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Perdue v. Kenny A.130 S. Ct. 1662 (2010)

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Ohio Northern University
Law Review

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Perdue v. Kenny A.
130 S. Ct. 1662 (2010)

I. INTRODUCTION

Perdue v. Kenny A.[1] presented the Supreme Court of the United States with the issue of whether lodestar calculations of attorney's fees under federal fee-shifting statutes could be enhanced due to superior performance by counsel or positive litigation results.[2] Relying on principles derived from prior Supreme Court decisions, the majority concluded that an enhancement of attorney's fees above a lodestar calculation is permitted under rare circumstances for superior performance, but never for results.[3] The Court reversed and remanded the appellate court's decision, holding that although a fee increase is permitted for performance—which was a reason for allowing an enhancement in this case—the district court abused its discretion by increasing the award without applying the appropriate standards required to justify an enhancement.[4] This decision will likely create problems in the future for individuals who wish to utilize the monetary benefits of fee-shifting statutes. Attorneys may refuse representation or provide subpar legal assistance knowing that the chances of obtaining an enhancement based on quality performance will be unlikely and that the results they achieve will always be an irrelevant basis for added compensation.

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1. 130 S. Ct. 1662 (2010).
2. A "lodestar" figure is calculated by multiplying the number of hours the attorneys and their employees worked by the hourly rates prevailing in the community. *Id*. at 1666-67, 1669.
3. *Id.* at 1673-74. *See generally* Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, 465 U.S. 886 (1984).
4. *Perdue*, 130 S. Ct. at 1675-77.

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II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

Congress enacted 42 U.S.C. § 1988 as an exception to the general rule requiring litigating parties to pay their own attorney's fees and expenses.[5] Under § 1988, a prevailing party in a civil rights action can recover "a reasonable attorney's fee as part of the costs."[6] Since § 1988 did not define the term "reasonable," the lodestar method was developed by the judicial system and deemed to be the most efficient way to calculate attorney's fees under the statute.[7]

The Respondents initiated a civil rights suit falling under the requirements of § 1988.[8] The Respondents represented 3,000 children in the Georgia foster-care system and their next friends who filed a class action against the Petitioners, the Governor of Georgia, and other state officials.[9] The Respondents claimed that the foster-care system in two Georgia counties operated in violation of state and federal laws.[10] The United States District Court for the Northern District of Georgia sent the case to mediation where the parties negotiated a consent decree that resolved all relevant issues but failed to include any agreement pertaining to attorney's fees recoverable under § 1988.[11]

Following the district court's approval of the consent decree, Respondents requested over $14 million in attorney's fees of which half was determined by a lodestar calculation, while the remainder represented a fee enhancement for superior work and results.[12] The Petitioners objected to the enhancement and the district court reviewed the Respondent's request, reduced the lodestar amount because of some unclear billing entries, and then enhanced the remaining amount by seventy-five percent, which produced a total award of approximately $10.5 million.[13]

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5. *Id.* at 1671 (citing *Hensley*, 461 U.S. at 429).
6. Section 1988(b) states:

In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 40302 of the Violence Against Women Act of 1994, , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[.]
42 U.S.C § 1988(b) (2010) (citations omitted).

7. *Perdue*, 130 S. Ct. at 1671-72 (Stating that "[t]he 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence." (citing City of Burlington v. Dague, 505 U.S. 557, 562 (1992))).
8. *Id.* at 1669-70.
9. *Id.* at 1669.
10. *Id.* at 1669-70.
11. *Id.*
12. *Perdue*, 130 S. Ct. at 1670.
13. *Id.* at 1670.

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision based on circuit precedent, which held that "superior results coupled with superior performance can be the basis for an enhancement of the lodestar amount."[14] The court's opinion reflected a slight aversion toward this precedent, but stated: "we are not permitted to reach a result contrary to a prior panel's decision merely because we are convinced it is wrong[.]"[15] Subsequently, the court denied en banc review and the Supreme Court of the United States granted the State of Georgia's petition for certiorari.[16]

III. THE COURT'S DECISION AND RATIONALE

A. The Majority Opinion

Justice Alito, writing for the majority, first addressed the legitimacy of the lodestar method for calculating attorney's fees under statutes such as § 1988.[17] The majority acknowledged that the lodestar approach was not without flaws, but confirmed that such a method was an objective way to calculate fees that would be comparable to what an attorney, who bills by the hour, would earn in a similar case. [18] These characteristics allow for effective judicial review.[19]

After affirming the lodestar approach, the majority listed six rules that the Court used as guidance to make its decision.[20] First, a reasonable fee is one that does not produce an unnecessary monetary windfall, but does adequately compensate the attorney.[21] Second, the lodestar method is presumed to be the most sufficient way to calculate a reasonable fee as described in the first rule.[22] Third, an enhancement of the lodestar amount is permitted, but only under "rare" and "exceptional" circumstances.[23] Fourth, the lodestar method incorporates the most necessary elements

14. *Kenny A. v. Perdue*, 532 F.3d 1209, 1238 (11th Cir. 2008) (citing NAACP v. Allen, 340 F. Supp. 2d 703 (M.D. Ala. 1972); *see generally* Norman v. Housing Authority of Montgomery, 836 F.2d 1292 (11th Cir. 1988)).

15. *Kenny A.*, 532 F.3d at 1238 (quoting Hurth v. Mitchem, 400 F.3d 857, 862 (11th Cir. 2005)).

16. *Perdue*, 130 S. Ct. at 1671.

17. *Id.* at 1672.

18. *Id.*

19. *Id.*

20. *Id.* at 1672-73.

21. *Perdue*, 130 S. Ct. at 1672-73 (citing Pennsylvania v. Del. Valley Citizens' Counsel for Clean Air, 478 U.S. 546, 565 (1986); *Blum*, v. Stenson, 465 U.S. 886, 897 (1984)).

22. *Id*. at 1673 (citing City of Burlington v. *Dague*, 505 U.S. 557, 562 (1992); *Del. Valley I*, 478 U.S. at 565; *Blum*, 465 U.S. at 899).

23. *Id*. (citing *Del. Valley I*, 478 U.S. at 565; *Blum*, 465 U.S. at 897; *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)).

needed to calculate a reasonable attorney's fee and an enhancement should not be based on any factor already reflected by the lodestar method.[24] Fifth, the party requesting a fee enhancement has the burden of proving its necessity.[25] Sixth, the requesting party must provide specific evidence substantiating why the enhancement should be granted.[26]

Next, the majority addressed the specific question of whether a trial judge could grant an enhancement based on superior work by counsel or positive litigation results.[27] The majority reasoned that the successful results of a case could potentially be the result of multiple factors unrelated to any act or work done by the prevailing attorney, such as a sympathetic jury, poor opposing counsel, or luck.[28] The majority concluded that there could be no concrete way to prove that the successful results were directly and solely attributable to the attorney.[29] Therefore, the Court prohibited enhancements based on successful results and the focus shifted to whether superior performance alone could justify an enhancement.[30]

The majority acknowledged that there could be "rare" and "exceptional" circumstances when superior attorney performance would not be incorporated within the lodestar calculation.[31] Under such a circumstance, the enhancement must be accompanied by "specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel.'"[32] The majority provided three specific examples of when an enhancement might be appropriate for performance: (1) when "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;" (2) if the attorney had to expend an "extraordinary outlay of expenses and the litigation [was] exceptionally protracted;" or (3) if there was an "exceptional delay in the payment of fees."[33] An enhancement award under any of those circumstances must also be supported with "specific proof linking the attorney's ability to a prevailing market rate" for the purpose of ensuring that the enhancement would be reviewable on appeal.[34] The majority rejected any argument for

24. *Id*. (citing *Del. Valley I*, 478 U.S. at 566; *Dague*, 505 U.S. at 562-63).
25. *Id*. (citing *Dague*, 505 U.S. at 561; *Blum*, 465 U.S. at 901-02).
26. *Perdue*, 130 S. Ct. at 1673 (citing *Blum*, 465 U.S. at 899).
27. *Id*. at 1674-75.
28. *Id*. at 1674.
29. *Id*.
30. *Id*.
31. *Perdue*, 130 S. Ct. at 1674 (quoting *Blum*, 465 U.S. at 897).
32. *Id*. (quoting *Blum*, 465 U.S. at 897).
33. *Id*. at 1674-75.
34. *Id*. at 1674.

an enhancement based on the suggestion that attorneys have recently deviated from the practice of hourly billing or because attorneys sometimes accept reduced hourly rates for the chance to receive bonuses after litigation.[35]

The majority concluded the opinion with an analysis of whether the case at hand met the aforementioned criteria for an enhancement based on superior performance.[36] The Court held that the lodestar award was arbitrarily enhanced by seventy-five percent because the trial judge failed to provide any relevant market rates or figures to justify such an increase.[37] Although the trial judge reasoned that the enhancement was due to the attorney's "extraordinary outlays for expenses" and great delays in payments—which were two reasons the majority accepted as a basis for an enhancement—the district court failed to calculate the amounts attributable to those specific factors.[38] The majority also noted that the enhancement increased the attorney's rate to more than $866 per hour, which was also unsubstantiated by any prevailing market rate.[39]

The Supreme Court further disagreed with the district court's subjective rationale for awarding the enhancement.[40] The trial judge stated that the "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its [twenty-seven] years on the bench."[41] The majority found that this reasoning was not only a deviation from the lodestar method, but a way to prevent any meaningful review on appeal.[42] The majority explained that because the district court did not "provide a reasonably specific explanation" for the enhancement, the district court abused its discretion.[43] In a 5-4 split, the Court reversed the judgment of the court of appeals and remanded the case for further proceedings.[44]

35. *Id*. at 1675; *see also* Brief for Law and Economics Scholars, et al. as Amici Curiae Supporting Respondents, at 7-11, Purdue v. Kenny A., 130 S. Ct. 1662 (2010) (No. 08-970) (noting that numerous law firms are replacing hourly billing with systems that recognize the quality of an attorney's performance.).

36. *Perdue*, 130 S. Ct. at 1675-77.

37. *Id*. at 1675-76.

38. *Id*.

39. *Id*. at 1676.

40. *Id*. at 1675-76.

41. *Kenny A. v. Perdue*, 532 F.3d 1209, 1228 (11th Cir. 2008).

42. *Perdue*, 130 S. Ct. at 1676.

43. *Id*.

44. *Id*. at 1677-78.

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B. Concurring Opinion by Justice Kennedy

In a brief concurring opinion, Justice Kennedy noted that attorneys and judges tend to find that the cases they are currently involved in or have just completed are the ones that they consider to be the most important or extraordinary cases of their career.[45] Justice Kennedy agreed that enhancements should be permitted, but only in rare circumstances that were not present in the case at hand.[46]

C. Concurring Opinion by Justice Thomas

Justice Thomas also provided a short concurring opinion. He referenced past Supreme Court cases holding that although enhancements are permitted, the circumstances that allow for them are extremely limited.[47] Justice Thomas further expressed his acceptance of the Court's decision by stating that "the lodestar calculation will in virtually every case already reflect all indicia of attorney performance relevant to a fee award."[48]

D. Concurring and Dissenting Opinion by Justice Breyer

Justice Breyer, joined by Justice Stevens, Justice Ginsburg, and Justice Sotomayor, concurred with the majority's conclusion that a lodestar calculation can be enhanced due to superior attorney performance.[49] Justice Breyer disagreed, however, with how the majority answered a question not before the Court, noting how the issue was a general inquiry of whether a lodestar calculation could be enhanced as a result of superior performance and not whether an enhancement was justified in this particular case.[50] In support of his dissent, Justice Breyer referenced *Glover v. United States*,[51] which stated: "As a general rule . . . we [the Supreme Court] do not decide issues outside the questions presented[.]"[52]

Justice Breyer further reasoned that a district court is in a better position than an appellate court to determine "whether the lodestar calculation 'adequately measure[s]' an attorney's 'value,' as 'demonstrated' by his performance 'during the litigation,'" which was a question that the majority

45. *Id.* at 1677 (Kennedy, J., concurring).
46. *Id.*
47. *Perdue*, 130 S. Ct. at 1677-78 (Thomas, J., concurring) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 431, 435 (1983); *Blum v. Stenson*, 465 U.S. 886, 897 (1984)).
48. *Id.* at 1678.
49. *Id.* (Breyer, J., concurring in part and dissenting in part).
50. *Id.*
51. 531 U.S. 198 (2001).
52. *Perdue*, 130 S. Ct. at 1678 (Breyer, J., concurring in part and dissenting in part) (quoting *Glover*, 531 U.S. at 205).

said must be answered when analyzing whether an enhancement is appropriate.[53] Justice Breyer explained that the reason a district court is given the discretion to review enhancements is attributed to the fact that a district judge reads the entire record and observes the entire case, which places that judge in the best position to make an enhancement determination.[54] Justice Breyer argued that an appellate court is far too removed from the case to "second-guess a district judge who is aware of the many intangible matters that the written page cannot reflect."[55]

Although Justice Breyer disagreed with the Court's decision to answer a question not presented, he included four reasons why the Court should have affirmed the judgment of the court of appeals.[56] First, Justice Breyer reasoned that the record undoubtedly reflected a problem that required an "exceptionally high degree of skill and effort"[57] in order to successfully repair a foster care system that was so inadequate that it was described as "operating in crisis mode."[58] Second, the litigation was unexpectedly prolonged and complicated by the state's failure to cooperate in the discovery process, the state's motion for dismissal and summary judgment—which were both unfounded—as well as other actions that unduly delayed the case.[59] Third, the results of the mediation were extraordinarily successful by producing wide-ranging reforms in the foster-care system.[60] Fourth, Justice Breyer referred to various statements by the district judge, illustrating the extraordinary work performed by plaintiff's counsel and the significance of the results, which were deemed to be far beyond what the lodestar method could calculate.[61]

The dissent further addressed the majority's belief that the enhancement would produce an hourly rate of $866 per hour.[62] Justice Breyer argued that this high rate was awarded to only one out of the seventeen attorneys involved in the case while the other attorneys would have earned a rate of approximately $249 per hour.[63] Furthermore, the Court failed to take into account the fact that hourly rates do not represent an attorney's profit since

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53. *Id.* at 1678-79 (quoting *id.* at 1674 (majority opinion)).
54. *Id.* at 1679.
55. *Id.*
56. *Id.* at 1679-83.
57. *Perdue,* 130 S. Ct. at 1679 (Breyer, J., concurring in part and dissenting in part).
58. *Id.* at 1680 (quoting 2001 OCA ANN. REP. 10) (internal quotation marks omitted),
59. *Id.* at 1681.
60. *Id.* at 1681-82.
61. *Id.* at 1682 (citing Kenny A. *ex rel* Winn v. Perdue, 454 F. Supp. 2d 1260, 1282, 1288-90 (N.D. Ga. 2006)).
62. *Perdue*, 130 S. Ct. at 1683 (Breyer, J., concurring in part and dissenting in part).
63. *Id.* at 1682-83.

a percentage goes toward litigation costs and overhead.[64] Justice Breyer noted that the average hourly rate in the State of Georgia was $268 and that the attorneys here were fairly inexperienced, which negatively impacted their lodestar award, making this case one of the "rare" or "exceptional" cases warranting an enhancement.[65]

IV. ANALYSIS

A. Introduction

Although the Supreme Court previously expressed a general aversion toward enhancements, *Perdue* further decreased the possibility for a prevailing attorney to acquire a fee increase, even when the appropriate standards appear to be met. The dissent properly criticized the Court's decision. The majority failed to adequately provide examples of when enhancements based on superior performance are appropriate, used contradictory factors for the calculation of an attorney's market value, and ignored the primary purpose of § 1988. Ultimately, the majority failed to answer the inquiry of when enhancements based on superior attorney performance can be awarded, leaving district courts without any solid direction and with less discretion. This analysis will explore how the decision in *Perdue* will most likely affect future civil rights cases under fee-shifting statutes in an extremely negative way.

B. Discussion

The majority set the stage for its analysis of whether attorney performance could justify an enhancement by stating: "we inquire [if] there are circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation."[66] The majority answered in the affirmative followed by a description of three specific scenarios when a fee enhancement is appropriate.[67] However, only the first scenario referred to an enhancement based on superior attorney performance, illustrating a complete disregard for their initial inquiry of whether there are circumstances, meaning more than one scenario, when an enhancement would be appropriate for attorney performance. This section of the opinion was not set up to discuss enhancements in general, but enhancements

64. *Id.* at 1683 (citing ALTMAN WEIL PUBLICATIONS, INC., SURVEY OF LAW FIRM ECONOMICS 30 (2007)).
65. *Id.*
66. *Id*. at 1674 (majority opinion).
67. *Perdue*, 130 S. Ct. at 1674-75.

specifically related to attorney performance. Therefore, the majority ignored their initial question, fluffed the opinion with scenarios unrelated to the issue at hand, and essentially eliminated the possibility of an enhancement based on attorney performance by massively limiting the trial court's discretion.[68]

The one relevant scenario the Court set forth stated that "an 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 litigation."[69] The majority provided only one example of when such a situation could occur and then placed a strict rule on trial judges to provide "specific proof linking the attorney's ability to a prevailing market rate."[70] This proof requirement contradicted and disregarded their example of when an enhancement based on attorney performance would be appropriate. The Court stated that an attorney's true market value is partly demonstrated during litigation, a subjective observation, followed by the requirement that an enhancement must be based on an objective rate. Justice Breyer's dissenting opinion correctly noted that the district judge alone "witnessed the proceedings" and "evaluate[d] the attorneys' overall performance in light of the objectives, context, legal difficulty, and practical obstacles present in the case."[71] In a word, "the district judge will have observed the attorney's true 'value, as *demonstrated . . . during the litigation.*'"[72] If the Court is going to state that an attorney's true market value is partly demonstrated by litigation, it does not make sense to then demand that a trial judge provide market figures to quantify the entire enhancement, which is partly awarded based on personal observations.

The Court's failure to list more than one circumstance of when enhancements based on attorney performance might be acceptable coupled with the majority's contradictory instruction of how to calculate an attorney's market value ultimately will increase confusion at the district court level. This case simply adds to past Supreme Court decisions that have also addressed enhancements but neglected to provide concrete examples of when an increase in the lodestar award is permitted, leaving

68. *See* Lyle Denniston, *Analysis: The lodestar as gold standard*, SCOTUSBLOG, http://www.scotusblog.com/2010/04/analysis-the-lodestar-as-gold-standard (last visited Feb. 21, 2011) (stating that "[t]he mere articulation of these three tended, therefore, to enhance the impression that quality-based enhancements are, for the most part, virtually out of reach").

69. *Perdue*, 130 S. Ct. at 1674.

70. *Id*.

71. *Id*. at 1679 (Breyer, J., concurring in part and dissenting in part).

72. *Id*. (quoting *id.* at 1674 (majority opinion)).

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district courts to determine for themselves what types of circumstances meet these vague standards.[73]

The only other guidance that the majority provided was that an enhancement must be supported with "specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel.'"[74] The problem with this instruction is that competent counsel is purely subjective and has not been adequately defined by the Supreme Court or any fee-shifting statute, thus, making it simple for a defendant to interpret competent attorney as meaning any attorney willing or available to take the case.[75] If any attorney could be considered competent then significant hardships could arise for individuals seeking to litigate in complicated civil rights cases since highly experienced attorneys may ultimately refuse to provide representation due to the likelihood of being undercompensated.[76] Furthermore, it is likely that the majority of civil rights cases will be brought back to court based on arguments concerning fee enhancements that may or may not be supported by the court's decision in *Perdue*.[77]

The majority chastised the district court for increasing the lodestar award, calling its decision arbitrary, but contradictorily acknowledged that the district judge took into account that the attorneys "had to make extraordinary outlays for expenses and had to wait for reimbursement," which were two specific examples this Court provided to permit enhancement.[78] The majority disagreed with how the district court did not make mention of specific calculations and figures attributed to those factors.[79] In an attempt to justify the increase, the dissent explained that without an enhancement the attorneys would have been compensated "at a rate lower than the average rate charged by attorneys practicing law in the state of Georgia[.]"[80] However, footnote seven of the majority opinion

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73. *See* Rebecca Friedman, Article, *The Lodestar Ranger: Calculating Attorneys' Fee Awards in Perdue v. Kenny A.*, 5 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 58, 71-72 (2010).

74. *Perdue*, 130 S. Ct. at 1674 (citing *Blum v. Stenson*, 465 U.S. 886, 897 (1984)).

75. *See* Scott Street, *Rejecting fee enhancements without rejecting them*, SCOTUSBLOG, http://www.scotusblog.com/2010/05/rejecting-fee-enhancements-without-rejecting-them/ (last visited Feb. 21, 2011) (stating that "it is difficult to imagine a situation where the lodestar would not hypothetically be sufficient to attract *some* attorney. So long as a defendant can produce evidence that *some* attorney would have taken the case . . . it seems a court would have to reject an enhancement").

76. *See* Brief for Civil Rights Clinic at Howard University School of Law as Amici Curiae Supporting Respondents, at 3, Purdue v. Kenny A., 130 S. Ct. 1662 (2010) (No. 08-970) (explaining that child welfare cases "are extremely complex and difficult, requiring specialized, experienced and skillful attorneys").

77. *See id*.

78. *Perdue*, 130 S. Ct. at 1676.

79. *Id*.

80. *Id*. at 1683 (Breyer, J., concurring in part and dissenting in part) (citing SURVEY OF LAW FIRM ECONOMICS, *supra* note 64, at 89).

disregarded any reference to an average attorney rate, reasoning that the lodestar amount was what the attorneys requested and that there was nothing wrong with compensating their work based on a rate that was below the market average.[81] The majority argued that if enhancements based on subjective opinions were permitted, defendants would "have no way to estimate the likelihood of having to pay a potentially huge enhancement."[82] Here, the majority was too concerned with the possibility of defendants paying large awards under fee-shifting statutes.[83] Instead, the focus should have been on the very essence of why statutes like § 1988 exist: "making it possible for persons without means to bring suit to vindicate their rights" by being able to hire attorneys who are confident that they will be adequately compensated for their work.[84]

The majority also justified their refusal to support an enhancement based on the idea that fee-shifting statutes operate to prevent unfair monetary windfalls to attorneys.[85] The Court, however, ignored the fact that denying this enhancement would seriously contradict § 1988's objective of adequately compensating attorneys in civil rights cases since the attorneys would be paid below the market rate, making the chance of a windfall a non-issue.[86]

Furthermore, the legislative history behind § 1988 places greater importance on encouraging the litigation of civil rights cases rather than the avoidance of windfalls.[87] Instead of being concerned with windfalls, the majority should have placed greater weight on the potentially negative effect of their decision; attorneys disinterested in litigating important civil rights cases.[88] This consequence is highly likely and will be attributable to this Court's refusal to provide a fee adjustment for attorneys legitimately qualifying for an enhancement.[89] Justice Breyer appropriately asked: "If

81. *Id*. at 1676 n.7 (majority opinion).

82. *Id*. at 1676 (citing Marek v. Chesney, 473 U.S. 1, 7 (1985)).

83. *Perdue*, 130 S. Ct. at 1676; *see also* Tony Mauro, *High Court Justices Doubt Lawyers Should Be Paid Extra for Winning*, NAT'L L.J., Oct. 15, 2009, http://www.law.com/jsp/article.jsp?id=1202434599147 (noting that "several justices seemed more worried about high legal fees than in encouraging quality lawyers to do public-minded work").

84. *Perdue*, 130 S. Ct. at 1676; *see also* Layne Rouse, Notes and Comment, *Battling for Attorneys' Fees: The Subtle Influence of Conservatism in 42 U.S.C. §1988*, 59 BAYLOR L. REV. 973, 979-81 (2007) (explaining that the legislative purpose behind Section 1988 is to provide monetary incentives to attorneys in order to motivate them to take on civil rights cases).

85. *Perdue*, 130 S. Ct. at 1676-77.

86. *See id*. at 1683 (Breyer, J., concurring in part and dissenting in part).

87. *See generally* S. REP. NO. 94-1011 (1976); *see also* Rouse, *supra* note 84, at 1006 n.143 (observing that "[w]hile the Senate Report only mentions the need to avoid windfalls once, the Report mentions the need to encourage civil rights litigation throughout the legislative history").

88. *See* Friedman, *supra* note 73, at 72.

89. *Id*. at 72.

this is not an exceptional case, what is?"[90] The majority unfortunately failed to fully address this concern.

This is not to say that the majority was wrong for addressing the potential for attorneys to be overcompensated in civil rights cases. The issue of enhancements properly brings up the debate of unfair windfalls versus adequate attorney compensation.[91] That said, the Court here had a chance to "establish a healthy balance between these two concerns."[92] Instead, the Court ruled against an enhancement based on a potential windfall that was not even relevant in this particular case.[93] As a result, the majority failed to find a balance by opting for an easy reason to deny an enhancement while also leaving a group of attorneys undercompensated.

The majority was also correct for its concern with the possibility of trial judges arbitrarily issuing enhancements.[94] The need for a solid, uniform system was the basis for producing the lodestar method.[95] However, after various Supreme Court cases attempted to tackle the issue of enhancements under fee-shifting statutes, this case was the moment for the Court to finally provide clarity.[96] In two short paragraphs, the majority quickly rejected any suggestion that a move away from the lodestar method would be appropriate, but noted that if hourly billing ceased to be the standard then a new way to calculate attorney's fees under § 1988 would need to be developed.[97] The majority was arguably clinging to an aging system of attorney billing and blind to the fact that the lodestar method might no longer be appropriate for fee-shifting statutes.[98] The majority's concern for arbitrary enhancements backfired due to their failure to realize that the lodestar calculation could be the source of the problem.

Although the Court claimed that the lodestar method almost always calculates the factors necessary to reach reasonable attorney's fees, such as an attorney's education, reputation, and experience; what the method fails to recognize is that prior performance is not always the best indicator of future

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90. *Perdue*, 130 S. Ct. at 1683 (Breyer, J., concurring in part and dissenting in part).

91. Michele Alexandre, *Does a District Court Have Discretion to Enhance an Attorney's Fees Award for Quality of Performance and Results?*, 1 PREVIEW U.S. SUP. CT. CAS. 39 (2009).

92. *Id.*

93. *See Perdue*, 130 S. Ct. at 1676.

94. *Id.*

95. *See* Brian Albert Davis, Case Note, City of Burlington v. Dague - *Contingency Enhancement: The Court Buckles Under the Statutory Burden*, 42 CATH. U. L. REV. 615, 629-30 (1993).

96. *See* Friedman, *supra* note 73, at 58.

97. *Perdue*, 130 S. Ct. at 1675.

98. *See* George B. Murr, *Analysis of the Valuation of Attorney Work Product According to the Market for Claims: Reformulating the Lodestar Method*, 31 LOY. U. CHI. L.J. 599, 619 (2000).

performance.[99] As a result, the lodestar calculation ignores the value of an attorney's work product on a particular case.[100] The problem here is that there is a trend for attorneys to deviate from hourly billing and turn to performance billing in which an attorney is paid based on the success of the case.[101] As a result, attorneys will likely become discouraged to litigate civil rights cases in which they might face under compensation for quality results.[102] Likewise, they will be forced to bill in a way not representative of the changing legal market.[103] Alternatively, attorneys may still choose to litigate these cases but bill for extra, unnecessary hours, avoid settling cases in order to litigate for the purpose of collecting more billable hours, or work less passionately for the cause since there would be less monetary incentive to prevail.[104] Again, the purpose of § 1988 is to encourage attorneys to vindicate people's rights in civil rights cases, which the lodestar method ultimately discourages.[105]

Another problem with the Court's decision was its use of precedent to justify its decision when, in fact, precedent actually supported an outcome contrary to its holding. The majority relied on its decision in *Blum v. Stenson*,[106] a case that denied a 50% enhancement.[107] The Court in *Blum* held that although hourly rates usually reflect quality representation, an enhancement could be justified "in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'"[108] The Court in *Blum* expressed their dissatisfaction with the way the district court justified a 50% enhancement by making general statements of how "[t]he quality of representation was high" and "[t]he litigation was complex" but failed to expound on why or how the quality was high or litigation complex.[109] The Court in *Blum* did not request that the district court make specific calculations involving market rates to justify an enhancement. Instead, the Supreme Court considered broad statements referring to high quality representation and complex litigation not enough to show that "the hourly

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99. *See* Brief for Law and Economics Scholars, et al. as Amici Curiae Supporting the Respondents, *supra* note 35, at 10-11.
100. Murr, *supra* note 98, at 618.
101. Friedman, *supra* note 31, at 72.
102. *Id.*
103. *See id*. at 72-73.
104. *See id*. at 74.
105. *Id.* at 70.
106. 465 U.S. 886 (1984).
107. *Id.* at 901-02.
108. *Id*. at 899 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)).
109. *Id*. at 899-900 (quoting Stenson v. Blum, 512 F. Supp. 680, 685 (S.D.N.Y. 1981)).

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rates failed to provide a reasonable fee for the quality of representation provided."[110] When the *Blum* Court stated that specific evidence must be provided, the opinion seemed to suggest that the district court needed a more thorough explanation for the enhancement, but did not mention any need for documenting prevailing market rates or figures.[111]

By contrast the district court in *Perdue* did not provide blanket statements for why an enhancement was necessary, but instead provided detailed reasoning, although partly subjective, for why it was justified.[112] Furthermore, *Blum* and *Hensley v. Eckerhart* explained that exceptional success in litigation could also result in a fee enhancement if the district court identified record evidence to support an enhancement based on results.[113] Whereas, the majority in this case concluded that results should never be the basis for an enhancement.[114] As Justice Breyer stated in his dissent, the attorneys here surprisingly and successfully led to the repair of a foster-care system that was "operating in crisis mode."[115] Therefore, if this Court properly followed precedent, it should have found that the results in this case were so exceptional, as supported by the record and as described in the district court's opinion, to justify an enhancement.

Furthermore, "[§] 1988 was intended to be a pro-plaintiff law."[116] As previously explained, the very purpose of this fee-shifting statute was to ensure that people who have had their civil rights violated can effectively turn to the judicial system without fear that attorneys would deny them of representation. The Court in *Hensley* reduced the award without applying the pro-plaintiff objectives of § 1988 into its decisional factors.[117] The majority in *Perdue* should have recognized the error of the *Hensley* decision and upheld the meritorious basis for fee-shifting statutes by establishing a precedent reflecting the importance of defending civil rights and ensuring that the means to defend those rights are never compromised.[118]

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110. *Id*. at 900.

111. *Blum*, 465 U.S. at 900.

112. *Kenny A. v. Perdue*, 454 F. Supp. 2d at 1265-90 (providing specific examples of the major improvements made to the Georgia foster—care system as a result of the consent decree).

113. *Blum*, 465 U.S. at 899-903; *Hensley*, 461 U.S. at 434-35. In Hensley, the court stated that "[t]he product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of 'results obtained.'" *Id*. at 434.

114. *Perdue v. Kenny A.*, 130 S. Ct. 166, 16742 (2010).

115. *Id*. at 1680 (Breyer, J., concurring in part and dissenting in part) (quoting 2001 OCA ANN. REP. 10, at 14).

116. Rouse, *supra* note 84, at 978.

117. *See Hensley* 461 U.S. at 437-40; *see also* Rouse, *supra* note 84, at 990-91.

118. *See* Brief for Civil Rights Clinic at Howard University School of Law as Amici Curiae Supporting Respondents, *supra* note 76, at 12-13 (emphasizing the far-reaching benefits of litigating for the

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V. CONCLUSION

Perdue represents an incredible upset for the future of civil rights litigation under fee-shifting statutes. The Court's acceptance of fee enhancements for superior attorney performance is in no way a victory for individuals who wish to utilize § 1988 or for attorneys who may consider representing clients in such cases. The requirements that the Court provides for justifying this type of enhancement are so narrow and vague that the Court seems to be ultimately saying "yes, you can enhance" but thinking "really, you never can." The decision in *Perdue* creates a tremendous risk that attorneys will refuse to take on civil rights cases fearing that they may not be adequately compensated, which is the complete antithesis of the purpose behind § 1988.

LAURA LEISTER

civil rights of abused children and the simultaneous importance of fully compensating attorneys who represent these children).

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