SUPREME COURT OF THE UNITED STATES

No. 08–970

SONNY PERDUE, GOVERNOR OF GEORGIA, ET AL., PETITIONERS *v.* KENNY A., BY HIS NEXT FRIEND LINDA WINN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 21, 2010]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join, concurring in part and dissenting in part.

We granted certiorari in this case to consider "whether the calculation of an attorney's fee" that is "based on the 'lodestar,'" *ante,* at 1 (opinion of the Court), can "*ever* be enhanced based solely on [the] quality of [the lawyers'] performance and [the] results obtained," Pet. for Cert. i (emphasis added). The Court answers that question in the affirmative. See *ante,* at 1 ("We have stated in previous cases that such an increase is permitted in extraordinary circumstances, and we reaffirm that rule"); see also *ante,* p. ___ (KENNEDY, J., concurring). As our prior precedents make clear, the lodestar calculation "does not end the [fee] inquiry" because there "remain other considerations that may lead the district court to adjust the fee upward." *Hensley* v. *Eckerhart*, 461 U. S. 424, 434 (1983). For that reason, "[t]he lodestar method was never intended to be conclusive in all circumstances." *Ante,* at 9. Instead, as the Court today reaffirms, when "superior attorney performance," *ibid.*, leads to "exceptional success an enhanced award may be justified," *Hensley supra,* at 435*;* see also *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 565 (1986); *Blum* v. *Stenson*, 465

U. S. 886, 896–900 (1984). I agree with that conclusion.

Where the majority and I part ways is with respect to a question that is not presented, but that the Court obliquely, and in my view inappropriately, appears to consider nonetheless—namely, whether the lower courts correctly determined *in this case* that exceptional circumstances justify a lodestar enhancement. See Parts IV–V, *ante;* see also *ante,* p. ___ (KENNEDY, J., concurring). I would not reach that issue, which lies beyond the narrow question that we agreed to consider. See 556 U. S. __ (2009) (limiting review to the first question presented); Pet. for Cert. i (stating question); see also *Glover* v. *United States*, 531 U. S. 198, 205 (2001) ("As a general rule . . . we do not decide issues outside the questions presented . . ."). Nor do I believe that this Court, which is twice removed from the litigation underlying the fee determination, is properly suited to resolve the fact-intensive inquiry that 42 U. S. C. §1988 demands. But even were I to engage in that inquiry, I would hold that the District Court did not abuse its discretion in awarding an enhancement. And I would therefore affirm the judgment of the Court of Appeals.

As the Court explains, the basic question that must be resolved when considering an enhancement to the lodestar is whether the lodestar calculation "adequately measure[s]" an attorney's "value," as "demonstrated" by his performance "during the litigation." *Ante,* at 10. While I understand the need for answering that question through the application of standards, I also believe that the answer inevitably involves an element of judgment. Moreover, when reviewing a district court's answer to that question, an appellate court must inevitably give weight to the fact that a district court is better situated to provide that answer. For it is the district judge, and only the district judge, who will have read all of the motions filed in the

case, witnessed the proceedings, and been able to evaluate the attorneys' overall performance in light of the objectives, context, legal difficulty, and practical obstacles present in the case. In a word, the district judge will have observed the attorney's true "value, *as demonstrated . . . during the litigation*." *Ibid.* (emphasis added). By contrast, a court of appeals, faced with a cold and perhaps lengthy record, will inevitably have less time and opportunity to determine whether the lawyers have done an exceptionally fine job. And this Court is yet less suited to performing that inquiry. Accordingly, determining whether a fee enhancement is warranted in a given case "is a matter that is committed to the sound discretion of a trial judge," *ante,* at 13, and the function of appellate courts is to review that judge's determination for an abuse of such discretion. See *Pierce* v. *Underwood*, 487 U. S. 552, 571 (1988); see also *General Elec. Co.* v. *Joiner*, 522 U. S. 136, 143 (1997) ("[D]eference . . . is the hallmark of abuse-of-discretion review").

This case well illustrates why our tiered and functionally specialized judicial system places the task of determining an attorney's fee award primarily in the district court's hands. The plaintiffs' lawyers spent eight years investigating the underlying facts, developing the initial complaint, conducting court proceedings, and working out final relief. The District Court's docket, with over 600 entries, consists of more than 18,000 pages. Transcripts of hearings and depositions, along with other documents, have produced a record that fills 20 large boxes. Neither we, nor an appellate panel, can easily read that entire record. Nor should we attempt to second-guess a district judge who is aware of the many intangible matters that the written page cannot reflect.

My own review of this expansive record cannot possibly be exhaustive. But those portions of the record I have reviewed lead me to conclude, like the Court of Appeals,

that the District Judge did not abuse his discretion when awarding an enhanced fee. I reach this conclusion based on four considerations.

First, the record indicates that the lawyers' objective in this case was unusually important and fully consistent with the central objectives of the basic federal civil-rights statute, 42 U. S. C. §1983. Moreover, the problem the attorneys faced demanded an exceptionally high degree of skill and effort. Specifically, these lawyers and their clients sought to have the State of Georgia reform its entire foster-care system—a system that much in the record describes as well below the level of minimal constitutional acceptability. The record contains investigative reports, mostly prepared by Georgia's own Office of the Child Advocate, which show, for example, the following:

- The State's foster-care system was unable to provide essential medical and mental health services; children consequently and unnecessarily suffered illness and life long medical disabilities, such as permanent hearing loss, due to failures on the part of the State to administer basic care and antibiotics. See, *e.g.,* Doc. 3, Exh. 3C, pp. 11–13.
- Understaffing and improper staffing placed children in the care of individuals with dangerous criminal records; children were physically assaulted by the staff, locked outside of the shelters at night as punishment, and abused in other ways. See, *e.g.,* Doc. 50, pp. 32–36, 55; Doc. 3, Exh. 3A, pp. 2–6; Doc. 3, Exh. 2, pp. 4–5; Doc. 52, Exh. 1, pp. 6, 12–15, 34.
- The shelters themselves were "unsanitary and dilapidated," "unclean," infested with rats, "overcrowded," unsafe, and "'out of control.'" See, *e.g.,* Doc. 3, Exh. 3A, at 1–2; Doc. 3, Exh. 3B, p. 2; Doc. 50, at 29.
- Due to improper supervision and other deficiencies at the shelters, 20% of the children abused drugs; some

also became victims of child prostitution. See *id.,* at 39; Doc. 3, Exh. 3A, at 3.

- Systemic failures also caused vulnerable children to suffer regular beatings and sexual abuse, including rape, at the hands of more aggressive shelter residents. See, *e.g.,* Doc. 50, at 18–22, 54–55; Doc. 52, Exh. 1, at 7–10, 26; Doc. 3, Exh. 3B, at 3 ("[A child] was beaten so badly by eight other [children] that he suffered severe internal bleeding"); *id.,* at 4 (describing violent sexual assault and rape).
- Not surprisingly, many children—upwards of 5 per day and over 750 per year—tried to escape these conditions; others tried to commit suicide. See, *e.g.,* Doc. 50, at 27–28, 54; Doc. 52, Exh. 18, p. 4 (under seal) (at least 25% of children run away from shelters); Doc. 52, Exh. 18E, pp. 1–11, 18–19 (under seal) (daily logs); see also Doc. 50, Exh. 1, at 37, 54 (describing suicide attempts) (all docket entries above and hereinafter refer to No. 1:02–cv–1686 (ND Ga.) (case below)).

The State's Office of the Child Advocate, whose reports provide much of the basis for the foregoing description, concluded that the system was "operating in crisis mode" and that any private operator who ran such a system "would never be licensed to care for children." Office of the Child Advocate for the Protection of Children Ann. Rep. 10, 14 (2001), Record, Doc. 3, Exh. 3C (hereinafter OCA 2001 Report); accord, *id.,* Exh. 3A, at 1. The advocate noted that neither her investigative reports nor national news publicity (including a television program that highlighted a 5-year-old foster child's death from beatings) had prompted corrective action by the State. OCA 2001 Report 1, 14.

The advocate further stated that litigation was necessary to force reform. *Id.,* at 14–15. And she repeatedly asked the State to give her office the authority to conduct

that litigation. See Office of the Child Advocate Advisory Committee, Ann. Effectiveness Rep. 4 (2002), online at http://www.georgia.gov/vgn/images/portal/cit_1210/7/22/84622967effectiveness2003.pdf (all Internet materials as visited Apr. 16, 2010, and available in Clerk of Court's case file) ("[F]or the Office to be truly effective, it must possess the authority to compel change [and] . . . to initiate litigation on behalf of children. Such authority is widely considered by other states' Child Advocates as crucial to effecting meaningful change for children"); Office of the Child Advocate Advisory Committee, Ann. Effectiveness Rep. 13 (2003–2004) (same), online at http://gachildadvocate.org/vgn/images/portal/cit_1210/48/16/84624761OCA_Effectiveness_Report2003_2004.doc; Office of the Child Advocate Advisory Committee, Ann. Effectiveness Rep. 11 (2004–2005) (same), online at http://www.georgia.gov/vgn/images/portal/cit_1210/31/23/102387685OCA%20Effectiveness%20Report%202004-2005.doc. But the State did not grant the Child Advocate's office the litigating authority she sought. See 2000 Ga. Laws p. 245, as codified, Ga. Code Ann. §15–11–173 (2008).

The upshot is that the plaintiffs' attorneys did what the child advocate could not do: They initiated this lawsuit. They thereby assumed the role of "a 'private attorney general'" by filling an enforcement void in the State's own legal system, a function "that Congress considered of the highest priority," *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968) *(per curiam)*, and "meant to promote in enacting §1988," *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782, 793 (1989).

Second, the course of the lawsuit was lengthy and arduous. The plaintiffs and their lawyers began with factual investigations beyond those which the child advocate had already conducted. See, *e.g.,* Record, Docs. 50–52 (partially under seal). They then filed suit. And the State met

the plaintiffs' efforts with a host of complex procedural, as well as substantive, objections. The State, for example, argued that the law forbade the plaintiffs to investigate the shelters; on the eve of a state-court decision that might have approved the investigations, the State then removed the case to federal court; the State then sought protective orders preventing the attorneys from speaking to the shelters' staff; and, after losing its motions, the State delayed to the point where the District Court "was forced to admonish [the] State Defendants for 'relying on technical legal objections to discovery requests in order to delay and hinder the discovery process.'" 454 F. Supp. 2d. 1260, 1268 (ND Ga. 2006) (quoting Record, Doc. 145, p. 4). See also Doc. 1; Doc. 3, pp. 9–10; Docs. 26, 28–29, 44, 60.

In the meantime, the State moved for dismissal, basing the motion on complex legal doctrines such as *Younger* abstention and the *Rooker-Feldman* doctrine, which the District Court found inapplicable. 218 F. R. D. 277, 284–290 (ND Ga. 2003). See *Younger* v. *Harris,* 401 U. S. 37 (1971); *Rooker* v. *Fidelity Trust Co.,* 263 U. S. 413 (1923), and *District of Columbia Court of Appeals* v. *Feldman,* 460 U. S. 462 (1983). The State also opposed the petitioners' request to certify a class of the 3,000 children in foster care, but the District Court again rejected the State's argument. 218 F. R. D., at 299–302. And, after that, the State filed a lengthy motion for summary judgment, Record, Docs. 243–245, which plaintiffs' attorneys opposed in thorough briefing supported by comprehensive exhibits, see Docs. 254–258, 260. After losing that motion and eventually agreeing to mediation, the State forced protracted litigation as to who should be the mediator. See Docs. 363–364, 366, 369–370, 373, 376, 380. All told, in opposing the plaintiffs' efforts to have the foster-care system reformed, the State spent $2.4 million on outside counsel (who, because they charge the State reduced rates, worked significantly more hours than that figure alone

indicates) and tapped its own law department for an additional 5,200 hours of work. 454 F. Supp. 2d, at 1287.

Third, in the face of this opposition, the results obtained by the plaintiffs' attorneys appear to have been exceptional. The 47-page consent decree negotiated over the course of the mediation sets forth 31 specific steps that the State will take in order to address the specific deficiencies of the sort that I described above. See *id.,* at 1289; see also App. 92–207 (consent decree). And it establishes a reporting and oversight mechanism that is backed up by the District Court's enforcement authority. See 454 F. Supp. 2d, at 1289. As a result of the decree, the State agreed to comprehensive reforms of its foster-care system, to the benefit of children in many different communities. And informed observers have described the decree as having brought about significant positive results. See, *e.g.,* Record, Doc. 632, p. 4 (most recent court-appointed overseers' report) ("The State's overall performance . . . continues the trend of steady improvement . . ."); *id.,* at 4–10 (detailing substantial health, safety, and welfare improvements); see also, Office of the Child Advocate Ann. Report (2008), Letter from Tom C. Rawlings, Child Advocate, to Sonny Perdue, Governor of Georgia (Jan. 16, 2009), online at http://oca.georgia.gov/vgn/images/portal/cit_1210/48/0/131408008OCA%202008%20Annual%20Report.pdf ("[W]e are generally pleased with the direction of our state's child welfare system . . ."); cf. Weinstein & Weinstein, Before It's Too Late: Neuropsychological Consequences of Child Neglect and their Implications for Law and Social Policy, 33 U. Mich. J. L. Reform 561, 590–591 (2000) (describing in general the broad social impact of dysfunctional child-welfare systems (quoting National Institute of Health, Research on Child Neglect (1999), online at http://grants.nih.gov/grants/guide/rfa-files/RFA-OD-99-06.html)). But see Record, Doc. 632, at 10–13 (noting areas in which Georgia's system still needs improvement).

Fourth and finally, the District Judge, who supervised these proceedings, who saw the plaintiffs amass, process, compile, and convincingly present vast amounts of factual information, who witnessed their defeat of numerous state procedural and substantive motions, and who was in a position to evaluate the ultimate mediation effort, said:

1. the "mediation effort in this case went far beyond anything that this Court has seen in any previous case," 454 F. Supp. 2d, at 1282;
2. "based on its personal observation of plaintiffs' counsel's performance throughout this litigation, the Court finds that . . . counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench," *id.,* at 1288–1290;
3. the Consent Decree "provided extraordinary benefits to the plaintiff class . . . ." *Id.,* at 1282. "[T]he settlement achieved by plaintiffs' counsel is comprehensive in its scope and detailed in its coverage. . . . After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale," *id.,* at 1289–1290.

Based on these observations and on its assessment of the attorneys' performance during the course of the litigation, the District Court concluded that "the evidence establishes that the quality of service rendered by class counsel . . . was far superior to what consumers of legal services in the legal marketplace . . . could reasonably expect to receive for the rates used in the lodestar calculation." *Id.,* at 1288.

On the basis of what I have read, I believe that assessment was correct. I recognize that the ordinary lodestar calculation yields a large fee award. But by my assess-

ment, the lodestar calculation in this case translates to an average hourly fee per attorney of $249. See *id.,* at 1287 (lodestar calculation and attorney hours). (The majority's reference to an hourly fee of $866, *ante,* at 12, refers to the rate associated with the *single highest* paid of the 17 attorneys under the *enhanced* fee, not the *average* hourly rate under the *lodestar*. The lay reader should also bear in mind that a lawyer's "fee" is substantially greater than his "profit," given that attorneys must sometimes cover case-specific costs (which in this case exceeded $800,000, see 454 F. Supp. 2d, at 1291) and also must cover routine overhead expenses, which typically consume 40% of their fees, see Altman Weil Publications, Inc., Survey of Law Firm Economics 30 (2007 ed.)).

At $249 per hour, the lodestar would compensate this group of attorneys—whom the District Court described as extraordinary—at a rate *lower* than the *average* rate charged by attorneys practicing law in the State of Georgia, where the average hourly rate is $268. See *id.,* at 89. Accordingly, even the majority would seem to acknowledge that some form of an enhancement is appropriate in this case. See *ante,* at 10 ("[A]n enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation"). Indeed, the fact that these exceptional results were achieved in a case where "much of the work," *ante,* at 13, n. 7, was performed by relatively inexperienced attorneys (who, accordingly, would be compensated by the lodestar "below the market average," *ibid.*) is all the more reason to think that their service rendered their outstanding performance worthy of an enhancement. By comparison, the District Court's enhanced award—a special one-time adjustment unique to this exceptional case—would compensate these attorneys, on this one occasion, at an average hourly rate of $435,

which is comparable to the rates charged by the Nation's leading law firms on average on every occasion. See Firm-by-Firm Sampling of Billing Rates Nationwide, National Law Journal, Dec. 11, 2006, p. S2 (listing 13 firms at which average hourly rate is between $400 and $510); J. Barnett, Certification Drag: The Opinion Puzzle and Other Transactional Curiosities, 33 Iowa J. Corp. L. 95, 110, n. 58 (2007) ("These numbers are probably an underestimate given that many of the highest-billing national law firms decline to take part in the National Law Journal Survey"). Thus, it would appear that the enhanced award is wholly consistent with the purpose of §1988, which was enacted to ensure that "counsel for prevailing parties [are] paid as is traditional with attorneys compensated by a fee-paying client." S. Rep. No. 94–1011, p. 6 (1976); see H. R. Rep. No. 94–1558, p. 9 (1976) ("[C]ivil rights plaintiffs should not be singled out for different and less favorable treatment"); see also *Blum,* 465 U. S., at 893, 897.

In any event, the circumstances I have listed likely make this a "rare" or "exceptional" case warranting an enhanced fee award. And they certainly make clear that it was neither unreasonable nor an abuse of discretion for the District Court to reach that conclusion. Indeed, if the facts and circumstances that I have described are even roughly correct, then it is fair to ask: If this is not an exceptional case, what is?

* * *

My disagreement with the Court is limited. As I stated at the outset, we are in complete agreement with respect to the answer to the question presented: "[A]n increase" to the lodestar "due to superior performance and results" "is permitted in extraordinary circumstances." *Ante,* at 1. Unlike JUSTICE THOMAS, I do not read the Court's opinion to "advance our attorney's fees jurisprudence further along the decisional arc" toward a point where enhancements

are "virtually" barred in all cases. *Ante,* at 2 (concurring opinion). Our prior cases make clear that enhancements are permitted in "'exceptional' cases," *Delaware Valley,* 478 U. S., at 565, where the attorney achieves "exceptional success," *Hensley,* 461 U. S., at 435; see also *Blum,* 465 U. S., at 896–901. By definition, such exceptional circumstances occur only rarely. See *ante,* p. ___ (KENNEDY, J., concurring). I do not see how the Court could "advance" our fee enhancement jurisprudence so as to further discourage lodestar enhancements without overruling the precedents I have just cited, which the Court has not done. To the contrary, today the Court "reaffirm[s]" those precedents, which allow enhancements for exceptional performance. *Ante,* at 1. And with respect to that central holding we are unanimous.

Nor is my disagreement with the Court absolute with respect to the proper resolution of the case before us, for the Court does not purport to prohibit the District Court from awarding an enhanced fee on remand if that court provides more detailed reasoning supporting its decision. *Ante*, at 12; cf. Tr. of Oral Arg. 47. But the majority and I do disagree in this respect: I would not disturb the judgment below. "A request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U. S., at 437. Nor should it lead to years of protracted appellate review. See *id.,* at 455–456 (Brennan, J., concurring in part and dissenting in part). We did not grant certiorari in this case to consider the fact-intensive dispute over whether this is, in fact, an exceptional case that merits a lodestar enhancement. The District Court has already resolved that question and the Court of Appeals affirmed its judgment, having found no abuse of discretion. I would have been content to resolve no more than the question presented. But, even were I to follow the Court's inclination to say more, I would hold that the principles upon which we agree—including the applicability of abuse-of-

discretion review to a District Court's fee determination—require us to affirm the judgment below.