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Unreasonable Calculations of “Reasonable” Fees: Perdue v. Kenny A. ex. rel. Winn and the Supreme Court’s Ongoing Struggle with 42 U.S.C. § 1988

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**UNREASONABLE CALCULATIONS OF
“REASONABLE” FEES:
PERDUE V. KENNY A. EX REL. WINN AND THE
SUPREME COURT’S ONGOING STRUGGLE
WITH 42 U.S.C. § 1988**

*Kristin A.C. Olin**

I. INTRODUCTION

In *Cowan v. Prudential Insurance Co. of America*,¹ finding that plaintiff Curtis Cowan had been a victim of racial discrimination in violation of Title VII and 42 U.S.C. § 1981 was the easy part.² The district court readily awarded Cowan \$15,000 in damages for emotional distress,³ but—like many courts before and since⁴—it faltered when it began to contemplate Cowan’s entitlement to attorney’s fees under 42 U.S.C. § 1988.⁵

Section 1988 appears straightforward: it provides, in pertinent part, that “[i]n any action or proceeding to enforce a provision” of one of a number of statutes creating a right of action for vindication of civil rights—including §§ 1981 and 1983—“the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs.”⁶ However, the *Cowan* district court was so confused by U.S. Supreme Court precedent that it rendered *three*

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1. 935 F.2d 522 (2d Cir. 1991).
2. *Id.* at 523 (citing *Cowan v. Prudential Ins. Co. of Am.*, 703 F. Supp. 177 (D. Conn. 1986)). “Title VII” refers to Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e to 2000e-17.
3. *Id.* (citing *Cowan*, 703 F. Supp. at 196).
4. *See, e.g., infra* notes 35–37 and accompanying text.
5. *Cowan*, 935 F.2d at 523 (citing *Cowan v. Prudential Ins. Co. of Am.*, 728 F. Supp. 87, 89 (D. Conn. 1990)).
6. 42 U.S.C. § 1988(b) (2006).

alternative attorney's fees awards, apparently arbitrarily entering judgment in the amount of the intermediate award and triggering an appeal in which the Second Circuit overturned the fees award.⁷

The *Cowan* trial court is only unusual in its willingness to admit its confusion—myriad courts have been stymied in their attempts to apply § 1988⁸ and other exceptions⁹ to the American Rule, which requires each party to pay its own attorney's fees.¹⁰ Since Congress enacted § 1988, courts—including the Supreme Court¹¹—have struggled to determine when parties may recover attorney's fees from their opponents,¹² how to calculate “reasonable” fees,¹³ and what level of discretion courts may exercise.¹⁴

Unfortunately for civil rights plaintiffs like Curtis Cowan, for parties accused of constitutional violations, and for trial and appellate court justices, the Supreme Court appears unlikely to answer these questions any time soon. The Supreme Court's most recent holding regarding fees determination under § 1988, *Perdue v. Kenny A. ex rel. Winn*,¹⁵ appears on its face to provide more guidance to lower courts than it actually does. Although *Perdue* purports to distinguish between facts influencing the lodestar and the enhancement factors,¹⁶ the Court confined its holding to the facts at hand,¹⁷ avoided resolving a long-standing inconsistency in the evolution of fees

7. See *Cowan*, 935 F.2d at 523–24 (citing *Cowan*, 728 F. Supp. at 89) (reversing and remanding the trial court's fees award and granting a fees award in the amount of the trial court's highest calculation).

8. The formal title of 42 U.S.C. § 1988 is the Civil Rights Attorney's Fees Award Act of 1976. *Id.* at 523.

9. Other exceptions include 28 U.S.C. § 2412(d)(1)(A), 15 U.S.C. § 15, 42 U.S.C. § 6972(e), and 33 U.S.C. § 1365(d), though they may be subject to different limitations than 42 U.S.C. § 1988.

10. *E.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (“[T]he ‘American Rule’ [provides] that each party in a lawsuit ordinarily shall bear its own attorney's fees . . .”).

11. *E.g.*, *infra* notes 12–13, 15, 28.

12. *E.g.*, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

13. *E.g.*, *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Blum v. Stenson*, 465 U.S. 886 (1984).

14. See, *e.g.*, *Sorenson v. Mink*, 239 F.3d 1140, 1146–47 (9th Cir. 2001); *Gates v. Deukmejian*, 987 F.2d 1392, 1399–1400 (9th Cir. 1992); *Jordan v. Multnomah Cnty.*, 815 F.2d 1258, 1263–64 (9th Cir. 1987).

15. 130 S. Ct. 1662 (2010).

16. *Id.* at 1669. The lodestar and its enhancement will be defined and discussed in detail beginning *infra* Part II.

17. See *infra* Parts III.C.1, 4.

calculations,¹⁸ and declined to make explicit what *would* make enhancement reasonable.¹⁹

This Comment posits that the Supreme Court should make a decisive ruling disapproving *Johnson v. Georgia Highway Express, Inc.*'s²⁰ application to fees awards, defining the “prevailing market rate” in a way that maximizes public benefit, and enumerating the *precise* circumstances—if any—that would warrant enhancement of the lodestar. Part II provides an overview of the judicial mechanisms for awarding attorney’s fees from § 1988’s enactment in 1976 through *Perdue*’s publication in 2010. Part III focuses on the reasoning and issues that the *Perdue* Court avoided; it also identifies the sources of today’s inconsistency and uncertainty underlying fees awards. Part IV suggests a comprehensive solution based on Justice Scalia’s partial concurrence in *Blanchard v. Bergeron*,²¹ Justice Thomas’s concurring opinion in *Perdue*, and the majority’s practical observations in both *Blum v. Stenson*²² and *Perdue* itself. It also explains the benefits—including consistency, predictability, fairness, and easy application—of the proposed solution. Part V concludes by recommending that the Supreme Court simplify and clarify fees-award jurisprudence the next time it considers a case like *Perdue*.

II. BACKGROUND: THE DEVELOPMENT OF THE LODESTAR APPROACH

The lodestar method of calculating reasonable attorney’s fees is rooted in the pre-42 U.S.C. § 1988 development of hourly billing practices.²³ In the 1940s, attorneys began to “determine whether fees charged were sufficient to cover overhead and generate suitable profits” by “record[ing] the hours spent on each case in order to ensure that fees ultimately charged afforded reasonable compensation for counsels’ efforts.”²⁴ Hourly billing gradually replaced other methods of determining fees actually charged because

18. See *infra* Parts II, III.C.2, 4. This inconsistency involves the so-called *Johnson* factors’ continuing use: although the *Johnson* factors have technically been replaced by the lodestar method of calculating fees awards, they are still widely and irregularly applied. See *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974); see *infra* Parts II, III.C.2, 4.

19. See *infra* Part III.C.3–4.

20. 488 F.2d 714 (5th Cir. 1974).

21. 489 U.S. 87 (1989).

22. 465 U.S. 886 (1984).

23. *Gisbrecht v. Barnhart*, 535 U.S. 789, 800 (2002).

24. *Id.*

it was “administratively convenient” and provided an objective measure of effort that clients could appreciate.²⁵ By the 1970s, hourly billing was ubiquitous, but courts still determined awards under fee-shifting statutes by other means.²⁶

In *Johnson*, the Fifth Circuit enumerated twelve factors that initially appeared to comprise a thorough method of calculating attorney’s fees.²⁷ Indeed, “both the House and Senate Reports [on section 1988] refer to the 12 factors set forth in *Johnson* for assessing the reasonableness of an attorney’s fee award.”²⁸ Under the *Johnson* approach, the Supreme Court directed courts to consider the following criteria in calculating a reasonable fees award:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal service properly;
- (4) the preclusion of employment by the attorney due to the acceptance of the case;
- (5) the customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the “undesirability” of the case;
- (11) the nature and length of the professional relationship with the client; and
- (12) awards in similar cases.²⁹

In *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*,³⁰ the Third Circuit developed the competing lodestar method almost simultaneously with the *Johnson* court’s development of the twelve-factor approach, but the lodestar did not become dominant until the Supreme Court adopted it in *Hensley v. Eckerhart*, a 1983 decision.³¹ The lodestar is a monetary figure representing “the product of reasonable hours times

25. *Id.* at 800–01.

26. *Id.* at 801.

27. *E.g.*, *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1671–72 (2010); *Gisbrecht*, 535 U.S. at 801.

28. *Blanchard v. Bergeron*, 489 U.S. 87, 91 (1989).

29. *Perdue*, 130 S. Ct. at 1672 n.4 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 430 n.3 (1983) (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974))).

30. 487 F.2d 161 (3d Cir. 1973).

31. *Perdue*, 130 S. Ct. at 1672.

a reasonable rate.”³² According to the Supreme Court, the lodestar method “has, as its name suggests, become the guiding light of [] fee-shifting jurisprudence”³³ because it avoids *Johnson*’s problem of providing lower courts with “very little actual guidance” and “unlimited discretion.”³⁴ However, many courts still use the *Johnson* factors to determine the lodestar itself,³⁵ enhancements to the lodestar,³⁶ and other aspects³⁷ of § 1988.

Enhancement of the lodestar—for example, by increasing the lodestar by 75 percent as the *Perdue* trial court did³⁸—is perhaps the most ill-defined aspect of fee awards. Supreme Court “jurisprudence since *Blum* has charted ‘a decisional arc that bends decidedly against enhancements,’”³⁹ but the Supreme Court appears to have eliminated only four of the twelve *Johnson* factors as possible grounds for enhancement since the *Hensley* Court made the lodestar method mainstream in 1983 and the *Blum* Court rejected enhancement in 1984.⁴⁰

III. INCONSISTENCY AND UNCERTAINTY

A. The District Court’s 75 Percent Enhancement of the Lodestar

Perdue was a suit on behalf of 3,000 children in the Georgia foster-care system. The District Court for the Northern District of Georgia resolved their constitutional claims by approving a consent

32. *City of Burlington v. Dague*, 505 U.S. 557, 559–60 (1992) (quoting *Pa. v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986)).

33. *Perdue*, 130 S. Ct. at 1672; *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002); *Dague*, 505 U.S. at 562.

34. *Perdue*, 130 S. Ct. at 1672 (quoting *Del. Valley*, 478 U.S. at 563).

35. *E.g.*, *Blum v. Stenson*, 465 U.S. 886, 893–94 & n.9 (1984); *Moreno v. City of Sacramento*, 534 F.3d 1106, 1114 (9th Cir. 2008).

36. *See, e.g.*, *Del. Valley*, 478 U.S. at 562–65; *Jordan v. Multnomah Cnty.*, 815 F.2d 1258, 1262 (9th Cir. 1987).

37. *See, e.g.*, *Blanchard v. Bergeron*, 489 U.S. 87, 91–93 (1989); *id.* at 88 (using the *Johnson* factors to conclude that an award of attorney’s fees under § 1988 is not “limited to the amount provided in a contingent-fee arrangement entered into by a plaintiff and his counsel”).

38. *Perdue v. Kenny A. ex rel. Winn*, 454 F. Supp. 2d 1260, 1290 (N.D. Ga. 2006), *aff’d*, 547 F.3d 1319 (11th Cir.), *rev’d*, 130 S. Ct. 1662 (2010).

39. *Perdue*, 130 S. Ct. at 1677 (Thomas, J., concurring).

40. *Jordan*, 815 F.2d at 1262 & n.6 (“Among the *Johnson* factors that cannot serve as independent bases for adjusting fee awards are: (1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, and (4) the results obtained.” (citing *Blum*, 465 U.S. at 898–900; *Del. Valley*, 478 U.S. at 564–68)).

decree.⁴¹ In addition to declaratory and injunctive relief, the consent decree entitled the children's attorneys (hereafter "respondents") to fees and costs under 42 U.S.C. § 1988.⁴²

Because the prevailing party has the burden of providing evidence supporting its requested fee,⁴³ respondents submitted documentation of their requested hours and rates as well as affidavits from third parties in support of respondents' contention that the rates sought were consistent with prevailing market rates.⁴⁴ Respondents also provided affidavits supporting their request for a 100 percent enhancement to that lodestar,⁴⁵ asserting that "the lodestar amount 'would be generally insufficient to induce lawyers of comparable skill, judgment, professional representation and experience' to litigate this case."⁴⁶

After reducing non-travel hours by 15 percent and halving the rate for travel hours to account for vague or excessive billing entries, the court applied a 75 percent enhancement, resulting in a total fee award of approximately \$10.5 million.⁴⁷ The court justified the enhancement by citing respondents' counsel's \$1.7 million advance in expenses over three years, lack of compensation during litigation, uncertain recovery due to their fees' contingent nature, and generally extraordinary performance.⁴⁸

B. The Eleventh Circuit's Divided Affirmance and Judge Carnes's Opinion

A divided Eleventh Circuit appellate panel affirmed both the lodestar and the enhancement.⁴⁹ Based on his understanding of

41. *Perdue*, 130 S. Ct. at 1669.

42. *Id.* at 1669–70.

43. *E.g.*, *Blum*, 465 U.S. at 895 n.11.

44. *Perdue*, 130 S. Ct. at 1670; *Blum*, 465 U.S. at 895 n.11.

45. *Perdue*, 130 S. Ct. at 1670, 1675.

46. *Id.* at 1670.

47. *Id.*

48. *Id.* (citation omitted). In praise of counsel's performance, "[t]he court stated that respondents' attorneys had exhibited 'a higher degree of skill, commitment, dedication, and professionalism than the Court has seen displayed . . . during its 27 years on the bench,'" "that the results obtained were 'extraordinary,'" and that "'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.* (citations omitted) (internal ellipses and brackets omitted).

49. *Id.*

Supreme Court precedent, Circuit Judge Carnes disagreed with the amount of the fees award and insightfully observed that “the quality of the attorneys’ performance was adequately accounted for either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rates,” that “an enhancement could not be justified based on delay in the recovery of attorney’s fees and reimbursable expenses because such delay is a routine feature of cases brought under 42 U.S.C. § 1983,” and that the contingent nature of respondents’ compensation did not justify enhancement.⁵⁰ Sitting en banc, the Eleventh Circuit denied a motion for rehearing over Carnes’s and two other judges’ dissents; one of the other judges felt that the trial judge had rendered his decision unreviewable by justifying enhancement primarily by comparing respondents with other counsel whom he had personally observed.⁵¹

C. The Supreme Court’s Consideration of the Enhancement and Subsequent Reversal

1. Goals in Granting Certiorari in *Perdue*

The Supreme Court granted certiorari to resolve the narrow issue of “whether either the quality of an attorney’s performance or the results obtained are factors that may properly provide a basis for an enhancement.”⁵² Noting that “superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance,” the Court further narrowed its inquiry to “whether superior attorney performance can justify an enhancement.”⁵³

2. Summary of Relevant “Established” Law

The Court delineated the *Johnson* factors and the competing lodestar approach, then noted the virtues of the latter: the lodestar “roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case”; it is “readily

50. *Id.* at 1671 (internal quotation marks and brackets omitted).

51. *Id.*

52. *Id.* at 1673–74.

53. *Id.* at 1674. The Court noted that any other cause of excellent results—such as “inferior performance by defense counsel, unanticipated defense concessions, unexpectedly favorable rulings by the court, an unexpectedly sympathetic jury, or simple luck”—would not justify an enhancement. *Id.*

administrable”; and it “cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results” due to its “objective” nature.⁵⁴ The Court then listed six rules established in its prior decisions: (1) that “a reasonable fee is . . . sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case”⁵⁵ but “does . . . not produce windfalls to attorneys”⁵⁶; (2) that there is a “strong” presumption that the lodestar is “sufficient to achieve this objective”⁵⁷; (3) that “enhancements may be awarded in rare and exceptional circumstances”⁵⁸; (4) that the lodestar “includes most, if not all, of the relevant factors constituting a reasonable attorney’s fee” so that “an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation,” such as “the novelty and complexity of a case” or “the quality of an attorney’s performance”⁵⁹; (5) that the fee applicant bears “the burden of proving that an enhancement is necessary”⁶⁰; and (6) that the fee applicant must produce “specific evidence” in support of enhancement so that it is “objective and capable of being reviewed on appeal.”⁶¹

3. Scenarios Warranting Lodestar Enhancement

In light of these guidelines, the Court inquired “whether there are circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation.”⁶² It found that three such scenarios existed. First, attorney performance could justify enhancement if the hourly rate did not represent the attorney’s market value—for example, if a single factor or attribute such as “years since admission to the bar” determined the hourly rate.⁶³ However, the Court noted that “the special skill and experience of

54. *Id.* at 1672 (emphasis omitted).

55. *Id.* at 1672 (internal quotation marks omitted).

56. *Id.* (quoting *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (internal quotation marks omitted)).

57. *Id.* at 1673 (internal quotation marks omitted).

58. *Id.* (internal quotation marks omitted).

59. *Id.* (internal quotation marks omitted).

60. *Id.*

61. *Id.* (internal quotation marks omitted).

62. *Id.* at 1674.

63. *Id.*

counsel should be reflected in the reasonableness of the hourly rates.”⁶⁴ Attorney performance, then, should logically never justify enhancement. According to the Court, superior performance would justify enhancement if the reasonable hourly rate did not reflect it, but the reasonable hourly rate should reflect all of an attorney’s special qualities; therefore, the reasonable hourly rate should always reflect superior performance, and superior performance would never justify enhancement.

Second, the Court stated that “an enhancement may be appropriate if the attorney’s performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted.”⁶⁵ The Court acknowledged Judge Carnes’s observation that any attorney taking on a civil rights case on a contingency-fee basis “presumably understands that no reimbursement is likely to be received until the successful resolution of the case”⁶⁶; however, it went on to conclude that enhancements on this basis may still be appropriate in “unusual” or “exceptional” cases.⁶⁷ This exception has two problems. The Court declined to state what qualities would render a case sufficiently extraordinary that an enhancement would be appropriate, leaving lower courts with no more guidance on this point than they had before. In addition, courts could apply the exception to allow many—if not all—attorneys working on a contingency basis to receive varying degrees⁶⁸ of enhancement.

The third and final exception is similar to the second: enhancement may be appropriate where “an attorney’s performance involves exceptional delay in the payment of fees,” such as where “an attorney assumes these costs in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense.”⁶⁹ This exception is subject to the same infirmities as the second exception is regarding lower courts’ interpretations of

64. *Id.* at 1674 n.5 (quoting *Blum v. Stenson*, 465 U.S. 886, 898 (1984) (internal quotation marks omitted)).

65. *Id.* at 1674.

66. *Id.*

67. *Id.*

68. For example, a court could award a 10 percent enhancement to an attorney advancing significantly above-average costs and undergoing significantly lengthy litigation, a 20 percent enhancement to an attorney advancing yet greater costs and litigating for yet longer, and so on. See Parts III.C.4 and IV.C–D for further discussion of this problem.

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

“exceptional”:⁷⁰ the same lack of specificity is present in the Court’s mention of “unanticipated delay”—especially because “delay is a routine feature of cases brought under 42 U.S.C. § 1983”⁷¹—and its mention of delay that is “unjustifiably caused by the defense.”⁷²

4. Analysis and Rejection of the *Perdue* Enhancement

Having concluded its abstract analysis, the Court proceeded to the merits of the case at hand. It condemned the 75 percent enhancement as “essentially arbitrary” and increased the hourly rate to an amount not shown to be “an appropriate figure for the relevant market.”⁷³ The Court then examined the enhancement in light of its three approved justifications for attorney-performance-based enhancement of the lodestar. It identified five ways in which the district court’s reasons for awarding the enhancement did not withstand scrutiny: the court (1) “did not *calculate* the amount of the enhancement that is attributable” to respondents’ “*extraordinary* outlays for expenses” and delay in reimbursement; (2) failed to use “proof in the record” to show that respondents’ delayed receipt of fees was “outside the *normal range* expected by attorneys who rely on § 1988”; (3) did not “provide a *calculation* of the cost to counsel of any *extraordinary* and *unwarranted* delay”; (4) cited respondents’ fees’ contingent nature in contravention of the Court’s holding in *City of Burlington v. Dague*;⁷⁴ and (5) “did not employ a methodology that permitted meaningful appellate review” because it compared respondents’ performance to that of counsel in other cases.⁷⁵

The Supreme Court’s emphasis on calculation and quantification in the first three points listed above illustrates the problems with the Court’s scenarios where enhancement could be appropriate. The

70. See *supra* notes 67–68 and accompanying text.

71. *Perdue*, 130 S. Ct. at 1671 (summarizing Judge Carnes’s reasoning at the Eleventh Circuit level).

72. A lower court could consider a delay to be “unjustifiably raised by the defense” in an array of circumstances ranging from an *unsuccessful* motion or defense that causes a delay to a *frivolous* motion or defense that causes a delay. *Black’s Law Dictionary* defines “frivolous” as “[l]acking a legal basis or legal merit” and a “frivolous defense” as “[a] defense that has no basis in fact or law.” BLACK’S LAW DICTIONARY 483, 739 (9th ed. 2009).

73. *Perdue*, 130 S. Ct. at 1675–76.

74. 505 U.S. 557 (1992).

75. *Perdue*, 130 S. Ct. at 1676 (emphasis added) (citations omitted).

Court did not provide—and, indeed, logic does not suggest—any method of assigning a numerical value to “extraordinary outlays for expenses and [delay in] reimbursement,” the extent to which delay in receipt of fees is “outside the normal range” for § 1988 litigation, or “extraordinary and unwarranted delay.”⁷⁶ The Court’s very use of subjectively defined adjectives (such as “extraordinary” and “normal”) *ensures* that any enhancement based on these factors will be inconsistent with a “major purpose of the lodestar method—providing an objective and reviewable basis for fees.”⁷⁷

The Court’s reasoning in the fourth and fifth points listed above is stronger. A more careful analysis, however, reveals that the reasoning from *Dague* cited in the fourth point undermines the latter two scenarios in which the Court believed an enhancement may be proper.⁷⁸ In *Dague*, the Court “h[e]ld that enhancement for contingency is not permitted”⁷⁹ because it could “perceive no . . . basis . . . by which contingency enhancement, if adopted, could be restricted to fewer than all contingent-fee cases.”⁸⁰ Because “no claim has a 100% chance of success,” all contingent-fee cases would receive fees exceeding the “reasonable amount.”⁸¹ Such excessive fees would both “indiscriminately encourage[] nonmeritorious claims to be brought” in addition to meritorious ones⁸² and increase the “burdensome satellite litigation” that the lodestar approach sought to avoid in the first place.⁸³

The Court failed to consider that four of the five reasons for rejecting the enhancement in *Perdue* also warranted rejecting two of its three circumstances justifying enhancement.⁸⁴ The fifth point—that a court cannot grant an enhancement for unreviewable reasons—creates another conundrum: the Court’s second and third acceptable scenarios for enhancement would result in the same unreviewable decisions due to the highly subjective nature of the requirements they

76. *Id.*

77. *Id.* (citing *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992)).

78. *See supra* notes 65–72 and accompanying text.

79. *Dague*, 505 U.S. at 567.

80. *Id.* at 565.

81. *Id.* at 563.

82. *Id.*

83. *Id.* at 566 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 437 (1983)).

84. *See supra* notes 65–72.

suggest.⁸⁵ Rather than provide guidance, *Perdue* ultimately creates more confusion due to the Court's circular reasoning and its implementation of an unworkable standard.

IV. PROPOSAL

Four opinions provide the key elements of this Comment's proposed solution to the confusion, subjectivity, and inconsistency of fee awards under § 1988: Justice Scalia's opinion concurring in part and concurring in the judgment in *Blanchard v. Bergeron*,⁸⁶ Justice Thomas's concurrence in *Perdue*,⁸⁷ the end of the majority opinion in *Perdue*,⁸⁸ and the core of the majority opinion in *Blum*.⁸⁹ The former two advocate valuable simplifications of fees-award jurisprudence, while the latter two contribute practical observations that should guide the Supreme Court's future decisions.

A. Justice Scalia in *Blanchard*

Justice Scalia wrote a separate opinion in *Blanchard* solely to address an aspect of the majority's analysis that is also relevant to *Perdue*.⁹⁰ Like many courts determining attorney's fees under § 1988,⁹¹ the *Blanchard* majority stated early in its opinion that "[i]n many past cases considering the award of attorney's fees under § 1988, we have turned our attention to *Johnson v. Georgia Highway Express, Inc.*,"⁹² it went on to list the twelve factors⁹³ and apply

85. See *supra* notes 65–72 (using terms such as “extraordinary,” “exceptionally,” “unanticipated,” and “unjustifiably” to define the requirements for acceptably enhancing the lodestar).

86. 489 U.S. 87, 97–100 (1989) (Scalia, J., concurring in part and concurring in the judgment).

87. *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1677–78 (2010) (Thomas, J., concurring).

88. *Id.* at 1676–77 (majority opinion).

89. *Blum v. Stenson*, 465 U.S. 886, 892–902 (1984).

90. See *Blanchard*, 489 U.S. at 97–100 (Scalia, J., concurring in part and concurring in the judgment) (“I concur in the judgment and join the opinion of the Court except that portion which rests upon detailed analysis of the Fifth Circuit’s opinion in *Johnson v. Georgia Highway Express, Inc.* and [related cases].” (citation omitted)). The actual holding in *Blanchard* is not relevant to *Perdue*.

91. See, e.g., *Perdue*, 130 S. Ct. at 1671–72; *Gisbrecht v. Barnhart*, 535 U.S. 789, 798–801 (2002); *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 562–64 (1986); *Blum*, 465 U.S. at 896–97; *Jordan v. Multnomah Cnty.*, 815 F.2d 1258, 1262–63 (9th Cir. 1987).

92. *Blanchard*, 489 U.S. at 91.

93. *Id.* at 91 n.5.

them⁹⁴ before turning to the lodestar method, which ultimately led to the holding.⁹⁵

Troubled by the majority's focus on *Johnson* despite the Court's recognition that a "reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended . . . times a reasonable hourly rate"⁹⁶ and that there is a "strong presumption that the lodestar figure . . . represents a 'reasonable fee,'"⁹⁷ Justice Scalia condemned the majority for "expand[ing] . . . our cases' excessive preoccupation . . . with the 12-factor *Johnson* analysis" and *Johnson*'s related cases.⁹⁸ He disparaged the idea that *Johnson*'s inclusion in the § 1988 Senate and House Committee Reports bound the Court to use *Johnson* as a guide to legislative intent⁹⁹ and reminded his colleagues that they had voted to use the lodestar method instead.¹⁰⁰

Justice Scalia makes a valuable point. Because courts have universally concluded that the lodestar method "has, as its name suggests, become the guiding light of our fee-shifting jurisprudence,"¹⁰¹ the *Johnson* factors seem to create more confusion than clarity. "Reasonable hours" appears to subsume two of the twelve factors,¹⁰² and a "reasonable hourly rate" appears to subsume

94. *Id.* at 92–94.

95. *Id.* at 94–97.

96. *Id.* at 94 (quoting *Blum*, 465 U.S. at 888).

97. *Id.* at 95 (quoting *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)).

98. *Id.* at 99 (Scalia, J., concurring in part and concurring in the judgment).

99. *Id.* at 98–99 ("I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to [*Johnson* and its related cases] were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . , but rather to influence judicial construction.")

100. *Id.* at 99 ("This expansion is all the more puzzling because I had thought that in . . . *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, we had acknowledged our emancipation from *Johnson*." (citations omitted)).

101. *E.g.*, *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1672 (2010) (quoting *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) (internal quotation marks omitted)).

102. *See Perdue*, 130 S. Ct. at 1672 n.4; *Hensley v. Eckerhart*, 461 U.S. 424, 430 n.3 (1983) (listing courts' considerations in determining "reasonable hours," which include *Johnson* factors (1) and (4)); *supra* text accompanying note 29.

the other ten.¹⁰³ As a result, none of the *Johnson* factors justify enhancement—“duplicat[ing] . . . factors already subsumed in the lodestar . . . amounts to double counting.”¹⁰⁴ The *Johnson* factors now serve only to create inconsistency,¹⁰⁵ and *Johnson* should be expressly disapproved the next time the Court grants certiorari in a § 1988 case.

B. Justice Thomas in *Perdue*

In his concurrence in *Perdue*, Justice Thomas appeared to question the need for enhancement under any circumstances. Although he did not go so far as to suggest that enhancement should never occur, he emphasized the majority’s limitations on enhancement and its recognition of the likelihood that enhancement would “double count”¹⁰⁶ a factor already accounted for in the lodestar.¹⁰⁷

Justice Thomas’s view is based on the well-settled rule that “the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney’s own affidavits—that the requested rates are in line with those *prevailing in the community for similar services* by lawyers of *reasonably comparable skill, experience, and*

103. See *Perdue*, 130 S. Ct. at 1672 n.4; *Hensley*, 461 U.S. at 430 n.3 (listing courts’ considerations in determining “reasonable hourly rate,” which include *Johnson* factors (2), (3), and (5) through (12)); *supra* text accompanying note 29.

104. *Dague*, 505 U.S. at 562–63.

105. A comparison of two recent unpublished district court opinions illustrates the varying ways in which lower courts currently apply the *Johnson* factors, resulting in a lack of uniformity. The *Jin v. Pacific Buffet House, Inc.*, No. 06-CV-579 (VVP), 2010 WL 2653334 (E.D.N.Y. June 25, 2010), district court asserted that the Second Circuit had formulated an “*Arbor Hill* approach” whereby the *Johnson* factors are used to determine the reasonable hourly rate, which is then multiplied by the reasonable hours spent. *Id.* at *1–2 & n.1. In contrast, the district court in *Sound v. Koller*, No. 09-00409 JMS/KSC, 2010 WL 1992194 (D. Haw. May 19, 2010), declared that it “must decide whether to enhance or reduce the lodestar figure based on an evaluation of the [*Johnson*] factors that are not already subsumed in the initial lodestar calculation.” *Id.* at *5 & n.4.

106. *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 566 (1986) (“Because considerations concerning the quality of a prevailing party’s counsel’s representation normally are reflected in the reasonable hourly rate, the overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of ‘double counting.’”).

107. *Perdue*, 130 S. Ct. at 1677–78 (Thomas, J., concurring) (“[The Court has] never sustained an enhancement of a lodestar amount for performance, and our jurisprudence since *Blum* has charted ‘a decisional arc that bends decidedly against enhancements’ [T]he lodestar calculation will in virtually every case already reflect all indicia of attorney performance relevant to a fee award.” (citation omitted)).

reputation.”¹⁰⁸ If a court computes the lodestar properly, then, the first scenario in which the *Perdue* majority approved a possible enhancement—for example, if the reasonable hourly rate were based on a single factor such as “years since admission to the bar”¹⁰⁹—will never occur.¹¹⁰ A court finding that its lodestar warrants enhancement because the hourly rate did not take into account some salient characteristic should recalculate the lodestar using reasonable rates and reasonable hours as described above—it should not attempt to compensate for the faulty lodestar by applying an enhancement.

C. Practical Considerations in *Perdue*

In the last two paragraphs of the *Perdue* majority opinion, the Court made three points that—though mentioned almost as an afterthought and not truly brought to bear on the analysis—speak to the fundamental justice and practicality of fees-award jurisprudence. First, the Court stated that without consistency in § 1988 awards, “defendants contemplating the possibility of settlement will have no way to estimate the likelihood of having to pay a potentially huge enhancement,” thereby undermining public policy, which favors settlement.¹¹¹ Second, the Court asserted that “unjustified enhancements that serve only to enrich attorneys are not consistent with [§ 1988’s] aim”¹¹² because the statute “was enacted to ensure that civil rights plaintiffs are adequately represented, not to provide . . . a windfall” to attorneys.¹¹³ Third and perhaps most importantly, the Court noted that taxpayers—as opposed to the actual wrongdoers—frequently end up paying fees awards, and “money that is used to pay attorney’s fees is money that cannot be used for programs that provide vital public services.”¹¹⁴

The Court’s holding in *Perdue* is inconsistent with these policy considerations. The circumstances that the majority felt would justify enhancement are so subjective that they render fees awards

108. *Blum v. Stenson*, 465 U.S. 886, 895–96 n.11 (1984) (emphasis added).

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

110. *See supra* notes 63–64 and accompanying text.

111. *Perdue*, 130 S. Ct. at 1676 (citing *Marek v. Chesny*, 473 U.S. 1, 7 (1985)).

112. *Id.*; *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989) (“[T]he very nature of recovery under § 1988 is designed to prevent any . . . windfall.” (internal quotation marks omitted)).

113. *Perdue*, 130 S. Ct. at 1677 n.8.

114. *Id.* at 1677 (citing *Horne v. Flores*, 129 S. Ct. 2579, 2593–94 (2009)).

unpredictable and discourage defendants from settling. Increasing a fee award above what is reasonable by applying an enhancement will always implicate the Court's concerns about windfalls to plaintiffs' attorneys and draining public funds. Even if litigation "is exceptionally protracted" or "involves exceptional delay in the payment of fees,"¹¹⁵ the lodestar approach ensures that a prevailing attorney will be paid reasonably for services rendered.¹¹⁶ The *Perdue* Court, then, successfully identified the key public policy considerations that § 1988 fees awards implicate; however, the Court failed to arrive at a holding consistent with these policies. The Court should rectify this omission in its next fees-award case.

D. Practical Considerations in *Blum*

The *Blum* majority discussed an aspect of fees awards that has received little attention in the twenty-six years since that opinion's publication but should be discussed in the Court's next § 1988 case. *Blum* sought a definition of "prevailing market rate" to use both in determining the lodestar's "reasonable hourly rate" and in calculating any enhancement.¹¹⁷ In *Blum*, attorneys from a nonprofit firm represented plaintiff-respondents in a § 1983 action.¹¹⁸ When respondents prevailed, defendant-petitioners argued that "the use of prevailing market rates to calculate attorney's fees under § 1988 leads to exorbitant fee awards and provides windfalls to civil rights counsel" who were not working for profit.¹¹⁹ Petitioners and their amicus curiae therefore urged the court to award fees "according to the cost of providing legal services . . . [b]ecause market rates incorporate operating expenses that may exceed the expenses of nonprofit legal services organizations, and include an element of profit unnecessary to attract nonprofit counsel."¹²⁰

115. See *supra* notes 58, 61.

116. When a defendant protracts litigation or unreasonably delays victory (and therefore payment), plaintiff's counsel will naturally receive a fee reflecting a very large number of reasonably expended hours.

117. *Blum v. Stenson*, 465 U.S. 886, 888–89 (1984).

118. *Id.* at 889–90.

119. *Id.* at 892.

120. *Id.* at 892–93.

The Court cited *Stanford Daily v. Zurcher*¹²¹ and *Davis v. County of Los Angeles*,¹²² two of *Johnson*'s¹²³ companion cases, as well as § 1988 itself in rejecting petitioners' argument as contrary to congressional intent.¹²⁴ An alternative and perhaps more compelling rationale for this conclusion lies in the traditional tort principle that "[t]hings which happen [after a defendant's tort] and let an injured plaintiff escape some of the ultimate consequences of the wrong done him do not inure to the benefit of the defendant."¹²⁵ Here too, a defendant found guilty of a civil rights violation should not owe less under § 1988 merely because nonprofit counsel represents his victim—any benefit should inure to counsel, who are innocent of any wrongdoing, rather than to the defendant. In addition, the Court held that the distinction between private and nonprofit representation—like complexity, novelty, quality of representation, number of persons represented, and (generally) quality of representation and results obtained—did not justify enhancement.¹²⁶

The Court noted that legal practice does not operate like a normal supply-and-demand market, so "[i]n this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community."¹²⁷ From this observation, the

121. 64 F.R.D. 680 (N.D. Cal. 1974). Courts "must avoid . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return." *Blum*, 465 U.S. at 895 (quoting *Stanford Daily*, 64 F.R.D. at 681) (internal quotation marks omitted).

122. No. 73-63-WPG, 1974 WL 180 (C.D. Cal. June 5, 1974). "It is in the interest of the public that [nonprofit] law firms be awarded reasonable attorneys' fees to be computed in the traditional manner." *Blum*, 465 U.S. at 895 (quoting *Davis*, 1974 WL 180, at *2) (internal quotation marks omitted).

123. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (1974).

124. "The statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum*, 465 U.S. at 895.

125. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 185 F. Supp. 826, 829 (M.D. Pa. 1960), *aff'd*, 281 F.2d 481 (3d Cir. 1960); *id.* at 829-30 ("Thus, if a man is injured by the negligence of another and has the good fortune to have an insurance policy which recompenses him for loss, the insurance money does not reduce the damages which the wrongdoer must pay. If friends of a man against whom a tort is committed make up a purse to pay for his medical services, that does not cut down what the plaintiff may recover from the tortfeasor. Wages continued by an employer during a time when an injured man is not working do not redound to the benefit of the wrongdoer. And, likewise, if a man having sustained an injury works extra hard after his recovery and comes out at the end of the year as financially well off as he would have been without the loss of time, the wrongdoer cannot claim reduction of damages on this account." (footnotes omitted)).

126. *Blum*, 465 U.S. at 898-902.

127. *Id.* at 895 n.11.

Court reasoned that private-counsel rates provide the best proxy for the prevailing market rate and reiterated the general rule that requested rates should parallel those sought by “lawyers of reasonably comparable skill, experience, and reputation.”¹²⁸

While these observations appear facially consistent, they present a significant policy problem in light of the *Perdue* majority’s third practical observation:¹²⁹ private attorneys bill much more per hour than nonprofit attorneys do,¹³⁰ so prevailing hourly rates based on private rates impose a very high cost on the public. If, for example, a court finds an individual police officer guilty of violating a suspect’s civil rights, the city or county must pay not only the damages award but also a fees award based on a private, for-profit hourly rate; this is true even if the case were handled pro bono or if the private attorney handling the case were of lesser “skill, experience, and reputation” than the majority of pro bono attorneys handling such cases.¹³¹

The Court has offered no reason to believe that fees awards based on *average* hourly rates—rather than on private, for-profit hourly rates—charged by attorneys of a particular caliber would not serve § 1988’s purpose of “ensur[ing] that [civil] rights are adequately enforced.”¹³² An hourly rate so calculated would also impose lesser costs on the public—thereby maximizing public benefit—and be more consistent with the plain language that defines the lodestar method as the product of reasonable hours and the *prevailing* rate.¹³³

V. CONCLUSION

Although the Supreme Court undoubtedly ruled properly in striking down the enhancement, *Perdue* represents a missed opportunity. The trial court imposed a huge enhancement that opened the door for the Court to strike down enhancements as a class. However, the Court neglected to rule broadly, apparently overlooking its own precedent that defined the lodestar and identified the public policies underlying fees awards. Furthermore, the Court

128. *Id.*

129. *See supra* note 114.

130. *See, e.g., Blum*, 465 U.S. at 892.

131. *Id.* at 892 n.6.

132. *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1671 (2010).

133. *E.g., Blum*, 465 U.S. at 895.

recited and used the *Johnson* factors despite its own frequent criticism of that method of fee calculation as granting excessive discretion to trial courts and despite the ample evidence of that criticism's accuracy.

The Court must dispose of enhancements and the *Johnson* factors if it is to avoid burdensome fees litigation, foster uniformity, prevent windfalls to attorneys at the expense of taxpayers, and encourage predictability so as to promote settlement. By adhering to the practical simplicity of the lodestar approach and keeping policy considerations in mind, the Court can provide lower courts the guidance they lack and promote reasonable § 1988 fees awards when they next grant certiorari in a case like *Perdue*.

