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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

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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 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 in 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

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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.

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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

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1 second-year associate whose billing rate for two 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 is an enhancement, but it isn't as transparent as
24 the one that Judge Shoob gave.

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

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1 going to retreat from it -- said 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.

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

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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 regularly 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, and no
23 reasonable law firm would do that, which is why a judge
24 would be beyond his discretion -- or her discretion --

25 JUSTICE SOTOMAYOR: That's not true. Law

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1 firms get bonuses from clients all the time. They get
2 negotiated. Some of the amici gave examples of what's
3 happening in -- what happens in the marketplace.

4 MR. COHEN: But those are private agreements
5 that are entered into with the client.

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

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

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

17 MR. COHEN: No.

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

23 MR. COHEN: Well, Congress was --

24 JUSTICE SOTOMAYOR: That part of the market
25 anyway.

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1 MR. COHEN: I'm sorry.

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

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

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

22 CHIEF JUSTICE ROBERTS: Counsel, this --
23 this brilliant second-year associate we are talking
24 about, the way these submissions to the Court are -- the
25 way they're presented, do they carve out her

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1 contribution to a particular filing? To the extent I
2 have looked at them they have something like, you know,
3 draft motion to dismiss, and the associate has 40 hours
4 and the junior partner has 10 hours and the senior
5 partner has 5 hours dedicated to that.

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

11 MR. COHEN: You don't in the traditional way
12 of billing that you are talking about.

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

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

25 And when the court determined to actual

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

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

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

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

22 MR. COHEN: Well, I would submit, though,
23 that when the judge decides how to do the lodestar rate,
24 he is looking at the affidavits, talking about what the
25 range of the market is for that area. He's also looking

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1 at the number of hours reasonably expended.

2 JUSTICE KENNEDY: But -- so in computing the
3 lodestar rate he cannot consider the quality of
4 performance?

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

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

13 MR. COHEN: Well, but --

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

18 MR. COHEN: Correct. And --

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

22 MR. COHEN: But superior performance is just
23 the reason that hourly rates are what they are. That's
24 what this Court said in *Pierce v. Underwood*.

25 JUSTICE GINSBURG: Not necessarily --

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

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

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

9 MR. COHEN: That's correct, that's correct.

10 JUSTICE STEVENS: And so the quality of
11 performance really is totally irrelevant.

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

14 JUSTICE STEVENS: Right.

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

21 JUSTICE GINSBURG: We are going back to the
22 judge, who did say that this was the best performance he
23 ever saw. So I can't credit just that it was just
24 contingency.

25 But, first, you have clarified that what you

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1 said in your brief meant only the top range for a lawyer
2 of this period. So this is more limited than -- than
3 one might take it to be.

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 MR. COHEN: Thank you.

24 CHIEF JUSTICE ROBERTS: Mr. Shah.

25 ORAL ARGUMENT OF PRATIK A. SHAH

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1 ON BEHALF OF THE UNITED STATES,
2 AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONERS

4 MR. SHAH: Mr. Chief Justice, and may it
5 please the Court:

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

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

18 MR. SHAH: There are none for attorney
19 performance, Your Honor. There may be circumstances --

20 JUSTICE SCALIA: Such as? That's what I'm
21 asking.

22 MR. SHAH: Right.

23 JUSTICE SCALIA: What are you referring to
24 if not attorney performance?

25 MR. SHAH: Right. The government sets out

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1 one example in our brief of where we think an upward
2 enhancement might be appropriate, and that is where an
3 attorney takes on a particularly unpopular client or
4 cause that causes some external harm, external to the
5 case, to his practice or income.

6 CHIEF JUSTICE ROBERTS: But it's one of the
7 outstanding traditions of the bar that lawyers are
8 expected to do that in the normal course, so why would
9 that be a special circumstance?

10 MR. SHAH: Well, Your Honor, I think that
11 circumstance is much more closely tied to the statutory
12 purpose of section 1988, which is to attract competent
13 counsel in --

14 CHIEF JUSTICE ROBERTS: Well, how do you
15 tell -- how do you tell whether a client is popular or
16 unpopular? I mean, a lot of unpopular clients in the
17 abstract sense are in fact -- they have a lot of support
18 in the community. I suppose one of the more unpopular
19 clients these days is a Wall Street banker. But I mean,
20 you wouldn't say -- you wouldn't suggest that law firms
21 charge more when they represent them?

22 MR. SHAH: No, Your Honor. I think what our
23 -- what our enhancement would allow for, even if you
24 can't make the ex ante determination that taking on this
25 representation is going to cause me some special harm;

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1 that is, all my clients will leave my firm if I take on
2 this case. Even if you don't know that before the fact,
3 the fact that there is an ability for the court to give
4 you an enhancement when that occurs -- remember this is
5 done after, after the case is already complete is when
6 the fear -- fee hearing determination is made. The
7 ability of a court to give that sort of compensation
8 would provide insurance or guarantee to the attorney
9 before they take on a case that if it turns out badly
10 that -- that they will still get compensated.

11 JUSTICE SCALIA: You think that is what we
12 had in mind, huh? You think that is what we had in mind
13 when we said they are extraordinary circumstances?

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

15 JUSTICE SCALIA: I think it's very
16 imaginative, but I would never --

17 (Laughter.)

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

20 (Laughter.)

21 MR. SHAH: Well, it is -- Your Honor, it is
22 one of the ten -- one of the Johnson factors set forth,
23 so it's not coming out of thin air. And I think it
24 is --

25 JUSTICE GINSBURG: Is there another example?

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1 I mean, you -- you are saying the rule isn't never, it
2 is sometimes. And you have given us one sometimes. Is
3 there any other --

4 MR. SHAH: Your Honor, that is the only one
5 that I think is left after this Court's fee-setting
6 jurisprudence over the last 25 years. It's consistently
7 knocked down other bases for an enhancement such as
8 complexity of issues, novelty of issues, contingency
9 risks, delayed payment. All of those other grounds of
10 potential enhancements that the legislative history
11 refers to have been categorically prohibited by this
12 Court's jurisprudence. I think that --

13 JUSTICE GINSBURG: How about a downward
14 adjustment? You have the hourly rate, the number of
15 hours, and the judge, after trimming the hours, then
16 says: This has been a case, even though they prevailed,
17 the lawyer wasn't prepare; I am not going to give the
18 hourly rate. Can a judge adjust the lodestar down for
19 poor performance?

20 MR. SHAH: Your Honor, I think the limited
21 circumstances which allow for a downward adjustment
22 would be those set forth in this Court's decision in
23 Hensley. I don't think that poor performance alone
24 would justify a downward departure --

25 JUSTICE GINSBURG: Hensley is you lost on an

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1 issue, so you don't get paid for --

2 MR. SHAH: Right. So if there were certain
3 claims that the poor performance led -- led the
4 plaintiff to be unsuccessful on certain claims but not
5 all the claims, I think a downward departure would be
6 appropriate.

7 JUSTICE GINSBURG: But the plaintiff -- the
8 plaintiff prevailed on everything, just that the judge
9 said this was a really poor, poor performance.

10 MR. SHAH: No, Your Honor, I don't think a
11 downward departure would be appropriate in that
12 circumstance, because that's what the prevail -- the
13 prevailing market would not allow for a downward
14 departure. Normally --

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

18 MR. SHAH: Well -- well, Your Honor, that
19 would be taken care of in the setting of the lodestar
20 rate. Remember there are two components --

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

23 MR. SHAH: Well, it -- not in the lodestar
24 rate, but in the number of reasonable -- there are two
25 components to the lodestar calculation, the number of --

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1 number of hours reasonably spent on the matter and the
2 reasonable hourly rate.

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

10 JUSTICE KENNEDY: For extraordinary
11 circumstances, what about a very, very popular cause and
12 he wins and they are beating his door down? Can we
13 reduce it for that?

14 (Laughter.)

15 MR. SHAH: No, Your Honor, that would not
16 require a reduction. That would be an extra award for
17 the attorney taking on that type of --

18 JUSTICE SCALIA: Well, I mean, what is sauce
19 for the goose is sauce for the gander.

20 (Laughter.)

21 JUDGE SCALIA: I mean, if -- if you get
22 rewarded for unpopularity, you ought to be get penalized
23 for popularity.

24 (Laughter.)

25 JUDGE SCALIA: You got a lot more clients

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1 because of this case.

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

5 Justice Sotomayor, if I can address your
6 concern about these alternative arrangements that --
7 that occur in -- that are starting to emerge, at least
8 as Respondent suggest in their brief to this Court by
9 citing a few newspaper articles and the proverbial word
10 on the street that these are an emerging trend.

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

20 They call these partial contingency or
21 hybrid contingency arrangements. It's not the same
22 standard hourly rate and then a client decides to throw
23 in a kicker of a million dollar bonus. Rather, these
24 are discounted rates with a success bonus, essentially a
25 modified form of contingency arrangement. They are

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1 prohibited for exactly the same reasons that this Court
2 prohibited a contingency risk enhancement in Dague. The
3 same reasons would prohibit relying on those sort of
4 alternative arrangements to provide an attorney
5 enhancement for performance.

6 JUSTICE SOTOMAYOR: One of the purposes of
7 Congress -- one of the purposes of Congress was to
8 ensure that litigants under these fee-shifting statutes
9 could attract competent counsel, correct?

10 MR. SHAH: Yes, Your Honor.

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

20 MR. SHAH: Two responses, Your Honor.
21 First, the problem that you posit about attorneys
22 having -- being deterred by having to absorb, you know,
23 the -- the upfront outlay of significant expert expenses
24 or to having absorbed the contingency risks, those are
25 problems created by this Court's precedent in Dague, not

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1 before this Court now.

2 JUSTICE SOTOMAYOR: That doesn't mean Dague
3 was right; right?

4 MR. SHAH: Well, Your Honor, no one has
5 asked --

6 JUSTICE SOTOMAYOR: You're here arguing a
7 different point?

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

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

19 Respondents' own numbers suggest that these
20 are granted less than one time -- once a year. That
21 suggests that no reasonable attorney would take that
22 into consideration and it does it not, in fact, further
23 the statutory purpose in that event of attracting
24 competent counsel.

25 I would like to make one last point, and

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1 this is to bring us back to the facts of this case. I
2 think Respondents' own trial counsel, the discussion
3 that they give of the lodestar rates used in this case I
4 think is particularly telling. And this is the
5 affidavit of Marcia Lowry, who is the lead plaintiffs'
6 trial counsel, and this was submitted during the fee-
7 setting hearing, and the relevant excerpts appear on
8 page 41 of the Joint Appendix. And I want to read from
9 paragraph 25, and here's what she has to say about the
10 rates used by the court:

11 "The standard hourly rates reflected in
12 Exhibit 2" -- and those are the rates used by the
13 district court -- "are fair, reasonable and consistent
14 with the hourly rates in the Atlanta market for the
15 price of legal services of comparable quality rendered
16 in cases demanding similar skill, judgment, and
17 performance."

18 Now, the affidavit goes on to say that the
19 rates are still too low for the other factors that
20 Mr. Cohen discussed -- contingency risks, delayed
21 payment, expert fees -- but not for attorney
22 performance.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 MR. SHAH: Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Mr. Clement.

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1 ORAL ARGUMENT OF PAUL D. CLEMENT

2 ON BEHALF OF THE RESPONDENTS

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

5 Let me begin with the colloquy that involved
6 Justices Ginsburg and Justice Kennedy about the rates
7 and whether you can have sort of pre-enhanced rates as
8 part of the lodestar or whether you can only do the
9 enhancement after the fact.

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

21 JUSTICE ALITO: But sometimes there is a
22 great advantage in doing things mechanically, because
23 it -- it provides an element of fairness. And I will
24 tell you what troubles me about this, and maybe you can
25 convince me that I shouldn't be troubled by it. Here

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1 the district judge in effect takes four plus million
2 dollars from the taxpayers of Georgia and -- and awards
3 it above the lodestar calculation to these attorneys and
4 says -- and I -- I certainly take him at his word --
5 this was the best performance I have seen in 28 years.
6 But it seems totally standardless, and I see no way of
7 policing it, and I see a great danger that trial judges
8 are going to use this as a way of favoring their
9 favorite nonprofit foundation or their favorite cause or
10 their favorite attorneys, because they think they
11 generally do good work.

12 And this is not -- this is not like private
13 litigation where the money is coming out of the pocket
14 of a corporation. It's coming out of the pocket of
15 taxpayers. So that is very troubling. And I don't know
16 how you can provide standards for determining whether
17 this kind of transfer is based on anything reasonable.

18 MR. CLEMENT: Well, Justice Alito, let me
19 say that I don't think that you need any more standards
20 for the possibility of an upward departure than you need
21 for the possibility of a downward departure. And this
22 Court has already held in *Farrar v. Hobby* that the
23 results obtained is an adequate basis for departure, and
24 not a small departure. In *Farrar v. Hobby*, the lodestar
25 amount, the mechanical calculation that we're talking

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1 about, was \$280,000. What was the reasonable attorney's
2 fee? This Court --

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

11 I have another problem with it. I don't
12 like judges -- it's certainly not in the tradition of
13 the bench to comment upon the performance of lawyers. I
14 can't tell you how often I would like to give a separate
15 grade --

16 (Laughter.)

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

20 And if you do this going up, you've got to
21 do it going down. And you could expect the judge to
22 say: This is the worst performance I have seen in
23 28 years. Judges don't do that in our system, and I
24 don't think -- I don't think we should set up a
25 mechanism that induces them to do it.

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1 MR. CLEMENT: Well, two things, Your Honor.
2 I mean, the results obtained is one of the two factors
3 that are at issue in this case. And I think results
4 obtained can be objective and be a basis for an upward
5 adjustment as well as a downward0 adjustment.

6 As you heard the lawyer in the earlier case
7 say, you know, in a complaint, it is a wish list. And
8 it's a rare case where the attorney gets everything they
9 ask for in the complaint. This is that rare case where
10 everything that was asked for in the complaint was
11 obtained. That's one factor, Your Honor.

12 CHIEF JUSTICE ROBERTS: I will let you
13 answer your second point, but just on that, I don't
14 understand the concept of extraordinary success or
15 results obtained. The results that are obtained are
16 presumably the results that are dictated or command or
17 required under the law. And it's not like, well, you
18 had a really good attorney, so I'm going to say the law
19 means this, which gives you a lot more, but if you had a
20 bad attorney I would say the law has this and so he
21 doesn't get a multiplier.

22 The results obtained under our theory should
23 be what the law requires, and not different results
24 because you have different lawyers.

25 MR. CLEMENT: Well, Mr. Chief Justice, I

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1 mean, I defer to you, but I'm not sure that comports
2 with my experience. I have seen lawyers come into this
3 Court and concede a point in oral argument and I have
4 seen that prominently featured in this Court's opinion,
5 so it does seem to me that sometimes the quality of the
6 performance and the results obtained do depend on the
7 lawyer's performance and are not foreordained just by
8 the four corners of the complaint.

9 And so I think, again --

10 CHIEF JUSTICE ROBERTS: Well, but what does
11 a judge say when he said, you have achieved
12 extraordinary results. That if you weren't there, I
13 would have made a mistake on the law?

14 MR. CLEMENT: No, I think what he says is
15 that in the hands of another counsel the relief that was
16 obtained might have been significantly less. This was
17 an enormous --

18 CHIEF JUSTICE ROBERTS: I guess that's
19 saying the same thing I said, which if it weren't for
20 how good you are I would have made a mistake.

21 MR. CLEMENT: Well, maybe not -- no, not how
22 good. How tenacious. I mean, this case settled. With
23 a different lawyer for the plaintiffs in this case than
24 --

25 CHIEF JUSTICE ROBERTS: Maybe we have a

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1 different perspective. You think the lawyers are
2 responsible for a good result and I think the judges
3 are.

4 (Laughter.)

5 MR. CLEMENT: And maybe your perspective's
6 changed, Your Honor.

7 (Laughter.)

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

16 JUSTICE ALITO: Maybe your perspective has
17 changed too, Mr. Clement. But your argument is that,
18 you know, for \$495 an hour you really can't get a good
19 lawyer? You need to have -- you need to pay more than
20 that?

21 MR. CLEMENT: Well, on that my perspective
22 has changed, Your Honor. But let me say two things.

23 One is, less than 10 percent of the total
24 rates here, the total compensable hours here, were
25 top-of-the-market rates. Only the two lead counsel were

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1 compensated, at sort of 495 and \$450 an hour.

2 If you want to talk about the -- the Lowry
3 declaration, which is one thing that Mr. Shah brought
4 up, what he quoted from was essentially the conclusion
5 of that, where as part of the existing Eleventh Circuit
6 precedent that looks to prevailing rates in the Atlanta
7 market there is a recitation that that is the sort of
8 the prevailing rate consistent with the quality. That
9 is essentially something that the Eleventh Circuit
10 requires you to say.

11 I think the more relevant part of that
12 declaration is at Joint Appendix at page 35, where
13 Ms. Lowry points out that as a matter of fact these
14 rates in the Atlanta market do nothing to account for
15 the fact that she has to pay New York overhead, and that
16 her real rates are a national rate based on providing a
17 service that almost no one else in the country can
18 provide. It's a really unique --

19 JUSTICE BREYER: What is the overhead?

20 MR. CLEMENT: What's that?

21 JUSTICE BREYER: What is the overhead? I
22 mean, that's something that I find interesting and
23 important and I can't find it anywhere. The numbers
24 began to bother me in the same way they did with Justice
25 Alito. I am thinking: There are 30,000 hours. They

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1 got 10.5 million. That translates into, what is it,
2 \$350 an hour. Now, if the lawyer works for 2,000 hours
3 of the year, which is a little high, he is being
4 compensated at \$700,000 on average in this case. But he
5 has to pay overhead. So what's that? 40 percent? 30?
6 20?

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

9 JUSTICE BREYER: Well, I mean, if you -- any
10 rough idea at all. Because I think if it's anywhere
11 near \$700,000 on average, you say to a taxpayer: You
12 are going to pay this, and that's more money than 99
13 percent of the taxpayers hope to see in their lives, and
14 suddenly they are paying that money to somebody, which
15 is -- I could say: Okay, pay them \$400,000. That's
16 what he would get as the average fee for the toppest,
17 most top lawyer. And that's, you know, pretty high.
18 But \$700,000 a year for a lawyer. Wow. And that's what
19 this judge paid.

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

24 MR. CLEMENT: Well, what I think you can say
25 for sure, Justice Breyer, is that what came out of that

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1 is a lot more if you have your office in New York than
2 if you have your office in Atlanta. But --

3 JUSTICE BREYER: That doesn't help me. And
4 the reason it doesn't help me is because if it's a very,
5 very high number in dollars per year, then I am tempted
6 to think: Well, very high is enough. You don't need
7 very, very, very high.

8 You see my point?

9 MR. CLEMENT: I do, Justice Breyer. But I
10 also think the question presented here is whether you
11 can ever have an enhancement.

12 JUSTICE BREYER: Yes. I would be saying:
13 Be satisfied forever with very, very high, the most top
14 pay that any top lawyer gets; do not want even more than
15 that.

16 And if in fact I doubt that I have really
17 made a difference to incentives on that one, for the
18 reason that the Solicitor General said -- and my
19 goodness, how do we explain this to the average person?
20 That -- those are the questions that are genuinely going
21 through my mind. I haven't made up my mind how I will
22 come out in this case. So it's not a kind of putting
23 this to you. I don't know.

24 MR. CLEMENT: Right. Well, Justice Breyer,
25 let me take issue, though, with the hypothetical that

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1 all these lawyers are getting the top, top rate. That's
2 not -- that's not what is happening, either in this case
3 or in general.

4 And one of the things, if you look out at
5 the circuits, you will see that, because this Court has
6 always said that the lodestar method is a two-step
7 process, the first step, as this Court has repeatedly
8 described it, is an estimate. Because of that, the
9 circuits have some looseness as to how they go about
10 estimating the reasonable hourly rate. They do not say:
11 Let's take the tippy-tip-top rate and use that to
12 calculate the rate. They use a variety of formulas. As
13 I say, the Laffey index in the D.C. Circuit is quite
14 formulistic and doesn't -- it puts you in three-year
15 groups and doesn't change your compensation between your
16 8th and 11th year and your 12th and 20th year, so it's
17 very mechanical. In some circuits, you can get a
18 national rate. So in a circuit -- if this case would
19 have been litigated in Cincinnati in the Sixth Circuit
20 then Ms. Lowry may have been able to get \$700 an hour,
21 which is a national rate. On the other hand, because
22 this was in Atlanta, she was able to get the prevailing
23 market rate in Atlanta, which was 495. Now --

24 CHIEF JUSTICE ROBERTS: Counsel, this lawyer
25 -- I'm sorry, this judge said they were extraordinarily

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1 good, but where's the cutoff? If the judge said: This
2 is in the top ten lawyers I have ever seen, or the top
3 20, where do you get an enhancement and where do you
4 not?

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

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

8 MR. CLEMENT: No, no. I don't mean to -- I
9 would start with this Court's cases that say it is to be
10 in a rare case. Now, they say that repeatedly, so I
11 take this Court at its word, and I would think that the
12 rare case might --

13 CHIEF JUSTICE ROBERTS: Well, for
14 28 years -- the judge was on the bench 28 years, right?

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

17 MR. CLEMENT: Well -- but he had one case in
18 28 years, so, I mean, whatever the denominator is --

19 CHIEF JUSTICE ROBERTS: I know, but we are
20 trying --

21 MR. CLEMENT: -- it's a huge denominator.

22 CHIEF JUSTICE ROBERTS: We are trying to
23 establish a principle, and other judges are going to
24 have to follow this. And do they think, well, this was
25 really good, but it wasn't as good as that law firm or

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1 lawyers we had three years ago, they were really good.

2 MR. CLEMENT: I mean, actually, I don't
3 think that's a crazy way to approach it, which is this
4 really is supposed to be something that is reserved for
5 the rare case. I am not --

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

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

11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: But how does he or
13 she know that that -- that may be as good as it gets,
14 for the next 28 years?

15 (Laughter.)

16 MR. CLEMENT: Well, maybe the judge stays
17 his or her hand in the first year. I mean, this is a
18 discretionary judgment. There is an element of
19 discretion in this, that starts with statutory facts --
20 which is may, not must -- and this Court has recognized
21 time and time again --

22 JUSTICE SCALIA: You say discretion. I say
23 randomness. I mean, that is not a matter of discretion.
24 It is a matter of randomness. How, how long has the
25 judge who observed this case been on the bench?

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

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

8 This Court has said it should be the rare
9 case in which there is an enhancement. I think they are
10 entitled to take, this Court, at its word, and I think
11 there is a reason, by the way, as this Court has
12 rejected enhancement based on other factors, that it has
13 always held out the possibility for the enhancement, in
14 the rare case, for the quality of service and the
15 excellence of results.

16 The reason is, if you take that off the
17 table, then the statute becomes unrecognizable to the
18 Congress that passed it. This is not a difficult
19 question about whether the Congress that passed the
20 statute intended for there to be bonuses or enhancements
21 based on exceptional quality and results.

22 Those of you that looked to legislative
23 history, in this context of interpreting this statute,
24 have repeatedly looked to the Senate report. The Senate
25 report provides three exemplary cases as to how you

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1 should correctly apply an attorney's fee.

2 Two of those three cases applied
3 enhancements based on exceptional performance and --

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

9 MR. CLEMENT: Well, two -- two responses,
10 Justice Scalia.

11 JUSTICE SCALIA: I don't do that.

12 MR. CLEMENT: I know you don't, and I know
13 that because I read your dissent -- or your
14 concurrence --

15 JUSTICE SCALIA: Yes.

16 MR. CLEMENT: -- in Blanchard. The rest of
17 the Court did that in Blanchard, and I think it
18 continued to do that because you are interpreting a word
19 like reasonable, and I think have you to look somewhere
20 in the -- and the Senate report provides guidance.

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

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

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

7 MR. CLEMENT: Well, Justice Breyer, I would
8 say that -- you know, you can look to the fact that we
9 have had a lot of inflation since then. You can make
10 the --

11 JUSTICE BREYER: Not just inflation. I
12 think the discrepancy between these top legal fees and
13 the fee of the average person -- or the work of the
14 average person, the average wage for a family of four
15 has changed quite a lot. I suspect that's true.

16 But I could look it up. But should I look
17 it up?

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

22 They were looking at lawyers and they were
23 trying to determine, we want to essentially make you
24 indifferent between engaging in civil rights work and
25 other complex civil litigation, like antitrust, and if

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1 that --

2 JUSTICE SCALIA: Of course, this statute was
3 passed before we adopted the lodestar approach, wasn't
4 it?

5 MR. CLEMENT: Before you adopted the
6 lodestar, sure.

7 JUSTICE SCALIA: Before this --

8 MR. CLEMENT: But not before the lower
9 courts had adopted the lodestar, and which way that cut,
10 I think that cuts very strongly against adopting a rule
11 that says, the lodestar is not just a guiding principle,
12 but is an absolute ceiling on the award.

13 JUSTICE SCALIA: No. I would think it cuts
14 the other way. Congress was not contemplating that we
15 would adopt approach -- an approach which takes into
16 account the excellence of counsel.

17 MR. CLEMENT: Well, again, Your Honor, with
18 respect, I don't think, in any direct way, the lodestar
19 takes into account the quality of counsel. Prevailing
20 market rates, as Justice Stevens indicated, win or lose,
21 those are the prevailing market rates.

22 So I don't think it directly takes it into
23 account, and the question here is whether you can ever
24 take that into account.

25 And I actually think, if you are looking for

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1 guidance, you can look to the early Third Circuit cases
2 that were decided before Congress passed the statute,
3 and what those Third Circuit cases decided -- there was
4 an en banc case, Lindy II, by Judge Aldisert and a panel
5 opinion in Merola by Judge Garth.

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

10 But what they --

11 JUSTICE ALITO: But you, yourself, make the
12 point in your brief that the -- that legal fees are
13 changing. And do you think that is relevant? Are they
14 going up? Or are they going down now?

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

19 I think the main thing -- the fact that
20 rates are not going up, in sort of an inevitable cycle,
21 suggests to me, is that this Court has to recognize that
22 the one basis for enhancement that it has already
23 consistently recognized, which is an enhancement for
24 delay, which is not the same thing as contingency.

25 This Court recognized that enhancement for

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1 delay was appropriate in the case of Missouri v.
2 Jenkins. Now, this Court indicated that you can take
3 account for delay, either through current rates, instead
4 of historical rates, or through an enhancement.

5 I think the one thing we know now is that we
6 have to be careful about using current rates to take
7 into account for delay because the assumption that that
8 would work was based on this assumption that rates
9 inevitably go up.

10 CHIEF JUSTICE ROBERTS: There is a flip side
11 to the unpopular case situation that you talked about,
12 which is lawyers and law firms sometimes take on a
13 particular high profile case to increase their profile,
14 and they would have done it for a lot less.

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

20 MR. CLEMENT: Well, and maybe that's right,
21 and maybe there should be adjustment in those cases.
22 Maybe you shouldn't just take the prevailing rate for
23 the general provision of services.

24 You should take into account that, actually,
25 you have lawyers here who are willing to do it for free.

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1 Sometimes, I think you get what you pay for, but that's
2 a different subject.

3 (Laughter.)

4 MR. CLEMENT: I do think that you can make
5 adjustments, and that is what -- think about the term,
6 the lodestar. I mean, the lodestar is not a
7 destination. It's not a complete calculation. The
8 lodestar is a guiding light. It gets you --

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

11 MR. CLEMENT: It's not, but if you want to
12 resort to what Congress had in mind, I think that only
13 favors the idea that you would have adjustments upward
14 and downward.

15 CHIEF JUSTICE ROBERTS: I want to resort to
16 what Congress said, which was --

17 MR. CLEMENT: And the term is reasonable,
18 and, again, I think, if you were looking for fertile
19 ground to derive a bright-line rule that you never, ever
20 have an enhancement for --

21 JUSTICE SOTOMAYOR: Aren't you -- most of
22 your arguments are suggesting that the counter -- that
23 your adversary is now limiting, that the adjustment
24 should be made -- tied to something, and that something
25 would be the actual rate.

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1 And most of the factors you are talking
2 about -- whether the person's a national attorney with
3 overhead or whether that person's a -- has done better
4 work -- the example I used, a second-year associate,
5 could be adjusted just in the rate.

6 And that would give you a grounded place to
7 make a judgment about the exercise of a court's
8 discretion. Why isn't that a more structured, more --

9 MR. CLEMENT: Well, I guess what I would
10 say, Justice Sotomayor, is that that potentially could
11 be more structured. I'm not sure it inherently is,
12 which is to say I think -- you know, in some ways, it
13 may be more transparent to say, we are just going to use
14 the Laffey Index, or we are going to use the prevailing
15 market rates, and then we are really going to hone in on
16 the issue of quality and exceptional results after the
17 fact.

18 I think, if the Court wants to suggest that
19 you should take those factors into account in setting
20 the rate -- and the rate should not be just a rigidly
21 calculated rate that comes from an index or comes from
22 the prevailing market.

23 I think the one thing I would very much want
24 to urge on you is, if you take that route, that you
25 allow a remand for an opportunity for my clients to make

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1 that showing to the district court because there is no
2 question, from the record here, that they were
3 responding to extant law of the Eleventh Circuit.

4 And that extant law did not provide that
5 possibility for adjustment with the prevailing market
6 rate.

7 JUSTICE GINSBURG: But Mr. Cohen said that
8 that would be a very limited adjustment. He wasn't
9 contemplating in his suggestion in his brief that you
10 could go outside what the associate would get; you just
11 go to the top. Let's say it could be 200 to 400, you
12 give them 400, but you don't give them 500. Justice
13 Alito asked -- he was concerned about standard list
14 enhancements, so one question is when do you enhance?
15 Another is, in this case it was 75 percent; how do you
16 know what's the right multiplier?

17 That -- the concern is you are going to have
18 variations from district judge to district judge in how
19 good the performance was, in what is the appropriate
20 multiplier, are there any handles that would prevent
21 this from becoming just random -- just -- rudderless.

22 MR. CLEMENT: Well, Justice Ginsburg, first
23 let me say that I had understood, and perhaps this was
24 wishful thinking, but I had understood that Justice
25 Sotomayor was suggesting the possibility of a broader

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1 inquiry at the rate-setting stage, not just a narrow
2 focus sort of within bands. So I just -- that's what I
3 was trying to respond to.

4 As to trying to cabin the discretion, let me
5 try to offer some thoughts about cabining the
6 discretion, but let me also say that, to paraphrase
7 Justice Scalia, what is sauce for the goose is sauce for
8 the gander. I mean, this Court has said that there are
9 bases for downward departures, and including downward
10 departures all the way to zero in *Farrar v. Hovey*, and
11 the Court has not been overly concerned about cabining
12 that discretion.

13 And that kind of discretion goes on downward
14 all the time. It can take place in terms of looking at
15 a particular motion and saying that wasn't a very good
16 motion; you were wasting your time; there are a variety
17 of ways that can be taken into account downward, and
18 this Court hasn't felt that concerned about cabining the
19 discretion.

20 Now if this is Court wants to cabin the
21 discretion, I think certainly there is two factors to
22 it: there is the quality of service and there is the
23 exceptional results. As to the quality of service, I
24 would certainly said that you ought not to have a rigid
25 rule, which is essentially what Petitioners are asking

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1 for, that would cap it with prevailing market rates.

2 There ought to be some flexibility for that,
3 for the judge to take into account the actual experience
4 that the judge has with the lawyers in the courtroom.

5 The second thing I would say is that I do
6 think it ought to be fair. If you are going to do this
7 kind of calculation that you don't base it on something
8 like the Laffey Index, and you don't base it on a rule
9 that a national expert can never get a national
10 prevailing rate, but even though they are sitting in New
11 York, they have to get the top rate only in the Atlanta
12 market. I think those differences should be taken into
13 account on the compensation side of things.

14 And then if at some point the judge wants to
15 say, and I want to give either this rate or this
16 multiplier for the quality of the performance, then
17 that's something that you can certainly assess. As to
18 the exceptional results, I also think thereto, you can
19 focus on specific factors of the case before you and you
20 can -- it.

21 Now I would say, for example in this case,
22 part of the reasons the results are exceptional, I would
23 point to three things. One is the advance of capital
24 here in order to take on a case of this breadth and
25 undertaking is really an exceptional undertaking. If

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1 you look at the Goldberg declaration at joint appendix
2 75, that declaration points out that a smaller firm
3 would have essentially been bankrupted by this case.

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

8 MR. CLEMENT: The district judge cut -- cut
9 off all of them following this Court's decision in
10 Casey, Your Honor.

11 JUSTICE KENNEDY: All right.

12 MR. CLEMENT: There was still, though, I
13 should say, something on the order of \$750,000 in
14 reimbursable expenses that had to be advanced. It is
15 worth pointing out that one factor that Judge Shoob took
16 into account in giving an enhancement here was the delay
17 in pavement. That is a permissible factor under
18 Missouri v. Jenkins and even if you use current rates
19 that doesn't do anything to compensate you for the delay
20 in reimbursement.

21 CHIEF JUSTICE ROBERTS: Well, I think it
22 does. I think rates are set with -- based on a law
23 firm's record of -- I mean, just because you bill a
24 client doesn't mean that they are going to pay or that
25 they are going to pay at what you billed them. And I

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1 think the rates are set to take into account that over
2 the past year, whatever, you have the realization rate
3 of -- whatever, 80 percent or 85 percent.

4 MR. CLEMENT: Oh, I am just making a narrow
5 point, Mr. Chief Justice, which is the current rates
6 don't take into account the fact that there was a delay
7 in repayment for reimbursable expenses. Some of these
8 expenses were paid out four years ago, I mean at the
9 time of fee calculation. You don't get sort of, you
10 know, today's copying expenses or today's Fed Ex
11 expenses. You get the expenses at the time you did
12 them, and you don't get any prejudgment interest on
13 that. So that is one thing Judge Shoob thought ought to
14 be compensated here.

15 Again, that is one factor that makes this
16 exceptional. Another factor is that this was an
17 entrenched problem that they were dealing with. In 1989
18 the foster care child system in Georgia was described as
19 a crisis; by 1986 it had been upgraded to a catastrophe.
20 This is a very difficult problem.

21 The last thing is the scope of the relief,
22 which really is I think very broad here and that's what
23 Judge Shoob was recognizing. And as I said earlier, I
24 do think in an era of coupon settlements, a judge is
25 entitled to look at a case like this and say this is

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1 really a remarkable result that has been achieved here,
2 and the normal rates, normal prevailing market rates
3 don't compensate for this kind of result.

4 So I do think there are things that the
5 Court could point to in this case or in other cases to
6 try to cabin that discretion. I do think, though, that
7 discretion is an inherent feature of this statutory
8 regime and this Court has tolerated a degree of
9 discretion in a variety of contexts including with
10 respect in the area of downward departures.

11 I do want to get, before I sit down, this
12 point about getting the incentives right, because one
13 thing that Congress was clearly very concerned about was
14 getting the incentive rights for counsel. And if you
15 accept Petitioner's position that the lodestar is a
16 ceiling and not something that is subject to adjustment
17 up or down, then what you are telling lawyers is the
18 that the maximum amount they can make in a civil rights
19 case is the minimum amount they can make in a different
20 case, where by the way they will get paid every 30 days
21 and their expenses will get reimbursed in real time.

22 Then you are also telling them something
23 else, which is, that's actually just the starter because
24 there are multiple ways for district courts to cut down
25 on the lodestar amount, either because you spent too

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1 much time on this or we didn't like your travel
2 expenditures. And so there are multiple ways for those
3 hours to be cut down.

4 If you accept Petitioner's rule and there is
5 no way to get those rates bumped up in any circumstances
6 then you are basically guaranteeing that as I say the
7 maximum you can make in a civil rights is the minimum
8 you can make in any other kind of case.

9 CHIEF JUSTICE ROBERTS: Well, but there --
10 general counsel do that all the time when they get a
11 bill from a law firm. They cut it down. They say you
12 spent too much time with this associate only because he
13 or she is a first year associate and is learning the
14 training; I'm not going to pay for that.

15 MR. CLEMENT: Two things.

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

19 MR. CLEMENT: Two things, Mr. Chief Justice,
20 one it's the law of the Eleventh Circuit and every
21 circuit that before submitting your fees to the court
22 you are supposed to use billing judgment to take care of
23 some of those things, approximating maybe what your
24 client would do for you. But second, and I think more
25 tellingly, the client may do that to you. The client

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1 doesn't have the help of your opposing counsel to egg
2 them on and give them suggestions, and that's what a
3 district court does in the context of one of these
4 cases.

5 So I really think as a practical matter you
6 are systematically undercompensating counsel. And I
7 mean, if you want to take into account practicalities, I
8 am not here to reargue the Dague case, but if you want
9 to talk about practicalities the fact that all of these
10 cases are contingency cases and the rational market for
11 those would be much higher than -- if you are worried
12 about sort of windfalls for plaintiffs's counsel in
13 these kind of cases, you really can worry about
14 something else, with all due respect, because the
15 combined effect of Dague and Casey makes it very
16 difficult to sort of get comparable compensation.

17 As I say, I am not here to reargue these
18 cases. I do think frankly, Dague, is distinguishable
19 because there, you had the prevailing party language.
20 The other thing about Dague that is distinguishable that
21 I will say before I sit down is one of this Court's
22 concerns in Dague was creating an asymmetry. Blanchard
23 had already said that contingency fees could not cap
24 your awards; they didn't want to have an asymmetrical
25 system. That's exactly what Petitioners are asking you

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1 for, is a completely asymmetrical system. Farrar v.
2 Hovey you can reduce downwards based on exceptionally
3 poor results. There would be no basis whatsoever to
4 even adjust a little bit under their rule for
5 exceptional results on the upside.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you Mr.
8 Clement.

9 Mr. Cohen, you have four minutes.

10 REBUTTAL ARGUMENT OF MARK H. COHEN

11 ON BEHALF OF THE PETITIONERS

12 MR. COHEN: Than you, Your Honor.

13 I would like to start out with the little
14 joke that Mr. Clement made, is that you get what you pay
15 for? You do get what you pay for, is -- because I am
16 getting paid half my hourly rate in this case means I
17 half of what I would do for another client who would pay
18 my full rate? No. Because my professional
19 responsibility is that when I am hired by a client for
20 an hourly rate I am supposed to represent that client
21 zealously within the bounds of the law.

22 So to say that in a case like this that
23 these lawyers would have done a different type of job
24 had they not known there was a possibility of a quality
25 enhancement is an insult, frankly, to Ms. Lowery and her

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1 group, because they do this all the time. They do it
2 without getting an enhancement; they never asked for one
3 before. And clearly if this Court determines that a
4 quality enhancement is going to be available even in
5 rare or exceptional circumstances, you are going to have
6 arbitrary results and you are going to have
7 inconsistency which the analytical part of the lodestar
8 guards against.

9 Second point I would make is that Mr.
10 Clement mentioned about the New York rates and the
11 overhead. That was not the rationale for the district
12 court's awarding a quality or an enhancement here. That
13 was not part of it at all.

14 Getting back to what the Court has
15 mentioned: "The best lawyer I have ever seen." Look at
16 what the purpose of this fee-shifting statute is. It's
17 to attract competent counsel by awarding them a
18 reasonable fee. What attorney is going -- who wouldn't
19 normally take a civil rights case is going to say:
20 Maybe I will take it, because maybe the judge will say
21 I'm the best he's ever seen or one of the best I've ever
22 seen? It's not a rational reason to give out there to
23 attract competent counsel. Counsel are going to take a
24 civil rights case because they know if they prevail they
25 are going to get their prevailing market rate, they are

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1 going to get all their hours, their reasonable number of
2 hours, put in. In this case, it was 25,000 hours over a
3 three-year period. And they got their reasonable rates.

4 The judge also double-counted for quality
5 because Ms. Lowry got a \$495 rate in part because of
6 her, quote, "stellar performance," as the district judge
7 decided. So to count that again by giving an
8 enhancement is impermissible double-counting, as this
9 Court has held in previous cases, including Delaware
10 Valley.

11 Finally, I would say that the district
12 judge's order in this case, if left undisturbed, will
13 create additional applications for enhancements and
14 whether they are granted or not, as Justice O'Connor
15 pointed out in the Delaware Valley II case in her
16 concurrence, it's not the issue of the rarity of the
17 granting of the enhancement. The issue is the
18 requesting of it. And the requests are going to come
19 out the wazoo, and district courts are going to be
20 deciding things arbitrarily and on different bases.

21 And for those reasons, we would respectfully
22 urge this Court to reverse.

23 JUSTICE STEVENS: May I ask this final
24 question? We have a question of law before us, whether
25 there is an absolute ceiling here.

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1 Am I justified in assuming that if we could
2 reach the question of whether it was a reasonable
3 enhancement, there is no argument about that?

4 MR. COHEN: I'm sorry, Your Honor, if you
5 determine that the enhancement was --

6 JUSTICE STEVENS: We are assuming for
7 purposes of decision that the enhancement was
8 reasonable, if that was -- if it's ever available,
9 because you are not challenging the amount. In other
10 words, you are making an argument of law. Even if they
11 give them a \$10 enhancement it would be exactly the same
12 issue before us.

13 MR. COHEN: We are arguing that the
14 enhancement in this case was unreasonable, Your Honor,
15 and --

16 JUSTICE STEVENS: That is not the question
17 presented in the cert petition.

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

19 JUSTICE STEVENS: If I understand it, the
20 question of law presented is that even if the
21 enhancement had only been \$1,000, you would say that was
22 equally wrong.

23 MR. COHEN: That's correct. For quality or
24 result. For those two factors.

25 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

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1 The case is submitted.

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

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