentially a
6 modified form of contingency arrangement. They are
7 prohibited for exactly the same reason that this Court
8 prohibited a contingency risk enhancement in Dague. The
9 same reasons would prohibit relying on those sort of
10 alternative arrangements to provide an attorney
11 enhancement for performance.

12 JUSTICE SOTOMAYOR: One of the purposes of
13 Congress -- one of the purposes of Congress was to
14 ensure that litigants under these fee-shifting statutes
15 could attract competent counsel, correct?

16 MR. SHAH: Yes, Your Honor.

17 JUSTICE SOTOMAYOR: If the market doesn't
18 give them attorneys to start with because there are so
19 many risks involved in this process and it sets a
20 reduced fee because of those risks, how do you attract
21 competent counsel? How do you attract counsel that is
22 better than the norm in that field to pursue as private
23 attorney generals cases that Congress has determined are
24 worthy of being pursued, unless you have a quality
25 adjustment factor?

1 MR. SHAH: Two responses, Your Honor:

2 First, the problem that you posit about attorneys
3 having -- being deterred by having to absorb, you know,
4 the -- the upfront outlay of significant expert expenses
5 or to having absorbed the contingency risks, those are
6 problems created by this Court's precedent in Dague, not
7 before this Court now.

8 JUSTICE SOTOMAYOR: That doesn't mean Dague
9 was right, right?

10 MR. SHAH: Well, Your Honor, no one has
11 asked --

12 JUSTICE SOTOMAYOR: No one is arguing a
13 different point?

14 MR. SHAH: No one in this case has asked the
15 Court to revisit Dague.

16 But more -- more to the point of your
17 question, the type -- even accepting Respondents'
18 formulation of this enhancement, it would only be
19 available in the rare and exceptional case. And no
20 reasonable attorney making an ex ante determination to
21 whether to take on a representation would rely on the
22 speculative and remote possibility that the district
23 judge is going to have found this to be one of the best
24 cases he has ever seen in making that calculation.

25 Respondents' own numbers suggest that these

1 are granted less than one time -- once a year. That
2 suggests that no reasonable attorney would take that
3 into consideration, and it does not, in fact, further
4 the statutory purpose in that event of attracting
5 competent counsel.

6 I would like to make one last point, and
7 this is to bring us back to the facts of this case. I
8 think Respondents' own trial counsel -- the discussion
9 that they give of the lodestar rates used in this case I
10 think is particularly telling. And this is the
11 affidavit of Marcia Lowry, who was the lead plaintiff's
12 trial counsel, and this was submitted during the fee-
13 setting hearing, and the relevant excerpt appears on
14 page 41 of the Joint Appendix. And I want to read from
15 paragraph 25, and here's what she has to say about the
16 rates used by the court:

17 "The standard hourly rates reflected in
18 Exhibit 2" -- and those are the rates used by the
19 district court -- "are fair, reasonable and consistent
20 with the hourly rates in the Atlanta market for the
21 price of legal services of comparable quality rendered
22 in cases demanding similar skill, judgment, and
23 performance."

24 Now, the affidavit goes on to say that the
25 rates are still too low for the other factors that

1 Mr. Cohen discussed -- contingency risk, delayed
2 payment, expert fees -- but not for attorney
3 performance.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MR. SHAH: Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE RESPONDENTS

9 MR. CLEMENT: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 Let me begin with the colloquy that involved
12 Justices Ginsburg and Justice Kennedy about the rates
13 and whether you can have sort of pre-enhanced rates as
14 part of the lodestar or whether you can only do the
15 enhancement after the fact.

16 At the end of the day, as long as it is
17 established in this case that you can have an
18 enhancement for quality, I suppose that my -- my clients
19 would be satisfied. The point is, though, that the
20 preexisting law in the Eleventh Circuit and most
21 circuits does not allow for a pre-enhanced rate to be
22 used to calculate the lodestar. They are either done
23 completely mechanically, as Justice Ginsburg suggests --
24 the Laffey index in the D.C. Circuit -- or they are done
25 through a simple calculation of the prevailing market

1 rates.

2 JUSTICE ALITO: But sometimes there's a
3 great advantage in doing things mechanically, because
4 it -- it provides an element of fairness. And I'll
5 tell you what troubles me about this, and maybe you can
6 convince me that I shouldn't be troubled by it. Here
7 the district judge in effect takes four plus million
8 dollars from the taxpayers of Georgia and -- and awards
9 it above the lodestar calculation to these attorneys and
10 says -- and I -- I certainly take him at his word --
11 this was the best performance I have seen in 28 years.
12 But it seems totally standardless, and I see no way of
13 policing it, and I see a great danger that trial judges
14 are going to use this as a way of favoring their
15 favorite nonprofit foundation or their favorite cause or
16 their favorite attorneys, because they think they
17 generally do good work.

18 And this is not -- this is not like private
19 litigation where the money is coming out of the pocket
20 of a corporation. It's coming out of the pocket of
21 taxpayers. So that is very troubling. And I don't know
22 how you can provide standards for determining whether
23 this kind of transfer is based on anything reasonable.

24 MR. CLEMENT: Well, Justice Alito, let me
25 say that I don't think that you need any more standards

1 for the possibility of an upward departure than you need
2 for the possibility of a downward departure. And this
3 Court has already held in *Farrar v. Hobby* that the
4 results obtained is an adequate basis for departure, and
5 not a small departure. In *Farrar v. Hobby*, the lodestar
6 amount, the mechanical calculation that we're talking
7 about, was \$280,000. What was the reasonable attorney's
8 fee? This Court --

9 JUSTICE SCALIA: Well, but wait. That's
10 pretty objective: results obtained. I mean, if, you
11 know, the -- what was sought in the complaint was 100,
12 and in fact you got only 30, you are still a prevailing
13 party, but you shouldn't -- you shouldn't be compensated
14 as though you got everything that was sought. I think
15 that's much more objective than whether -- whether this
16 attorney is the best one I've seen in 28 years.

17 I have another problem with it. I don't
18 like judges -- it's certainly not in the tradition of
19 the bench to comment upon the performance of lawyers. I
20 can't tell you how often I would like to give a separate
21 grade for --

22 (Laughter.)

23 JUSTICE SCALIA: -- for the lawyer who won a
24 case. You know, one grade for the case and the other
25 for the lawyer. But we don't do that.

1 And if you do this going up, you've got to
2 do it going down. And you could expect the judge to
3 say: This is the worst performance I have seen in
4 28 years. Judges don't do that in our system, and I
5 don't think -- I don't think we should set up a
6 mechanism that induces them to do it.

7 MR. CLEMENT: Well, two things, Your Honor.
8 I mean, the results obtained is one of the two factors
9 that are at issue in this case. And I think results
10 obtained can be objective and be a basis for an upward
11 adjustment as well as a downward adjustment.

12 As you heard the lawyer in the earlier case
13 say, you know, in a complaint, it is a wish list. And
14 it's a rare case where the attorney gets everything they
15 ask for in the complaint. This is that rare case where
16 everything that was asked for in the complaint was
17 obtained. So that's one factor, Your Honor.

18 CHIEF JUSTICE ROBERTS: I will let you
19 answer your second point, but just on that, I don't
20 understand the concept of extraordinary success or
21 results obtained. The results that are obtained are
22 presumably the results that are dictated or command or
23 required under the law. And it's not like, well, you
24 had a really good attorney, so I'm going to say the law
25 means this, which gives you a lot more, but if you had a

1 bad attorney I would say the law has this and so he
2 doesn't get a multiplier.

3 The results obtained under our theory should
4 be what the law requires, and not different results
5 because you have different lawyers.

6 MR. CLEMENT: Well, Mr. Chief Justice, I
7 mean, I defer to you, but I'm not sure that comports
8 with my experience. I have seen lawyers come into this
9 Court and concede a point in oral argument, and I have
10 seen that prominently featured in this Court's opinion,
11 so it does seem to me that sometimes the quality of the
12 performance and the results obtained do depend on the
13 lawyer's performance and are not foreordained just by
14 the four corners of the complaint.

15 And so I think, again --

16 CHIEF JUSTICE ROBERTS: Well, but what does
17 a judge say when he said, you have achieved
18 extraordinary results? That if you weren't there, I
19 would have made a mistake on the law?

20 MR. CLEMENT: No, I think what he says is,
21 in the hands of another counsel, the relief that was
22 obtained might have been significantly less. This was
23 an enormous --

24 CHIEF JUSTICE ROBERTS: Well, I guess that's
25 saying the same thing I said, which if it weren't for

1 how good you are, I would have made a mistake.

2 MR. CLEMENT: Well, maybe not -- no, not how
3 good. How tenacious. I mean, this case settled. With
4 a different lawyer for the plaintiffs in this case than
5 --

6 CHIEF JUSTICE ROBERTS: Maybe we have a
7 different perspective. You think the lawyers are
8 responsible for a good result, and I think the judges
9 are.

10 (Laughter.)

11 MR. CLEMENT: And maybe your perspective's
12 changed, Your Honor.

13 (Laughter.)

14 MR. CLEMENT: But I would say certainly in
15 the context of a consent decree, when to give up, when
16 to fight further, is going to be factored into the
17 results. And I think it's a fair point that a judge in
18 today's system, especially in the context of class
19 relief like this, sees a lot of cases that end up with a
20 coupon settlement that really doesn't do any good for
21 the class. They're --

22 JUSTICE ALITO: Maybe -- maybe your
23 perspective has changed too, Mr. Clement.

24 (Laughter.)

25 JUSTICE ALITO: But your argument is that,

1 you know, for \$495 an hour you really can't get a good
2 lawyer? You need to have -- you need to pay more than
3 that?

4 MR. CLEMENT: Well, on that my perspective
5 has changed, Your Honor.

6 (Laughter.)

7 MR. CLEMENT: But let me say two things:
8 One is, less than 10 percent of the total
9 rates here, the total compensable hours here, were
10 top-of-the-market rates. Only the two lead counsel were
11 compensated, at sort of \$495 and \$450 an hour.

12 If you want to talk about the -- the Lowry
13 declaration, which is one thing that Mr. Shah brought
14 up, what he quoted from was essentially the conclusion
15 of that, where as part of the existing Eleventh Circuit
16 precedent that looks to prevailing rates in the Atlanta
17 market, there is a recitation that that is the sort of
18 the prevailing rate consistent with the quality. That's
19 essentially something that the Eleventh Circuit
20 requires you to say.

21 I think the more relevant part of that
22 declaration is at Joint Appendix at page 35, where
23 Ms. Lowry points out that as a matter of fact these
24 rates in the Atlanta market do nothing to account for
25 the fact that she has to pay New York overhead, and that

1 her real rates are a national rate based on providing a
2 service that almost no one else in the country can
3 provide. This is really a unique --

4 JUSTICE BREYER: What is the overhead?

5 MR. CLEMENT: What's that?

6 JUSTICE BREYER: What is the overhead? I
7 mean, that's something that I find interesting and
8 important, and I can't find it anywhere. The numbers
9 began to bother me in the same way they did with Justice
10 Alito. I'm thinking: There are 30,000 hours. They
11 got 10.5 million. That translates into, what is it,
12 \$350 an hour. Now, if the lawyer works for 2,000 hours
13 of the year, which is a little high, he is being
14 compensated at \$700,000 on average in this case. But he
15 has to pay overhead. So what's that? 40 percent? 30?
16 20?

17 MR. CLEMENT: Justice Breyer, the numbers
18 aren't broken down. But I can tell you --

19 JUSTICE BREYER: Well, I mean, if you have
20 any rough idea at all, because I think if it's anywhere
21 near \$700,000 on average, you say to a taxpayer: You
22 are going to pay this, and that's more money than 99
23 percent of the taxpayers hope to see in their lives, and
24 suddenly they are paying that money to somebody, which
25 is -- I could say: Okay, pay them 400,000. That's

1 what he would get as the average fee for the toppest,
2 most top lawyer. And that's, you know, pretty high.
3 And -- but \$700,000 a year for a lawyer. Wow. And
4 that's what this judge paid.

5 Now, what is it that came out of that?
6 That's what I want to know before I make up my mind,
7 frankly. And I'm going to try to look it up, but I'm
8 trying -- I'm trying to get a rough idea here.

9 MR. CLEMENT: Well, what I think you can say
10 for sure, Justice Breyer, is that what came out of that
11 is a lot more if you have your office in New York --

12 JUSTICE BREYER: Oh, I know, but --

13 MR. CLEMENT: -- than if you have your office
14 in Atlanta.

15 JUSTICE BREYER: -- that doesn't help me,
16 and the reason it doesn't help me is because if it's a
17 very, very high number in dollars per year, then I am
18 tempted to think: Well, very high is enough. You don't
19 need very, very, very high.

20 You see my point?

21 MR. CLEMENT: I do, Justice Breyer, but I
22 also think the question presented here is whether you
23 can ever have an enhancement.

24 JUSTICE BREYER: Yes. I would be saying:
25 Be satisfied forever with very, very high, the most top

1 pay that any top lawyer gets; do not want even more than
2 that.

3 And if in fact I doubt that I have really
4 made a difference to incentives on that one, for the
5 reason that the Solicitor General said -- and my
6 goodness, how do we explain this to the average person?
7 That -- those are the questions that are genuinely going
8 through my mind. I haven't made up my mind how I will
9 come out in this case. So it's not a kind of putting
10 this to you. I don't know.

11 MR. CLEMENT: Right. Well, Justice Breyer,
12 let me take issue, though, with the hypothetical that
13 all these lawyers are getting the top, top rate. That's
14 not -- that's not what is happening, either in this case
15 or in general.

16 And one of the things, if you look out at
17 the circuits, you will see that, because this Court has
18 always said that the lodestar method is a two-step
19 process, the first step, as this Court has repeatedly
20 described it, is an estimate. Because of that, the
21 circuits have some looseness as to how they go about
22 estimating the reasonable hourly rate. They do not say:
23 Let's take the tippy-tip-top rate and use that to
24 calculate the rate. They use a variety of formulas. As
25 I say, the Laffey index in the D.C. Circuit is quite

1 formulistic and doesn't -- it puts you in three-year
2 groups and doesn't change your compensation between your
3 8th and 11th year and your 12th and 20th year, so it's
4 very mechanical. In some circuits, you can get a
5 national rate. So in a circuit -- if this case would
6 have been litigated in Cincinnati in the Sixth Circuit,
7 then Ms. Lowry may have been able to get \$700 an hour,
8 which is a national rate. On the other hand, because
9 this was in Atlanta, she was able to get the prevailing
10 market rate in Atlanta, which was 495. Now --

11 CHIEF JUSTICE ROBERTS: Counsel, this lawyer
12 -- I'm sorry, this judge said they were extraordinarily
13 good, but, I mean, where's the cutoff? If the judge
14 said, this is in the top 10 lawyers I've ever seen, or
15 the top 20, where do you get an enhancement and where do
16 you not?

17 MR. CLEMENT: Well, Mr. Chief Justice --

18 CHIEF JUSTICE ROBERTS: Yes, that's the
19 thing. It's hard to tell.

20 MR. CLEMENT: No, no. But I don't mean to
21 -- I would start with this Court's cases that say it is
22 to be in a rare case. Now, they say that repeatedly, so
23 I take this Court at its word, and I would think that
24 the rare case might --

25 CHIEF JUSTICE ROBERTS: Well, for

1 28 years -- the judge was on the bench 28 years, right?

2 Well, if you are in the top 28, is that a
3 rare case or not? It's once a year.

4 MR. CLEMENT: Well -- but he had one case in
5 28 years, so, I mean, whatever the denominator is --

6 CHIEF JUSTICE ROBERTS: I know, but we are
7 trying --

8 MR. CLEMENT: -- it's a huge denominator,
9 and this --

10 CHIEF JUSTICE ROBERTS: We are trying to
11 establish a principle, and other judges are going to
12 have to follow this. And do they think, well, this was
13 really good, but it wasn't as good as that law firm or
14 lawyers we had 3 years ago; they were really good.

15 MR. CLEMENT: I mean, actually, I don't
16 think that's a crazy way to approach it, which is this
17 really is supposed to be something that's reserved for
18 the rare case. I am not -- I don't want to see --

19 CHIEF JUSTICE ROBERTS: And I assume -- how
20 long -- how does a judge, who is on the bench in his or
21 her first year, do this?

22 Well, this is the best lawyer I've had in
23 the eight months I have been here.

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: But how does he or

1 she know that that -- that may be as good as it gets,
2 for the next 28 years?

3 (Laughter.)

4 MR. CLEMENT: Well, maybe the judge stays
5 his or her hand in the first year. I mean, this is a
6 discretionary judgment. There is an element of
7 discretion in this, that starts with the statutory text --
8 which is "may," not "must" -- and this Court has
9 recognized time and time again that the --

10 JUSTICE SCALIA: You say discretion. I say
11 randomness. I mean, that is not a matter of discretion.
12 It is a matter of randomness. How -- how long has the
13 judge who observed this case been on the bench?

14 If he has been there just a couple of years,
15 kiss good-bye to your -- your extra money for being
16 excellent. That's random. That's not discretion.

17 MR. CLEMENT: Well, no, I think it's a --
18 it's a discretionary judgment. I mean, the -- the
19 district courts are going to be exercising that
20 discretion guided by what this Court has said.

21 This Court has said it should be the rare
22 case in which there's an enhancement. I think they are
23 entitled to take this case -- this Court at its word,
24 and I think there's a reason, by the way, as this Court
25 has rejected enhancement based on other factors, that it

1 has always held out the possibility for the enhancement
2 in the rare case, for the quality of service and the
3 excellence of results.

4 The reason is, if you take that off the
5 table, then the statute becomes unrecognizable to the
6 Congress that passed it. This is not a difficult
7 question about whether the Congress that passed the
8 statute intended for there to be bonuses or enhancements
9 based on exceptional quality and results.

10 Those of you that look to legislative
11 history, in this context of interpreting this statute,
12 have repeatedly looked to the Senate report. The Senate
13 report provides three exemplary cases as to how you
14 should correctly apply an attorney's fee.

15 Two of those three cases applied
16 enhancements based on exceptional performance and
17 results.

18 JUSTICE SCALIA: So you want this Court to
19 look to those cases -- you know, it's the world turned
20 upside down. Instead of the lower courts reading our
21 cases, we have to read lower court cases to decide what
22 this statute means. Is that it?

23 MR. CLEMENT: Well, two -- two responses,
24 Justice Scalia.

25 JUSTICE SCALIA: I don't do that.

1 MR. CLEMENT: I know you don't, and I know
2 that because I read your dissent -- or your
3 concurrence --

4 JUSTICE SCALIA: Yes.

5 MR. CLEMENT: -- in Blanchard. The rest of
6 the Court did that in Blanchard, and I think it should
7 continue to do that because you are interpreting a word
8 like "reasonable," and I think have you to look
9 somewhere, and the -- and the Senate report provides
10 guidance.

11 The second thing though is, Justice Scalia,
12 you, in a number of contexts, have pointed out that, if
13 you don't look to legislative history, it's okay to look
14 at how a term was interpreted by courts at the time that
15 Congress adopted it.

16 And that's another way to get at the same
17 result, which is, in this is case --

18 JUSTICE BREYER: Should I -- should I look
19 at the fact that, in the early 1970s, when this was
20 done, legal fees were not quite so high? And perhaps,
21 comparatively so, they weren't quite so high, either.

22 MR. CLEMENT: Well, Justice Breyer, I would
23 say that -- you know, you can look to the fact that we
24 have had a lot of inflation since then. You can make
25 the --

1 JUSTICE BREYER: Not just inflation. I
2 think the discrepancy between these top legal fees and
3 the fee of the average person -- or the work of the
4 average person, the average wage for a family of four
5 has changed quite a lot. I suspect that's true, but I
6 could look it up. But should I look it up?

7 MR. CLEMENT: I don't think you should
8 because, again, what Congress said it was trying to do
9 here was not to try to make people indifferent between
10 whether they became lawyers or not.

11 They were looking at lawyers and they were
12 trying to determine, we want to essentially make you
13 indifferent between engaging in civil rights work and
14 other complex civil litigation, like antitrust, and if
15 that --

16 JUSTICE SCALIA: Of course, this statute was
17 passed before we adopted the lodestar approach, wasn't
18 it?

19 MR. CLEMENT: Before you adopted the
20 lodestar, sure.

21 JUSTICE SCALIA: Before this Court --

22 MR. CLEMENT: But not before the lower
23 courts had adopted the lodestar, and which way does that
24 cut?

25 I think that cuts very strongly against adopting a rule

1 that says, the lodestar is not just a guiding principle
2 but is an absolute ceiling on the award.

3 JUSTICE SCALIA: No. I would think it cuts
4 the other way. Congress was not contemplating that we
5 would adopt approach -- an approach which takes into
6 account the excellence of counsel.

7 MR. CLEMENT: Well, again, Your Honor, with
8 respect, I don't think, in any direct way, the lodestar
9 takes into account the quality of counsel. Prevailing
10 market rates, as Justice Stevens indicated, win or lose
11 -- those are the prevailing market rates.

12 So I don't think it directly takes it into
13 Account. And, the question here is whether you can ever
14 take that into account.

15 And I actually think, if you are looking for
16 guidance, you can look to the early Third Circuit cases
17 that were decided before Congress passed the statute,
18 and what those Third Circuit cases decided -- there was
19 an en banc case, Lindy II, by Judge Aldisert and a panel
20 opinion in Merola by Judge Garth.

21 And what those decisions did is they said
22 the great thing about having a lodestar with adjustments
23 is that, in the mine run of cases, the rates are going
24 to get quality of performance results about right.

25 But what they --

1 JUSTICE ALITO: But you, yourself, make the
2 point in your brief that the -- that legal fees are
3 changing. And do you think that's relevant? Are they
4 going up? Or are they going down now?

5 MR. CLEMENT: Well, I think, right now, they
6 are sort of, at best, staying stagnant and maybe going
7 down a little bit. I think this Court has always looked
8 to the market in setting rates a bit.

9 I think the main thing the fact that
10 rates are not going up in sort of an inevitable cycle
11 suggests to me is that this Court has to recognize that
12 the one basis for enhancement that it has already
13 consistently recognized, which is an enhancement for
14 delay, which is not the same thing as contingency.

15 This Court recognized that enhancement for
16 delay was appropriate in the case of Missouri v.
17 Jenkins. Now, this Court indicated that you can take
18 account for delay, either through current rates, instead
19 of historical rates, or through an enhancement.

20 I think the one thing we know now is you
21 have to be careful about using current rates to take
22 into account for delay because the assumption that that
23 would work was based on this assumption that rates
24 inevitably go up.

25 CHIEF JUSTICE ROBERTS: There is a flip side

1 to the unpopular case situation the S.G. talked about,
2 which is lawyers and law firms sometimes take on a
3 particular high-profile case to increase their profile,
4 and they would have done it for a lot less.

5 We have lawyers who argue here, who are
6 doing it for free, because it's a big deal to be
7 recognized as doing something in the Supreme Court. So
8 when you use prevailing rates with respect to that type
9 of work, you are overcompensating them.

10 MR. CLEMENT: Well -- and maybe that's
11 right, and maybe there should be adjustment in those
12 cases. Maybe you shouldn't just take the prevailing
13 rate for the general provision of services.

14 You should take into account that, actually,
15 you have lawyers here who are willing to do it for free.
16 Sometimes, I think you get what you pay for, but that's
17 a different subject.

18 (Laughter.)

19 MR. CLEMENT: I do think that you can make
20 adjustments, and that's what is -- think about the term
21 "the lodestar." I mean, the lodestar is not a
22 destination. It's not a complete calculation. The
23 lodestar is a guiding light. It gets you --

24 CHIEF JUSTICE ROBERTS: Well, it's also not
25 the term Congress used.

1 MR. CLEMENT: It's not, but if we want to
2 resort to what Congress had in mind, I think that only
3 favors the idea that you would have adjustments upward
4 and downward.

5 CHIEF JUSTICE ROBERTS: I want to resort to
6 what Congress said, which was --

7 MR. CLEMENT: And the term is "reasonable,"
8 and, again, I think, if you were looking for fertile
9 ground to derive a bright-line rule that you never, ever
10 have an enhancement for quality --

11 JUSTICE SOTOMAYOR: Aren't you -- most of
12 your arguments are suggesting that the counter -- that
13 your adversary is now limiting, that the adjustment
14 should be made -- tied to something, and that something
15 would be the actual rate.

16 And most of the factors you are talking
17 about -- whether the person's a national attorney with
18 overhead or whether that person's a -- has done better
19 work -- the example I used, a second-year associate,
20 could be adjusted just in the rate, and that would give
21 you a grounded place to make a judgment about the
22 exercise of a court's discretion. Why isn't that a more
23 structured, more --

24 MR. CLEMENT: Well, I guess what I would
25 say, Justice Sotomayor, is that that potentially could

1 be more structured. I'm not sure it inherently is,
2 which is to say I think -- you know, in some ways, it
3 may be more transparent to say, we are just going to use
4 the Laffey index, or we are going to use the prevailing
5 market rates, and then we are really going to hone in on
6 the issue of quality and exceptional results after the
7 fact.

8 I think, if the Court wants to suggest that
9 you should take those factors into account in setting
10 the rate -- and the rate should not be just a rigidly
11 calculated rate that comes from an index or comes from
12 the prevailing market -- I think the one thing I would
13 very much want to urge on you is, if you take that
14 route, that you allow a remand for an opportunity for my
15 clients to make that showing to the district court
16 because there's no question, from the record here, that
17 they were responding to extant law of the Eleventh
18 Circuit.

19 And that extant law did not provide that
20 possibility for adjustment with the prevailing market
21 rates. Those were --

22 JUSTICE GINSBURG: But Mr. Cohen said that
23 that would be a very limited adjustment. He wasn't
24 contemplating in his suggestion in his brief that you
25 could go outside what the associate would get; you just

1 go to the top. Let's say it could be 200 to 400, you
2 give him 400, but you don't give him 500.

3 Justice Alito asked -- he was concerned about
4 standard list enhancements, so one question is when do
5 you enhance? Another is, in this case it was 75 percent.
6 How do you know what's the right multiplier?

7 That -- the concern is you are going to have
8 variations from district judge to district judge in how
9 good the performance was, in what is the appropriate
10 multiplier. Are there any handles that would prevent
11 this from becoming just random, just rudderless?

12 MR. CLEMENT: Well, Justice Ginsburg, first
13 let me say that I had understood, and perhaps this was
14 wishful thinking, but I had understood that Justice
15 Sotomayor was suggesting the possibility of a broader
16 inquiry at the rate-setting stage, not just a narrow
17 focus sort of within bands. So I just -- that's what I
18 was trying to respond to.

19 As to trying to cabin the discretion, let me
20 try to offer some thoughts about cabining the
21 discretion, but let me also say that, to paraphrase
22 Justice Scalia, what sauce for the goose is sauce for
23 the gander. I mean, this Court has said that there are
24 bases for downward departures, and including downward
25 departures all the way to zero in *Farrar v. Hobby*, and

1 the Court has not been overly concerned about cabining
2 that discretion.

3 And that kind of discretion goes on downward
4 all the time. It can take place in the terms of looking
5 at a particular motion and saying that wasn't a very
6 good motion; you were wasting your time. There are a
7 variety of ways that that can be taken into account
8 downward, and this Court hasn't felt that concerned
9 about cabining the discretion.

10 Now, if this Court wants to cabin the
11 discretion, I think certainly there's two factors here:
12 There's the quality of service and there is the
13 exceptional results. As to the quality of service, I
14 would certainly say that you ought not to have a rigid
15 rule, which is essentially what Petitioners are asking
16 for, that would cap you with prevailing market rates.
17 There ought to be some flexibility for that,
18 for the judge to take into account the actual experience
19 that the judge has with the lawyers in the courtroom.

20 The second thing I would say is that I do
21 think it ought to be fair, if you are going to do this
22 kind of calculation, that you don't base it on something
23 like the Laffey index, and you don't base it on a rule
24 that a national expert can never get a national
25 prevailing rate, but even though they are sitting in New

1 York, they have to get the top rate only in the Atlanta
2 market. I think those differences should be taken into
3 account on the compensation side of things.

4 And then if at some point, the judge wants
5 to say, and I want to give either this rate or this
6 multiplier for the quality of the performance, then
7 that's something that you can certainly assess.

8 As to the exceptional results, I also think
9 there, too, you can focus on specific factors of the
10 case before you, and you can say things. Now, I would
11 say, for example in this case, part of the reason the
12 results are exceptional -- I would point to at least three
13 things: One is the advance of capital here in order to
14 take on a case of this breadth and undertaking is really
15 an exceptional undertaking. And if you look at the
16 Goldberg declaration at Joint Appendix 75, that
17 declaration points out that a smaller firm would have
18 essentially been bankrupted by this case.

19 JUSTICE KENNEDY: Were -- were expert
20 witness fees reimbursable in this case, under -- under
21 the statute? I noticed they were cut down, but I didn't
22 know if he cut out all of them or just part of them.

23 MR. CLEMENT: The district judge cut -- cut
24 out all of them following this Court's decision in
25 Casey, Your Honor.

1 JUSTICE KENNEDY: All right.

2 MR. CLEMENT: There was still, though, I
3 should say, something on the order of \$750,000 in
4 reimbursable expenses that had to be advanced. It's
5 worth pointing out that one factor that Judge Shoob took
6 into account in giving an enhancement here was the delay
7 in payment. That is a permissible factor under
8 Missouri v. Jenkins, and even if you use current rates,
9 that doesn't do anything to compensate you for the delay
10 in reimbursement of expenses.

11 CHIEF JUSTICE ROBERTS: Oh, I think it
12 does. I think rates are set with -- based on a law
13 firm's record of -- I mean, just because you bill a
14 client doesn't mean that they are going to pay or that
15 they are going to pay at what you billed them. And I
16 think the rates are set to take into account that over
17 the past year whatever you have a realization rate
18 of -- whatever, 80 percent or 85 percent.

19 MR. CLEMENT: Oh, I was just making a narrow
20 point, Mr. Chief Justice, which is the current rates
21 don't take into account the fact that there was a delay
22 in repayment for reimbursable expenses. Some of these
23 expenses were paid out 4 years ago, I mean at the
24 time of the fee calculation. You don't get sort of, you
25 know, today's copying expenses or today's FedEx

1 expenses. You get the expenses at the time you did
2 them, and you don't get any prejudgment interest on
3 that. So that is one thing Judge Shoob thought ought to
4 be compensated here.

5 Again, that's one factor that makes this
6 exceptional. Another factor is that this was an
7 entrenched problem that they were dealing with. In 1989
8 the foster care child system in Georgia was described as
9 a crisis; by 1996 it had been upgraded to a catastrophe.
10 This is a very difficult problem.

11 The last thing is the scope of the relief,
12 which really is, I think, very broad here and that's what
13 Judge Shoob was recognizing. And as I said earlier, I do
14 think in an era of coupon settlements, a judge is
15 entitled to look at a case like this and say this is
16 really a remarkable result that has been achieved here,
17 and the normal rates -- normal prevailing market rates
18 don't compensate for this kind of result.

19 So I do think there are things that the
20 Court could point to in this case or in other cases to
21 try to cabin that discretion. I do think, though, that
22 discretion is an inherent feature of this statutory
23 regime, and this Court has tolerated a degree of
24 discretion in a variety of contexts including with
25 respect in the area of downward departures.

1 I do want to get, before I sit down, this
2 point about getting the incentives right, because one
3 thing that Congress was clearly very concerned about was
4 getting the incentive rights for counsel. And if you
5 accept Petitioner's position that the lodestar is a
6 ceiling and not something that is subject to adjustment
7 up or down, then what you are telling lawyers is the
8 that the maximum amount they can make in a civil rights
9 case is the minimum amount they can make in a different
10 case, where by the way they will get paid every 30 days
11 and their expenses will get reimbursed in real time.

12 Then you are also telling them something
13 else, which is, that's actually just a starter because
14 there are multiple ways for district courts to cut down
15 on the lodestar amount, either because you spent too
16 much time on this or we didn't like your travel
17 expenditures. And so there are multiple ways for those
18 hours to be cut down.

19 If you accept Petitioner's rule and there is
20 no way to get those rates bumped up in any
21 circumstances, then you are basically guaranteeing that,
22 as I say, the maximum you can make in a civil rights is
23 the minimum you can make in any other kind of cases.

24 CHIEF JUSTICE ROBERTS: Well, but there --
25 general counsel do that all the time when they get a

1 bill from a law firm. They cut it down. They say you
2 spent -- you've spent too much time with this associate
3 only because he or she is a first-year associate and is
4 learning and training; I'm not going to pay for that.

5 MR. CLEMENT: Two things, Mr. Chief --

6 CHIEF JUSTICE ROBERTS: So it's the same--
7 it's the same thing that happens when a district court
8 looks at the -- the lodestar and cuts it down.

9 MR. CLEMENT: Two things, Mr. Chief Justice:
10 One, it's the law of the Eleventh Circuit and I think
11 every circuit that before submitting your fees to the
12 court you are supposed to use billing judgment and take
13 care of some of those things, approximating maybe what
14 your client would do for you. But, second, and I think
15 more tellingly, the client may do that to you. The
16 client doesn't have the help of your opposing counsel to
17 egg them on and give them suggestions, and that's what a
18 district court does in the context of one of these
19 cases.

20 So I really think, as a practical matter,
21 you are systematically undercompensating counsel. And I
22 mean, if you want to take into account practicalities, I
23 am not here to reargue the Dague case, but if you want
24 to talk about practicalities, the fact that all of these
25 cases are contingency cases and the rational market for

1 those would be much higher than -- if you are worried
2 about sort of windfalls for plaintiff counsel in
3 these kind of cases, you really can worry about
4 something else, with all due respect, because the
5 combined effect of Dague and Casey makes it very
6 difficult to get sort of comparable compensation.

7 As I say, I am not here to reargue those
8 cases. I do think, frankly, Dague is distinguishable
9 because there you had the prevailing party language.
10 The other thing about Dague that's distinguishable that
11 I will say before I sit down is one of this Court's
12 concerns in Dague was creating an asymmetry. Blanchard
13 had already said that contingency fees could not cap
14 your awards; they didn't want to have an asymmetrical
15 system. That's exactly what Petitioners are asking you
16 for, is a completely asymmetrical system. Farrar v.
17 Hobby says you can reduce downwards based on
18 exceptionally poor results. There would be no basis
19 whatsoever to even adjust a little bit under their rule
20 for exceptional results on the upside.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you Mr.
23 Clement.

24 Mr. Cohen, you have 4 minutes.

25 REBUTTAL ARGUMENT OF MARK H. COHEN

1 ON BEHALF OF THE PETITIONERS

2 MR. COHEN: Than you, Your Honor.

3 I would like to start out with the little
4 joke that Mr. Clement made, is that you get what you pay
5 for. You do get what you pay for. Is because I am
6 getting paid half my hourly rate in this case means I
7 exert
8 half of what I would do for another client who would pay
9 my full rate? No. Because my professional
10 responsibility is that when I'm hired by a client for
11 an hourly rate, I'm supposed to represent that client
12 zealously within the bounds of the law.

13 So to say that in a case like this that
14 these lawyers would have done a different type of job
15 had they not known there was a possibility of a quality
16 enhancement is an insult, frankly, to Ms. Lowry and her
17 group, because they do this all the time. They do it
18 without getting an enhancement; they never asked for one
19 before. And, clearly, if this Court determines that a
20 quality enhancement is going to be available even in
21 rare or exceptional circumstances, you are going to have
22 arbitrary results and you are going to have
23 inconsistency which the analytical part of the lodestar
24 guards against.

25 Second point I would make is that Mr.

1 Clement mentioned about the New York rates and the
2 overhead. That was not the rationale for the district
3 court's awarding a quality -- or an enhancement here.
4 That was not part of it at all.

5 Getting back to what the court has
6 mentioned: "The best lawyer I have ever seen." Look at
7 what the purpose of this fee-shifting statute is. It's
8 to attract competent counsel by awarding them a
9 reasonable fee. What attorney is going -- who wouldn't
10 normally take a civil rights case is going to say:
11 Maybe I will take it, because maybe the judge will say
12 I'm the best he's ever seen or one of the best I've ever
13 seen? It's not a rational reason to give out there to
14 attract competent counsel. Counsel are going to take a
15 civil rights case because they know if they prevail they
16 are going to get their prevailing market rate, they are
17 going to get all their hours, their reasonable number of
18 hours put in. In this case, it was 25,000 hours over a
19 3-year period. And they got their reasonable rates.

20 The judge also double-counted for quality
21 because Ms. Lowry got a \$495 rate in part because of
22 her, quote, "stellar performance," as the district judge
23 decided. So to count that again by giving an
24 enhancement is impermissible double-counting, as this
25 Court has held in previous cases, including Delaware

1 Valley.

2 Finally, I would say that the district
3 judge's order in this case, if left undisturbed, will
4 create additional applications for enhancements and
5 whether they are granted or not, as Justice O'Connor
6 pointed out in the Delaware Valley II case in her
7 concurrence, it's not the issue of the rarity of the
8 granting of the enhancement. The issue is the
9 requesting of it. And the requests are going to come
10 out the wazoo, and district courts are going to be
11 deciding things arbitrarily and on different bases.

12 And for those reasons, we would respectfully
13 urge this Court to reverse.

14 JUSTICE STEVENS: May I ask this one final
15 question: We have a question of law before us, whether
16 there's an absolute ceiling here.

17 Am I justified in assuming that if we could
18 reach the question of whether it was a reasonable
19 enhancement, there's no argument about that?

20 MR. COHEN: I'm sorry, Your Honor. If you
21 determine that the enhancement was --

22 JUSTICE STEVENS: We are assuming for
23 purposes of decision that the enhancement was
24 reasonable, if that was -- if it's ever available,
25 because you are not challenging the amount. In other

1 words, you are making an argument of law. Even if they
2 give them a \$10 enhancement, it would be exactly the
3 same issue before us.

4 MR. COHEN: We are arguing that the
5 enhancement in this case was unreasonable, Your Honor,
6 and --

7 JUSTICE STEVENS: That is not the question
8 presented in the cert petition.

9 MR. COHEN: Well, no, I understand that.

10 JUSTICE STEVENS: If I understand it, the
11 question of law presented is that even if the
12 enhancement had only been \$1,000 --

13 MR. COHEN: That's correct.

14 JUSTICE STEVENS: -- you would say that was
15 equally wrong.

16 MR. COHEN: For quality or result.

17 JUSTICE STEVENS: Right.

18 MR. COHEN: For those two factors.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 12:12 p.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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