Title VII's statute of limitations requirements to clarify when later applications of a discriminatory employment practice are considered a "use" of the policy. This clarification could be done by explicitly stating whether later applications of a policy can be subject to disparate impact claims, or by extending the statute of limitations for all disparate impact claims. Until Congress clarifies the statutory language of Title VII, courts will continue to apply interpretations to the statute that are contradictory and that Congress likely did not intend.

B. Civil Rights Attorney's Fees Award Act

Performance-Based Enhancements. — In the American legal system, each party to litigation is generally responsible for paying its own attorney's fees.[1] However, Congress enacted a statutory exception to the American Rule when it passed the Civil Rights Attorney's Fees Awards Act of 1976[2] (§ 1988), which allows for the award of "reasonable" attorney's fees to the prevailing party in civil rights litigation.[3] The Act was intended to facilitate the private enforcement of civil rights legislation by encouraging competent counsel to represent civil rights plaintiffs who might otherwise not be able to pay for their services.[4] Last Term, in *Perdue v. Kenny A. ex rel. Winn*,[5] the Supreme Court held that an award of attorney's fees under the Act could be enhanced due to the attorney's superior performance, but only in extraordinary circumstances.[6] The Court overturned a $4.5 million enhancement to a $6 million fee award because the district court did not provide a sufficiently specific explanation of how it calculated the performance enhancement.[7] But although the Court purported to leave open the possibility that a fee award could be enhanced on the basis of performance quality,[8] it has effectively precluded performance enhancements altogether. The Court should have done explicitly what it has done effectively and barred performance-based enhancements to lodestar awards outright.

In 2002, nine foster children brought a class action in the Superior Court of Fulton County, Georgia, on behalf of a class of foster children

---

1 *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717–18 (1967); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9 (providing a history of the American Rule).

2 Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988(b) (2006)).

3 *See* 42 U.S.C. § 1988(b).

4 *See* S. REP. NO. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913; *see also* City of Riverside v. Rivera, 477 U.S. 561, 576–78 (1986).

5 130 S. Ct. 1662 (2010).

6 *Id.* at 1669.

7 *Id.* at 1670, 1675.

8 *See id.* at 1674.

in Fulton and DeKalb Counties.[9] The children were represented by attorneys from Children's Rights, Inc., Keenan's Kids Law Center, and Bondurant, Mixon & Elmore.[10] The complaint asserted fifteen causes of action stemming from systemic deficiencies in the Fulton and DeKalb foster care systems and sought declaratory and injunctive relief.[11] The case was removed to federal court in the Northern District of Georgia,[12] where in 2005, after extensive discovery and mediation efforts, the parties entered into a consent decree that granted far-reaching relief to the plaintiffs.[13]

Both parties agreed that the plaintiffs were entitled to recover reasonable attorney's fees under § 1988; however, they disagreed about the amount of fees to which the plaintiffs were properly entitled.[14] The plaintiffs claimed a lodestar fee of approximately $7 million.[15] A lodestar fee "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" by multiplying the hours worked by the prevailing market rate.[16] The lodestar method of calculating attorney's fees is the generally accepted means for resolving attorney's fee disputes under federal fee-shifting statutes such as § 1988.[17] Because of the quality of service rendered and the extraordinary results achieved, the plaintiffs also claimed a 100% enhancement to the lodestar fee, for a total award in excess of $14 million.[18] The defendants contended that a reasonable fee award would be approximately $3 million.[19] Senior District Judge Shoob approved a lodestar award of approximately $6 million.[20] He then found that the plaintiffs had established that "the quality of service rendered by class counsel . . . was far superior to what consumers of legal services in the legal marketplace in Atlanta could reasonably expect to receive for the rates used in the lodestar calculation."[21] Emphasizing that the attorneys had advanced $1.7 million in case expenses without ongoing pay, that the "degree of skill, commitment, dedication, and professionalism" demonstrated by the at-

---

9 Kenny A. *ex rel.* Winn v. Perdue, 454 F. Supp. 2d 1260, 1266 (N.D. Ga. 2006).

10 *Id.*

11 *See id.* at 1267.

12 *See id.*

13 *See id.* at 1269.

14 *Id.*

15 *Id.* at 1270.

16 *Perdue*, 130 S. Ct. at 1672; *see* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The Court has stated that the hourly rate used in the lodestar calculation should be the prevailing market rate in the relevant community. *See* Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984).

17 *See, e.g.*, Gisbrecht v. Barnhart, 535 U.S. 789, 801–02 (2002).

18 *Kenny A.*, 454 F. Supp. 2d at 1270.

19 *Id.*

20 *Id.* at 1286.

21 *Id.* at 1288.

torneys exceeded that displayed "in any other case during [his] 27 years on the bench," and that the "sweeping relief" granted to the plaintiffs was "truly exceptional," Judge Shoob awarded a 75% enhancement to the lodestar for a total award of approximately $10.5 million.[22]

Both parties appealed on multiple grounds. The Eleventh Circuit affirmed the award.[23] Judge Carnes, writing for the court,[24] quickly disposed of the plaintiffs' claims and all but one of the defendants' claims, holding that the district court had resolved them correctly or had acted within its discretion.[25] But the panel fractured with regard to the defendants' claim that the performance enhancement was inappropriate, and each judge wrote separately: all three would affirm the district court's enhancement on the basis of circuit precedent,[26] but they disagreed about the correctness of that precedent.

In the portion of his opinion not joined by the remainder of the panel, Judge Carnes argued that both the district court's performance enhancement to the lodestar award and the circuit precedent supporting that enhancement were inconsistent with Supreme Court precedent.[27] Judge Carnes lamented that although he was "convinced that [the Eleventh Circuit precedent was] wrong and conflict[ed] with relevant Supreme Court decisions," the panel could not overturn prior panels' decisions.[28] Had Judge Carnes been "free to decide the issue," he would have held the $4.5 million enhancement to be an abuse of discretion because the enhancement was "based on an erroneous view of the law and reflect[ed] a clear error of judgment."[29] Judge Wilson filed a special concurrence in which he concurred in the decision to uphold the enhancement to the lodestar award, but disagreed with Judge Carnes's "view that the district court's decision and [the Eleventh Circuit's] prior precedents . . . are inconsistent with the teachings of the Supreme Court."[30] Judge Hill filed a brief concurrence, which stated that the enhancement should be upheld because of

---

[22] *Id.* at 1288–90.

[23] Kenny A. *ex rel.* Winn v. Perdue, 532 F.3d 1209, 1242 (11th Cir. 2008).

[24] Judge Hill joined Parts I–V and VII of Judge Carnes's opinion.

[25] *See Kenny A.*, 532 F.3d at 1219–20.

[26] All three judges cited *NAACP v. City of Evergreen*, 812 F.2d 1332 (11th Cir. 1987); and *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292 (11th Cir. 1988), finding that those cases controlled the outcome in this case. *See Kenny A.*, 532 F.3d at 1236–38 (opinion of Carnes, J.); *id.* at 1246 (Wilson, J., concurring); *id.* at 1251 (Hill, J., concurring).

[27] *See Kenny A.*, 532 F.3d at 1225 (opinion of Carnes, J.) (citing City of Burlington v. Dague, 505 U.S. 557, 562 (1992)) (finding district court decision was inconsistent with Supreme Court precedent); *id.* at 1238 (finding circuit precedent conflicted with Supreme Court precedent).

[28] *Id.* at 1238.

[29] *Id.* at 1236.

[30] *Id.* at 1242 (Wilson, J., concurring).

prior circuit precedent and expressed no opinion about the correctness of that precedent.[31]

The Eleventh Circuit denied rehearing en banc.[32] Judge Wilson concurred in the denial, stating that the circuit precedent was clear, consistent with Supreme Court precedent, and consistent with the positions of other circuits to have considered the question.[33] Three judges dissented from the denial of en banc review. Judge Tjoflat's dissent argued that under a proper reading of the circuit precedent, the district court's decision should be vacated on two independent grounds: first, the grounding of the district court's decision in the judge's personal observations made it unreviewable; second, the district judge's subjective evaluations of the plaintiffs' counsel's performance were effectively ex parte testimony that denied the defendants due process of law.[34] In the alternative, Judge Tjoflat argued that even if circuit precedent required affirmation of the district court's award, en banc review would still be appropriate to determine whether and how quality of performance could justify an enhancement to a lodestar award that already assumed a top-of-market hourly rate.[35] Judge Carnes's dissent, which was joined by Chief Judge Dubina and Judge Tjoflat, argued that rehearing en banc should have been granted to address "an important question of federal law that has not been, but should be, settled by [the Supreme] Court."[36]

The Supreme Court reversed and remanded. Justice Alito, writing for the majority,[37] extolled the virtues of the lodestar method of determining fee awards.[38] He emphasized that the lodestar method both approximates the payment an attorney would have received from a paying client and provides an objective measure that "cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results."[39] Accordingly, Justice Alito stressed that there is a "'strong presumption' that the lodestar figure is reasonable."[40] Nevertheless, the Court held that this presumption can be overcome and the lodestar award enhanced on the basis of attorney

---

[31] *Id.* at 1251 (Hill, J., concurring).

[32] Kenny A. *ex rel.* Winn v. Perdue, 547 F.3d 1319, 1319–20 (11th Cir. 2008).

[33] *See id.* at 1320–22 (Wilson, J., concurring in denial of rehearing en banc).

[34] *See id.* at 1323 (Tjoflat, J., dissenting from denial of rehearing en banc).

[35] *See id.* at 1327.

[36] *Id.* at 1331 (Carnes, J., dissenting from denial of rehearing en banc) (alteration in original) (quoting SUP. CT. R. 10(c)) (internal quotation mark omitted).

[37] Justice Alito was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.

[38] *Perdue*, 130 S. Ct. at 1672–73.

[39] *Id.* at 1672.

[40] *Id.* at 1673.

performance[41] in "rare" and "exceptional" circumstances where there is "specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel.'"[42] Justice Alito listed three circumstances in which a performance enhancement *might* be appropriate: (1) when "the method used in determining the hourly rate . . . does not adequately measure the attorney's true market value, as demonstrated in part during the litigation";[43] (2) when "the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted";[44] and (3) when "an attorney's performance involves exceptional delay in the payment of fees."[45]

Justice Alito rejected the performance enhancement in this case because the district court did not provide sufficient justification for the award.[46] He particularly took issue with the seeming arbitrariness of the 75% enhancement: "why 75% rather than 50% or 25% or 10%?"[47] Although the attorneys had made extraordinary outlays and payment was delayed, the district court did not explain how those factors contributed to its calculation of the enhancement.[48] A district court must "provide a reasonably specific explanation" of its calculation of an enhancement in order to facilitate appellate review and maintain predictability and regularity of fee awards.[49] Moreover, the district court improperly relied on an "impressionistic," comparative evaluation of the counsel's performance.[50]

Justices Kennedy and Thomas filed brief concurring opinions. Justice Kennedy's concurrence emphasized the tendency of judges and lawyers to view pending or recently finished cases as extraordinary and stressed that enhancements are proper "only in the rarest circumstances."[51] Justice Thomas's concurrence highlighted the "decisional arc" in Supreme Court jurisprudence that has continued to bend away from performance enhancements.[52] He stated that the lodestar award

---

41 While the question presented was whether attorney performance *or* the results obtained could be the basis of an enhancement, the Court treats "these two factors as one," since "superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance." *Id.* at 1674.

42 *Id.* (quoting Blum v. Stenson, 465 U.S. 886, 897 (1984)).

43 *Id.*

44 *Id.*

45 *Id.* at 1675.

46 *See id.*

47 *Id.*

48 *See id.* at 1676.

49 *Id.*

50 *Id.*

51 *Id.* at 1677 (Kennedy, J., concurring).

52 *Id.* at 1677–78 (Thomas, J., concurring) (quoting Kenny A. *ex rel.* Winn v. Perdue, 532 F.3d 1209, 1221 (11th Cir. 2008)).

would suffice and an enhancement would be unnecessary "in virtually every case."[53]

Justice Breyer concurred in part and dissented in part.[54] He agreed with the Court's holding that a lodestar award can be enhanced based on the quality of attorney performance in exceptional cases, but disagreed with the Court's evaluation of the award in this case.[55] Justice Breyer pointed out that the Court's decision went beyond the question on which it had granted certiorari — whether a lodestar award "can '*ever* be enhanced based solely on [the] quality of [the lawyers'] performance and [the] results obtained.'"[56] He argued that the Court should not have reached the issue of the award made in *Perdue* once it answered this question in the affirmative.[57] But even if he were to reach that question, Justice Breyer continued, he would have affirmed the award and held "that the District Court did not abuse its discretion in awarding an enhancement."[58] He emphasized the intangible elements of attorney performance and the deference an appellate court should pay to the district court judge's first-hand evaluation of that performance.[59] Pointing to the importance of the civil rights at stake, the "lengthy and arduous" investigation and proceedings, the exceptional results obtained, and the district judge's characterization of the attorneys' performance, Justice Breyer argued that the enhancement in this case was not an abuse of discretion.[60] He also noted that the lodestar award compensated attorneys at an average rate of $249 per hour, which was lower than the average rate of attorney compensation in Georgia.[61] The performance enhancement raised that rate to an average of $435 per hour, which was comparable to that charged by the nation's leading law firms and merited in the instant case by the attorneys' extraordinary performance.[62]

In *Perdue*, all nine Justices agreed that lodestar awards can be enhanced based on the quality of attorney performance in some circumstances.[63] In effect, however, the Court has precluded such enhancements altogether. Not only was this case clearly extraordinary, but also the requirement of "specific evidence that the lodestar fee would

---

[53] *Id.* at 1678.

[54] Justice Breyer's opinion was joined by Justices Stevens, Ginsburg, and Sotomayor.

[55] *See Perdue*, 130 S. Ct. at 1678 (Breyer, J., concurring in part and dissenting in part).

[56] *Id.* (alteration in original) (quoting Petition for Writ of Certiorari at i, *Perdue*, 130 S. Ct. 1662 (No. 08-970), 2009 WL 245095, at *i (emphasis added)).

[57] *See id.*

[58] *Id.*

[59] *See id.* at 1679.

[60] *See id.* at 1679–83.

[61] *Id.* at 1683.

[62] *Id.*

[63] *See id.* at 1674 (majority opinion); *id.* at 1683–84 (Breyer, J., concurring in part and dissenting in part).

not have been 'adequate to attract competent counsel'"[64] is a nearly insurmountable evidentiary bar. In addition, *Perdue* has essentially banned the consideration of attorney performance from an inquiry that is supposed to be about performance quality. Ultimately, although the Court paid lip service to performance enhancements, *Perdue* will likely prove to be their death knell. Instead of rendering performance enhancements virtually impossible while purporting to endorse them, the Court should have explicitly barred performance enhancements. Performance enhancements are not contemplated by § 1988 and result in arbitrary and unpredictable awards that are unsuited to appellate review. By nominally preserving performance enhancements, the Court has invited further litigation over attorney's fees, which will drain state funds better spent on the very programs that cases such as this one seek to reform. Although there is certainly reason to think that attorneys are not adequately compensated by lodestar awards,[65] the remote possibility of a performance enhancement is not a solution to systematic undercompensation.

The Court was careful to hold that there *are* exceptional circumstances in which a lodestar award can be enhanced on the basis of "superior attorney performance."[66] But it undermined this holding by refusing to endorse the enhancement awarded for the best performance a district court judge had seen "during [his] 27 years on the bench."[67] "If this is not an exceptional case," as Justice Breyer aptly pointed out, "what is?"[68] The Court further undermined its claim that it preserved the possibility of performance enhancements by requiring "specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel.'"[69] In 2009, the ABA reported that there were 1,180,386 active attorneys in the United States.[70] During the 2008–2009 academic year alone, 43,588 J.D. degrees were awarded by accredited U.S. law schools.[71] When there is such a large population of lawyers (many of whom are un- or underemployed), surely a lodestar fee, which compensates attorneys with reference to the market rate,

---

[64] *Id.* at 1674 (majority opinion) (quoting Blum v. Stenson, 465 U.S. 886, 897 (1984)).

[65] For example, because an attorney's receiving payment for his or her work is contingent upon the outcome of the case, a lodestar award does not compensate attorneys for the risk that they will not be paid. *See generally* John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473 (1981) (arguing that a fee award should be increased to account for the risk that a lawsuit will be unsuccessful).

[66] *Perdue*, 130 S. Ct. at 1674.

[67] Kenny A. *ex rel.* Winn v. Perdue, 454 F. Supp. 2d 1260, 1289 (N.D. Ga. 2006).

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

[69] *Id.* at 1674 (majority opinion) (quoting *Blum*, 465 U.S. at 897).

[70] *National Lawyer Population by State*, AM. BAR ASS'N (2009), http://new.abanet.org/marketresearch/PublicDocuments/2009_NATL_LAWYER_by_State.pdf.

[71] *Enrollment and Degrees Awarded*, AM. BAR ASS'N (2009), https://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf.

would always be adequate to attract *some* counsel.[72] Unless courts put a lot of weight on "competent,"[73] a defendant should always be able to identify a competent attorney who would have taken the case for the lodestar fee.[74] The evidentiary requirement that the Court glosses over would thus likely prove a total bar to performance enhancements should courts take it seriously.

In addition to failing to endorse an enhancement in a truly exceptional case and imposing a seemingly unachievable evidentiary requirement, the Court undermined performance enhancements in a more subtle way: it prevented judges from considering the quality of an attorney's performance in making an enhancement ostensibly on the basis of that performance. Justice Alito pointed to three circumstances that might justify a performance enhancement, but none is actually *about* performance quality. Two of these circumstances — extraordinary outlay of expenses over the course of protracted litigation and exceptional delay in payment — are wholly unrelated to performance quality. At first glance, the third — when the hourly rate "does not adequately measure the attorney's true market value"[75] — sounds as if it might have something to do with attorney performance. However, Justice Alito clarified that he was referring to the manner in which the rate is calculated, not the quality of performance.[76] And even when this circumstance is present, it does not actually justify a performance enhancement. Instead of awarding a performance enhancement, "the trial judge should adjust the attorney's hourly rate."[77]

---

[72] *See* Erin Miller, *Rejecting Fee Enhancements Without Rejecting Them:* Perdue v. Kenny A.*, Opinion Recap*, SCOTUSBLOG (May 3, 2010, 9:38 AM), http://www.scotusblog.com/2010/05/rejecting-fee-enhancements-without-rejecting-them ("[I]t is difficult to imagine a situation where the lodestar would not hypothetically be sufficient to attract *some* attorney.").

[73] The Court has not defined attorney competence in the context of attorney's fee awards, but it has done so extensively in ineffective assistance of counsel cases. *See, e.g.*, Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010). However, in these cases the Court has not provided a rule for identifying competent counsel ex ante, but rather has undertaken a case-by-case, ex post analysis of the propriety of certain actions taken by an attorney. *See, e.g.*, *id.* These precedents are thus unhelpful to the ex ante inquiry that would be necessary here.

[74] While much has been written about the difficulty of finding competent counsel to represent indigent criminal defendants, *see, e.g.*, Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 164–73 (2009), thanks to fee-shifting statutes like § 1988, the same concerns do not apply in the civil rights context. Attorneys who prevail are provided market-based compensation for their work, and contingent payment serves to motivate zealous representation. *See* Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 44 (1989) ("Contingent fees . . . motivate lawyers to work more diligently, since their compensation depends upon their clients' recovery.").

[75] *Perdue*, 130 S. Ct. at 1674.

[76] *Id.* (noting that the hourly rate might not measure the attorney's market value when that rate "is determined by a formula that takes into account only a single factor (such as years since admission to the bar) or perhaps only a few similar factors") (footnote omitted).

[77] *Id.*

Accordingly, despite being one of three circumstances that can supposedly justify a performance enhancement (and the only one of the three that appears to have something to do with attorney performance), it merely justifies an adjustment to the lodestar calculation.

Thus, the Court endorsed the possibility of performance enhancements while making them virtually impossible to obtain and stripping the inquiry of any relationship to attorney performance. The Court should have done explicitly what it has accomplished effectively: barred performance enhancements to lodestar awards. Performance enhancements are not contemplated by § 1988. The primary intent of § 1988 was to induce competent counsel to take on civil rights cases;[78] performance enhancements do not serve this end. The remote possibility that an attorney's performance might occur in the limited and extraordinary circumstances — some of which, like delayed payment, are entirely out of the attorney's control — that could justify a performance enhancement is unlikely to serve as an enticement: "[N]o reasonable attorney making an ex ante determination [about] whether to take on a representation would rely on the speculative and remote possibility that the district judge is going to have found this to be one of the best cases he has ever seen . . . ."[79] Additionally, performance enhancements constitute "windfalls to attorneys," contrary to the intent of § 1988,[80] because they double count attorney performance.[81] As the Court has noted before, "The 'quality of representation' . . . generally is reflected in the reasonable hourly rate."[82] Because the hourly rate itself compensates for performance quality, an enhancement "for quality of representation is a clear example of double counting."[83] If the hourly rate does not adequately reflect performance quality, that is reason to adjust that rate, not to award an enhancement.[84]

Performance enhancements to lodestar awards also lead to unpredictable and arbitrary awards that are ill-suited to appellate review. The unpredictability of these awards means that "defendants contemplating the possibility of settlement will have no way to estimate the likelihood of having to pay a potentially huge enhancement."[85] In

---

[78] *See* S. REP. NO. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5909–10.

[79] Transcript of Oral Argument at 25, *Perdue*, 130 S. Ct. 1662 (No. 08-970), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-970.pdf.

[80] *See* S. REP. NO. 94-1011, at 6, *reprinted in* 1976 U.S.C.C.A.N. at 5913.

[81] *See* City of Burlington v. Dague, 505 U.S. 557, 562–63 (1992); Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 566 (1986).

[82] Blum v. Stenson, 465 U.S. 886, 899 (1984).

[83] *Id.*; *see also Delaware Valley*, 478 U.S. at 566 ("Because . . . the quality of a prevailing party's counsel's representation normally [is] 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.'").

[84] Justice Alito himself suggests as much. *See Perdue*, 130 S. Ct. at 1674.

[85] *Id.* at 1676 (citing Marek v. Chesny, 473 U.S. 1, 7 (1985)).

overturning the district court's award, Justice Alito seemed most troubled by the seeming arbitrariness of the 75% enhancement, but it is not clear how a judge could choose a multiplier less arbitrarily. Furthermore, the subjective nature of an inquiry into performance quality precludes meaningful appellate oversight. While district court judges should have some discretion in making fee awards, impressions of attorney performance may be influenced by their "subjective opinion[s] regarding particular attorneys or the importance of the case."[86] Appellate courts are unable to assess the validity of the subjective impressions inevitably underlying performance enhancements.

The Court relied heavily on precedent in upholding the possibility of performance enhancements.[87] But although the Court considered itself bound by precedent to endorse the possibility of a performance enhancement, it has "never sustained an enhancement of a lodestar amount for performance."[88] In previous cases, the Court did note that a lodestar award *might* be enhanced based on quality of performance, but in none of those cases was the enhancement actually upheld.[89] Moreover, the Court's "jurisprudence since *Blum* [*v. Stenson*][90] has charted 'a decisional arc that bends decidedly against enhancements.'"[91] As Justice Thomas recognized, *Perdue* "advance[d] . . . attorney's fees jurisprudence further along [that] decisional arc" and barred performance enhancements "in virtually every case."[92] So while prohibiting performance enhancements would have advanced that arc one step further, that step is the logical conclusion to the jurisprudential path the Court has charted since *Blum*.

By nominally preserving performance enhancements while rendering them virtually unobtainable, the *Perdue* Court missed an opportunity for transparency. It also encouraged further litigation over performance enhancements. As the Court has stated, "A request for attorney's fees should not result in a second major litigation."[93] This precept is especially true in civil rights cases such as *Perdue* in which the cost of protracted litigation "divert[s] resources away from precisely those agencies and programs that benefit the class of plaintiffs on

---

[86] *Id.*

[87] *See id.* at 1672–73.

[88] *Id.* at 1673.

[89] *See, e.g.*, Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565–68 (1986); Blum v. Stenson, 465 U.S. 886, 897–98 (1984); Hensley v. Eckerhart, 461 U.S. 424, 435, 440 (1983).

[90] 465 U.S. 886.

[91] *Perdue*, 130 S. Ct. at 1677 (Thomas, J., concurring) (quoting Kenny A. *ex rel.* Winn v. Perdue, 532 F.3d 1209, 1221 (11th Cir. 2008)).

[92] *Id.* at 1678.

[93] *Hensley*, 461 U.S. at 437.

whose behalf the lawsuit was brought."[94] Because *Perdue* will govern the "application of at least one hundred federal fee-shifting statutes,"[95] the resources expended litigating performance enhancements that will be unobtainable "in virtually every case"[96] could be substantial. Instead of waiting for the next case to bring the arc of performance enhancement jurisprudence to its inevitable terminus and inviting litigation in the meantime, the Court should have taken this opportunity to prohibit performance enhancements outright.

C. Honest Services Fraud

Covered Offenses. — CEOs behaving badly: that was the story behind the Enron Corporation's implosion in 2001 and the accounting improprieties at Hollinger International Inc. Prosecutors zealously pursued Enron's Jeffrey Skilling and Hollinger's Conrad Black, convicting them of honest-services fraud among other crimes. However, last Term in *Skilling v. United States*,[1] *Black v. United States*,[2] and a third case, *Weyhrauch v. United States*,[3] the Court vacated Black's and Skilling's convictions, holding that the federal statute prohibiting honest-services fraud[4] applies only to bribery and kickback schemes. The Court's reasoning was odd, but criminal procedure left no better options; without other tools to preclude prosecutors from pursuing conduct that only potentially, rather than indisputably, fits a statute, the Court had to invalidate the statute, prune it, or uphold dubious convictions. The honest-services fraud trilogy thus illustrates a systemic problem in criminal justice: When prosecutors charge conduct that only debatably violates the prohibiting statute, those prosecutions are less likely to serve the public interest. Unfortunately, no avenue for judicial review of those decisions exists other than the unwieldy vagueness doctrine. If judges could filter out such prosecutions at the beginning of the litigation process — rather than after the fact on appeal — prosecutors would make better charging decisions and the public would be saved the expense of unnecessary trials.

---

[94] Brief of the States of Alabama et al. as Amici Curiae in Support of Petitioners at 12–13, *Perdue*, 130 S. Ct. 1662 (No. 08-970), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-970_PetitionerAmCu30StatesandDC.pdf; *see also Perdue*, 130 S. Ct. at 1677 ("[M]oney that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services.").

[95] Kenny A. *ex rel.* Winn v. Perdue, 547 F.3d 1319, 1331 (11th Cir. 2008) (Carnes, J., dissenting from denial of rehearing en banc).

[96] *Perdue*, 130 S. Ct. at 1678 (Thomas, J., concurring).

[1] 130 S. Ct. 2896 (2010).

[2] 130 S. Ct. 2963 (2010).

[3] 130 S. Ct. 2971 (2010) (per curiam).

[4] 18 U.S.C. § 1346 (2006).