2004 WL 1149249 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Jerry REGIER, et al., Petitioners,
v.
DOES 1-13, et al., Respondents.

No. 03-1445.
May 19, 2004.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

Brief in Opposition to Petition for a Writ of Certiorari

Steven M. Weinger, Esquire*, Helena M. Tetzeli, Esquire, Kurzban Kurzban Weinger &, Tetzeli, P.A., 2650 SW 27th Avenue, 2nd Floor, Miami, Florida 33133, (305) 444-0060, Attorneys for Respondent.

***i** QUESTION PRESENTED

Whether the decision of the Court of Appeals for the Eleventh Circuit followed the decisions of this Court and does not conflict with decisions of other Circuit Courts when it affirmed the District Court's award of attorney's fees in favor of Plaintiffs in their Section 1983 Civil Rights Class Action in which they represented a class of several thousand developmentally disabled individuals eligible for and in need of specialized Medicaid services who had been deprived of services by Defendants for many years.

OBJECTIONS TO PETITIONERS' "QUESTIONS PRESENTED"

Petitioners ignore the well-established standards for certiorari review by this Court. This Court does "not grant a certiorari to review evidence and discuss the specific facts." *United States v. Johnston,* 268 U.S. 220, 221 (1925). In this case the competent substantial evidence amply supports the opinions below.

***II PARTIES TO THE PROCEEDINGS**

The parties to this proceeding are:

Petitioners-Defendants: The Petitioners/Defendants are Jerry Regier, Secretary of the Florida Department of Children and Families; Mary Ellen McDonald, District 11 Administrator, Florida Department of Children and Families; Michelle Brantley, Assistant Secretary, Florida Department of Children and Families; and Robert Sharpe, Medicaid Director, Florida Agency for Health Care Administration.

Respondents-Plaintiffs: The Respondents are eleven named Plaintiffs who represent a class of several thousand developmentally disabled individuals who were eligible for and in need of specialized Medicaid Services in ICF/DDs.

***iii** TABLE OF CONTENTS

***v** TABLE OF AUTHORITIES

Cases

***1 BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

The Plaintiffs/Respondents, John/Jane Does 1-13, respectfully file this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed by the Defendants/Petitioners.

OPINIONS BELOW

The Court of Appeals' per curiam affirmance is unreported. The District Court's Order awarding attorney's fees is unreported. Both the Court of Appeals' affirmance without opinion and the District Court's opinion are reproduced in Petitioners' Appendix.

STATEMENT OF THE CASE

On March 13, 1992, Plaintiffs/Respondents ("Respondents") filed their Class Action Complaint. R. 1. Final Judgment was entered four years later on August 28, 1996. R. 449. Defendants/Petitioners ("Defendants") appealed.

The Court of Appeals affirmed the Final Judgment and remanded the case with instructions to the District Court to assess attorney's fees against Defendants. *Id.*; R. 488 (Mandate). *Doe v. Chiles,* 136 F.3d 709 (11th Cir. 1998).

After entry of the Final Judgment, Defendants took the position that they were merely required to place language in the State Medicaid Plan setting a reasonable ***2** waiting period but not required to actually provide services with reasonable promptness. *Doe v. Bush,* 261 F.3d 1037, 1047 (11th Cir. 1998). The Eleventh Circuit Court of Appeals found Defendants' position "untenable". *Id.* at 1047.

The District Court heard argument on the Plaintiffs' Motion for Attorney's Fees but entered an Order denying the motion until all post-judgment proceedings were completed and entered the final fee award on March 15, 2003, over eleven years after the lawsuit was commenced. Pet. App.5-11. Defendants appealed the District Court Order to the Eleventh Circuit Court of Appeals, the fourth appeal in this case. On January 16, 2004 the Eleventh Circuit entered its per curiam affirmance of the District Court's decision. Pet. App.1-4.

STATEMENT OF THE FACTS

A. Nature of the Case

Plaintiffs are a class of several thousand developmentally disabled individuals who were eligible for and in need of specialized Medicaid services in the Intermediate Care Facility for the Mentally Retarded/Developmentally Disabled ("ICF/MR" or "ICF/DD") program. Defendants failed to provide ICF/DD services to Plaintiffs, relegating them to years on waiting lists.

The ICF/DD program and the traumas suffered by the severely disabled class members who were deprived of life-preserving services for decades were documented by the Eleventh Circuit in affirming the Final Judgment. *Doe v. Chiles,* 136 F.3d 709 (11th Cir. 1998). "[T]he record 'reveals ***3** A plethora of facts showing the harm caused to developmentally disabled persons by the State of Florida's current procedure which allows eligible Medicaid recipients who have been determined to be in need of ICF/DD Services to be placed on indefinite waiting lists.' " *Doe v. Chiles, supra* at 713, n.7. Indeed, two of the thirteen named Plaintiffs died as the result of lack of essential services between the time the Complaint was filed and the entry of the Final Judgment. R. 627; 499, Tab 8 (1996 Whitaker Affidavit at ¶3).

Even after entry of the Final Judgment, Defendants repeatedly sought to avoid compliance. Upon remand, Defendants took the position that relief had only been ordered for the one dozen named class representatives and that Defendants were not required to provide any services to the other 2,000 individuals on the State of Florida waiting list who were eligible and awaiting services for many years. R. 579, at 1-9.

Prior to relief in this case, Florida ranked 49th among the states in providing for individuals with developmental disabilities and approximately 45th in providing ICF/DD beds per capita. R. 453, deposition of Donna Allen at 132; R. 453, Ex. 5, letter of Governor Lawton Chiles to the President of The Florida Senate at 1.

B. The Fee Award Is Supported By Uncontroverted Evidence

Through uncontroverted evidence, Plaintiffs established all the facts necessary to support the fee awarded by the District Court. The District Court credited this evidence, addressed and rejected the Defendant's objections, independently evaluated the file, and awarded the fee justified by the evidence. Pet. App. 5-12. First the ***4** District Court determined the lodestar. After determining the lodestar, the District Court determined that the lodestar should be adjusted as to hours expended in the District Court in accordance with established legal precedent. Pet. App.7-10. No adjustment of the lodestar was made for the fee award for work performed on the appeal to the Eleventh Circuit. Pet. App.11.

In adjusting the lodestar, the District Court made specific factual findings. Pet. App.8-11. All of the factual findings are based upon uncontroverted evidence and the District Court's personal observations during the course of the proceedings. *Id.* Defendants did not present any conflicting evidence as to any of the factual findings of the District Court used to upwardly adjust, or enhance, the lodestar before the Court of Appeals.

Some of the evidence omitted from Defendants' Statement of Facts is presented below.

1. Reasonableness of the Hours Expended

The Defendants claimed that the hours were unreasonable even though the hours claimed were minuscule compared to the hours expended by the Defendants' lawyers. One minor defense lawyer (Colodny, Fass and Talenfeld, P.A.) alone was paid for 400% more hours than the hours claimed by Plaintiffs' counsel. R. 462, 464, 465. In addition, Defendants utilized the services of two other law firms. Most significantly, a large team of lawyers from the Office of the Attorney General was lead counsel for the Defendants. Defendants' legal team spent perhaps 10 times as many hours as Plaintiffs' counsel in this case.

***5** The Colodny firm was employed as private counsel for the Secretary of the Department of Children and Families and was paid by the Defendant State of Florida officials for its work. Colodny represented the Secretary in these proceedings up until the entry of the Final Judgment. R. 462, 464, 465. As can be seen from the record, this attorney did virtually no original work as the Office of the Attorney General took the lead as counsel for all Defendants.

Colodny billed and was paid for over 4,000 hours of work for its minor role in this case.[1] During that same time, Plaintiffs' counsel logged and was awarded only 1,193.5 hours by the District Court. Remarkably, the Defendants approved payment for these minor attorneys for over 4,000 hours while objecting to the hours of Plaintiffs' counsel who spent only 25% as many hours actually litigating the entire case and prevailing in obtaining relief. R. 464 at 7, n. 10.

2. Hourly Rates

Just as Defendants frivolously and litigiously challenged the reasonable number of hours expended, Defendants challenged the hourly rate without a good faith basis. Near the inception of the lawsuit, in 1992, Defendants' outside counsel, Hinshaw & Culbertson, in another matter against the same Defendants advised Defendants that:

> ***6** We have little doubt that a court would award Mr. Weinger, based upon his experience, his usual fee of $250.00 per hour. Second, since this case was filed before *Wilder* was decided, Mr. Weinger may also be entitled to a multiplier. R. 453, Ex. 1.

Remarkably, ten years later, Defendants argued to the District Court that the hourly rate of $125.00 per hour was the reasonable hourly rate for Plaintiffs' lead counsel, Mr. Weinger. R. 492 at 14, R. 627 at 3. Needless to say, the District Court's determination that the reasonable hourly rate of lead counsel was $250.00 per hour is amply justified by the evidence in the record. R. 627 at 3.

3. The Case Was Rare and Exceptional And Plaintiffs Obtained Exceptional Results

Aside from the evidence presented by Margulies[2], ***7** Rossman[3] and Weinger[4], the District Court had ample evidence from which to conclude that the Plaintiffs had ***9** obtained exceptional results and that the case itself was exceptional.

a. Defendants' Admissions as to the Magnitude of the Case

In support of their Motion for Stay of the Final Judgment, Defendants argued that compliance with the Judgment would cost hundreds of millions of dollars and take years to accomplish. R. 461. Defendants took the same position before the Eleventh

Circuit in their Emergency Motion for Stay, arguing that compliance would require expenditure of an "astronomical amount." See Appellants' Emergency Motion for Stay of January 17, 1997 at 3. Defendants asserted to the District Court that the cost of providing prompt treatment to class members would be between $750,000,000 to one billion dollars. R. 490-491, R. 599, Transcript of November 4, 1998 hearing at 49 where Defendants' counsel stated, "Moreover, I think despite the fact that Mr. Weinger was accurate, not only I, but my clients have made public in record statements that in order to comply with this Court's final judgment would cost the state between somewhere between 750 (sic) to a billion dollars annually. I think the accurate number is now the one that is being discussed currently, which is possibly two thousand people total, but six hundred here who are in immediate need."

It should be noted that after losing the appeal on the merits, Defendants refused to comply with the Judgment, claiming that the offer of an ICF/DD placement to the surviving 12 named Plaintiffs at minimal cost was complete compliance. R. 579 at 5-9. As the Eleventh Circuit explained in the second appeal, "the defendants themselves have ***10** always understood that the relief granted in the final judgment was intended to be system-wide, and not just limited to the named Plaintiffs." *Doe v. Bush,* 261 F.3d 1037, 1050 (11th Cir. 2001). As a result, the litigation has benefited the 2000 eligible individuals as well as the hundreds or thousands of newly eligible developmentally disabled individuals who have entered the system since the Plaintiffs prevailed.

b. 2001 Status Report of National Association of State Directors of Developmental Disabilities Services, Inc.

Plaintiff also filed the 2001 Status Report of the National Association of State Directors of Developmental Disability Services, Inc., a "trade" association of State Directors administering Medicaid programs in the 50 states. R. 624, Tab 6. That report specifically referred to the instant case as follows:

> In March of 1998, the Eleventh U.S. [Court] of Appeals handed down a watershed decision in the Florida *Does v. Chiles* (now *Doe v. Bush*) litigation that made it clear that federal Medicaid law does not permit a state to 'wait list' individuals for ICF/MR services indefinitely. The Court ruled that ICF/MR services were no different than any other non-waiver Medicaid service, namely such services must be furnished with reasonable promptness to eligible applicants. *Most waiting list lawsuits elsewhere have been filed on the heels of this decision* … While the decision applies to states in the Eleventh Circuit, *it has been frequently cited as the basis of lawsuits filed in other Federal circuits.* R. 624, Tab 6, Status Report at 5 (emphasis added).

***11** The Status Report went on to note that "as of March 2001, waiting list lawsuits have been filed in 15 states." R. 624, Tab 6, Status Report at 6.

Moreover, and as a result of this case, Florida's "funding for developmental services has increased by approximately $360,000,000 over the past two years." R. 624, Tab 6, Status Report at 7. Thus, in the opinion of the Association for State Developmental Disability Directors, i.e., counter-parts of the Defendants in the other 49 states, this was "a watershed" decision with a significant and far reaching impact on the lives of developmentally disabled individuals throughout the country. R. 624, Tab 6.

The remarkable impact of this case is also seen in the remarkable increase in funding for services for individuals with developmental disabilities in Florida and the repeated citations to *Doe v. Chiles* throughout the country in support of successful litigation to expand available healthcare services. The decision has also been cited in dozens of law review articles, treatises and cases.

In terms of making services available to individuals with developmental disabilities, no other case in the country has had as significant an impact as *Doe v. Chiles.* Defendants in this case valued the impact at hundreds of millions of dollars in additional services annually. Nationally, the impact is in the billions of dollars in new services for eligible individuals.

c. Defendants' Conduct and Other Circumstances Made This Litigation Exceptionally Challenging

Against all odds, without legal precedent, ignoring the Defendants' threats, without help from lawyers who ***12** receive federal and state funds to advocate and litigate for individuals with disabilities, Plaintiffs' counsel successfully litigated this case for over a decade. R. 1-628. Thirteen years later, after 628 docket entries in the District Court and four appeals to the Eleventh Circuit, Defendants argued unsuccessfully to the Court of Appeals that the maximum total allowable fee is $91,896.75. This proposed figure includes over $27,000 in costs and all legal work in the trial Court and in the Court of Appeals on the appeal on the merits. Petitioner's Brief to Eleventh Circuit at 44. Defendants' proposed figure works out to $47.00 (Forty-Seven Dollars) per hour for the hours found reasonable and necessary by the District Court and by all of the experts. Defendants' position on attorney's fees is a powerful reminder of their litigation strategy from the inception of this case.

As a consequence of this case, Florida increased funding of services to its Medicaid eligible and developmentally disabled citizens by Three Hundred Sixty Million Dollars ($360,000,000.00) annually. See R. 624, Tab 6, at 7. Since entry of the Final Judgment literally billons of dollars in additional services have been provided.

Preparing and litigating this lawsuit was particularly challenging because:
1. The Defendants promised that they would litigate every possible issue and appeal every single Order (R. 453, Affidavit 2 of Weinger at ¶3) and they kept their promise as reflected in the docket sheet showing over 600 entries to date.

***13** 2. The stakes could not be higher. Prompt placement was a matter of life and death for many of the class members.[5] The cost of the services ordered by the District Court and affirmed by this Court was determined by the Defendants to be Seven Hundred Million Dollars ($700,000,000) to $1,000,000,000 (One Billion Dollars). E.g. 453, St. Petersburg Times Article; R. 599 at 49 (transcript of 11/4/98 hearing at which Defendants' counsel specifically admitted that Defendants and their counsel had made public statements that compliance with the Final Judgment would cost the state somewhere "between $750 million to a billion dollars annually.") Research discloses that State of Florida Officials have never been sued in a case that the State determined would have this significant a financial impact other than the litigation to clean up the Everglades.

3. The clients could not be more difficult to represent. These individuals are the lowest functioning developmentally disabled individuals. Many are non-verbal. Many are non-ambulatory. Many are fragile with severe medical problems. Many have extraordinarily difficult behaviors. R. 453, Tab 8. The Plaintiffs were unable to be gainfully employed because of their severe disabilities ***14** and were therefore indigent and Medicaid eligible.
4. The Defendants promised retribution against the Plaintiff's counsel, caused the loss of business from paying healthcare clients seeking to resolve differences with the Defendants' offices (Defendants were the heads of the Agency for Health Care Administration, which operates the entire Florida Medicaid Program and all health care licensing, and the Department of Children and Families) R. 453, Ex. 3, Affidavit 2 of Weinger at ¶3; R. 454, 499 Margulies Declaration at ¶9.

5. No advocacy groups or public interest lawyers were willing or competent to gather the facts, learn the law, and take on the tremendous burden of this litigation. R. 454, 499, Margulies Declaration at ¶6.

Defendants repeatedly misrepresented the facts in the record and took frivolous positions. Defendants denied many of the allegations of the Complaint and then failed to present any evidence supporting the denial of these allegations during the course of the litigation and raised numerous affirmative defenses, none of which had a legal or factual basis. Indeed, on their appeal on the merits, the Eleventh Circuit described Defendants' factual argument that class members were not being harmed by the Defendants' delay in providing services as "meritless" and "frivolous" and described Defendants' argument on the alleged lack of standing based on the lack of harm as "unworthy of further discourse." *Doe v. Chiles, supra* at 713, n.7.

***15 C. The Total Fee Award**

In 2003, based on the foregoing analysis, the District Court awarded Plaintiffs fees of $649,869.50. Order, R. 627 at 7. This sum includes fees for both the work performed in the District Court since the inception of the case which was filed in 1992, through March 2003 and the fees for the successful appellate work before the Eleventh Circuit Court of Appeals.

REASONS FOR DENYING THE PETITION

The Defendants' Petition for Writ of Certiorari should be denied because the decision of the Eleventh Circuit Court of Appeals is not inconsistent with the decisions of this Court; does not conflict with the decisions of any other Court of Appeals; does not decide a federal question in a way that conflicts with a decision of a state court of last resort; does not call for this Court's exercise of its supervisory powers; and does not decide an important issue of federal law that has not been, but should be, settled by this Court. In sum, the decisions below properly apply existing precedent to the facts presented.

*16 I. THE DISTRICT COURT PROPERLY AWARDED PLAINTIFFS AN UPWARD ADJUSTMENT OF THE LODESTAR BASED ON FINDINGS THAT THIS WAS A RARE AND EXCEPTIONAL CASE; "EXCEPTIONAL SUCCESS" AND "GROUND BREAKING RESULTS" ACHIEVED BY PLAINTIFFS

The District Court's Order explained that it was:
enhancing the lodestar fees for both the motion for attorneys' fees and the supplemental claim for attorneys' fees by a multiplier of 2.0 because this is a rare and exceptional case where upward adjustment of the lodestar is appropriate due to exceptional success. *Blum v. Stenson,* 465 U.S. 886, 898-99 (1984) (recognizing an enhanced award of attorneys' fees in cases of exceptional success); *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1953) "in some cases of exceptional success an enhanced award may be justified"); *Loranger v. Stierheim,* 10 at F.3d 776, 783 (1994) (declining to decide whether the case was a "rare and exceptional case where an award went upward adjustment of the lodestar is called for because of exceptional success"); *Allen v. Freeman,* 694 F. Supp. 1554, 1556 (1988) (court found enhancement of the lodestar amount appropriate because the results of the litigation were exceptional.) Pet. App.8.

The District Court went on to state it:

> also considered the exceptional success and groundbreaking results achieved by the plaintiffs in this case. In 1996, a judgment was entered for the Plaintiffs ordering state officials to provide institutional care for eligible applicants, some of whom have been waiting for many years without ***17** proper care. That judgment was affirmed on appeal by the Eleventh Circuit Court of Appeals in an opinion which painstakingly established the law to govern this case and several related cases which followed. See, *Doe v. Chiles,* 136 F.3d 709 (11th Circuit 1998). Pet. App.9.

The District Court's findings were amply supported by the record.[6] As set forth in the Margulies and Weinger ***18** Affidavits, this was a complex case presenting novel issues. R. 624 at Tab 4 and 5 especially Margulies Affidavit at ¶7 noting "the case is extremely complex and will require a thorough knowledge of highly specialized areas of law such as the Federal Medicaid Statutes and Regulations, the inner-workings of the Florida Medicaid Plan and comprehensive knowledge of the Federal Civil Rights Law. At the time the case was brought, the claim was unique and novel." See also R. 624, Tab 6, Status Report by National Association of State Directors of Developmentally Disability Services, Inc., at 5, describing this case as a "watershed" and groundbreaking case, noting the decision has "been frequently cited as the basis of lawsuits filed in other federal circuits", and that "most waiting list lawsuits elsewhere have been filed on the heels of this decision."

Moreover, as documented in filings for the District Court, this cause was an unpopular one and adversely affected Plaintiffs' counsel's law firm. No other attorneys, even those working with advocacy groups, were willing to accept this case. R. 454. "As a result of litigation" lead counsel's "reputation among elected officials in the state and executive branch has been

severely hurt … and the hard fought battle to win benefits for these individuals has, due to the unpopularity of this cause, and the unpopularity of providing additional funds to individuals with developmental disabilities, made the balance of his ***19** practice more difficult." R. 454 at ¶9. As a result, Plaintiffs' counsel's practice suffered. R. 453, Ex. 3, Weinger Affidavit, explaining that potential clients determined their interests would be better served by using another attorney without such an adversarial relationship with state officials.

II. NEITHER THE PER CURIAM AFFIRMANCE NOR THE UNPUBLISHED DISTRICT COURT OPINION CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR ANY OTHER COURTS OF APPEAL

In their Petition to this court, the Defendants fail to set forth any decision that conflicts with the Eleventh Circuit Court of Appeal's affirmance in this case or with the District Court's opinion. This is not surprising as the decision of the Eleventh Circuit does not cite any cases, but is instead a per curiam affirmance without opinion, citing to Eleventh Circuit Rule 36.1. Eleventh Circuit Rule 36.1 provides in pertinent part:
When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous; …

(e) judgment has been entered without a reversible error of law; and opinion would have no precedential value, the judgment or order may be affirmed without opinion.

The Court of Appeals and the District Court both applied relevant law. There is no conflict between this case ***20** and the cases cited by the Defendants. Thus, no conflict exists justifying a grant of certiorari in this case.

A. The Decisions Follow All Prior Decisions of This Court

This Court has made clear that attorney's fee cases are determined by their respective facts, and the District Court is given substantial discretion in determining the appropriate fee. See e.g., *Hensley v. Eckerhart,* 461 U.S. 424, 430, 437 (1983) noting "the amount of the fee, of course, must be determined on the facts of each case"; and emphasizing "the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters."

Upward enhancements of a lodestar are authorized by this Court in *Hensley* and its progeny. See e.g. *Blum v. Stenson,* 465 U.S. 886 (1984); *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air,* 478 U.S. 546 (1986). Thus, as this Court held in *Hensley*, "the product of the 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 the results obtained." *Hensley, supra* at 434. *Hensley* involved a §1983 claim for fees where Plaintiffs had not succeeded on all their claims and did not involve an upward adjustment to the lodestar. This Court remanded the case for the District Court to consider the relationship between Plaintiffs' success in the litigation and the fee award, which is exactly what the District Court did in this case. *Hensley*, therefore, does not conflict with the District Court's decision in this case, as Defendants do not challenge the lodestar in their Petition, and as it expressly ***21** recognizes that the District Court is authorized to adjust the fee up or down, based on its superior knowledge of the litigation and based on relevant considerations.

Defendants also rely on *Blum v. Stenson,* 465 U.S. 886 (1984). There is no conflict between *Blum* and this case. In *Blum*, this Court reaffirmed that "a District Court is authorized, in its discretion, to allow a prevailing party an upward adjustment in attorney's fees in cases of exceptional success." *Blum, supra* at 896. This Court in *Blum* rejected the Defendants' argument that "upward adjustments are never reasonable" but reversed the fee award because the District Court's award of an enhancement in that case was based partially on a contingency risk factor. This was not a basis for the multiplier awarded in this case. Moreover, unlike the Plaintiffs in this case, the plaintiff in *Blum* failed to carry her burden of proving that an upward adjustment was justified.

In *Blum*, this Court explained that, "the record before us contains no evidence supporting an upward adjustment of fees calculated under the basic standard of reasonable rates times reasonable hours. The affidavits of Respondent's attorneys do not claim, or even mention, entitlement to a bonus or upward revision." *Blum, supra* at 896. In contrast, the issue of a multiplier in this case was extensively supported by competent, substantial, uncontroverted evidence and this issue was litigated by the parties before the District Court and the Court of Appeals. The District Court made specific findings upon which it based enhancement of the lodestar including "the groundbreaking results achieved by the Plaintiff in this case" and the Eleventh Circuit's affirmance which it described as "an opinion which painstakingly established the law to govern this case as well as several related cases which followed." Pet. App.9. Moreover, the Plaintiffs in this case, as set forth in the affidavits and ***22** other record evidence, established the exceptional and indeed seminal nature of this litigation. See e.g. R. 490-91, R. 599, R. 624, Tabs 1-7. As set forth in the record before the Eleventh Circuit Court of Appeals, the decision has been described as "watershed" and led to the filing of similar cases on behalf of developmentally disabled individuals in at least 15 other states. R. 624, Tab 6.

Defendants also refer to this Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air,* 478 U.S. 546 (1986). Again, the facts of that case are inapposite to the facts of this case and the opinion of the District Court and the Eleventh Circuit Court of Appeals in this case are wholly consistent with this Court's opinion in *Delaware Valley.* First, the enhancement that was reversed in the *Delaware Valley* case was based partially on a contingency risk multiplier. *Delaware Valley, supra* at 555-556. This factor did not form any part of the analysis of the District Court in this case. Moreover, in *Delaware Valley* this Court reaffirmed its holding in *Hensley* reiterating that "the product of reasonable hour 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 …." *Delaware Valley* at 564, citations to *Hensley v. Eckerhart.*

This Court then reiterated that in *Hensley* it "took a more expansive view of what those 'other considerations' might be," noting that "the District Court also may consider the factors identified in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). *Delaware Valley, supra* at 564.

Finally this Court in *Delaware Valley* held that upward adjustments in "rare" and "exceptional" cases are ***23** allowed when supported by specific evidence on the record and findings by the lower court. *Delaware Valley, supra* at 564. As in *Blum*, this Court in *Delaware Valley* reversed the fee award because the Plaintiff in that case "presented no specific evidence as to what made the results it obtained … 'so outstanding'." *Delaware Valley, supra* at 567-568. Indeed, this Court in *Delaware Valley* based its decision in part on the District Court's "elimination of a large number of hours on the grounds that they were unnecessary, unreasonable, or unproductive" as this was "not supportive of the [District] Court's later conclusion that the remaining hours represented work of 'superior quality'." *Delaware Valley, supra* at 568. In contrast, the District Court in the case at bar did not make any findings inconsistent with superior quality work and Plaintiffs in this case presented substantial, uncontroverted evidence of the rare and exceptional nature of this case.

The only other Supreme Court decision cited by Defendants is *City of Burlington v. Dague,* 505 U.S. 557 (1992). Defendants seem to admit in their petition that *Dague* is distinguishable from this case as it stands solely for the proposition that an enhancement for contingency of an attorney's fees award to a prevailing party is not permitted. Thus, there is no conflict with *Dague* as Plaintiffs in this case were not awarded a multiplier based on contingency.

B. The Decision Does Not Conflict with the Decisions of Any Other Circuit Court

None of the circuit court decisions cited by Defendants present a conflict with this case. *Planned Parenthood of Central and Northern California v. Arizona,* 789 F.2d 1348 (9th Cir. 1986) predates the Ninth Circuit's decision in ***24** *Guam Society of Obstetricians and Gynecologists v. Ada,* 100 F.3d 691 (9th Cir. 1996), a section 1983 action against state officials where the Court of Appeals affirmed a multiplier of two times the lodestar amount because of the "visible and controversial nature of the case." This case is wholly consistent with the Ninth Circuit's more recent decision in the *Guam* case, cited by Plaintiffs in their Motions for Attorney's Fees filed with the District Court, and in their brief to the Eleventh Circuit Court of Appeals.

Further, there is no inconsistency between this case and the Ninth Circuit's decision in *Planned Parenthood.* The *Planned Parenthood* case involved a request for a multiplier based in part on the contingency aspect of the case and was decided six years before this Court directly addressed this issue in *City of Burlington v. Dague,* 505 U.S. 557 (1992). Moreover, the

Plaintiffs in *Planned Parenthood* failed to provide any evidence "that the representation actually posed a substantial risk to the law firm's business or that any risk presented was not adequately taken into consideration in setting the hourly rate." *Planned Parenthood, supra* at 1354. In contrast, Plaintiffs in the case at bar made a compelling and uncontroverted showing that the law firm was shunned by paying healthcare clients as a result of this suit against state healthcare officials, that the life or death nature of this case adversely affected Plaintiffs' counsel's law firm and also established other factors supporting an enhancement including the groundbreaking and beneficial results of this litigation. R. 490-91; 590; 626.

Defendants suggest that this case conflicts with *Van Gerwen v. Guarantee Mutual Life Company,* 214 F.3d 1041 (9th Cir. 2000). In *Van Gerwen*, an ERISA case, the Ninth Circuit reversed an award of a multiplier where there was ***25** no evidence the case was rare and unusual and where the Plaintiffs' attorney's work was inferior. Indeed, as the Ninth Circuit noted in that case, the District Court had reduced the award by applying a "*downward* multiplier" of .75 based on the "poor quality of the attorney's work." *Van Gerwen, supra* at 1044. (emphasis added). The Appeals Court in *Van Gerwen* reversed, holding that the District Court could not reduce the rates based on the poor quality of representation without making findings of fact. *Van Gerwen, supra* at 1049. *Van Gerwen* is therefore patently distinguishable from the case at bar where the opposite was true as the District Court specifically found that the Plaintiffs' counsel did a superior job.

Defendants' reliance on *Odima v. Western Tucson Hotel,* 53 F.3d 1484 (9th Cir. 1994) is also meritless. In *Odima*, a partial success case, the Circuit Court found that the Plaintiff had failed to demonstrate that an enhancement to the lodestar was justified. The Ninth Circuit in *Odima* simply remanded the case as the District Court did not set forth sufficient information supportive of the enhancement. *Odima, supra* at 1500. There is therefore no conflict between *Odima* and this case when the record here is replete with evidence supporting lodestar adjustment.

UNR Industries v. Schwartz, Cooper, Kolb & Gaynor Charter, 986 F.2d 207 (7th Cir. 1983) also does not conflict with the case at bar. In *UNR*, a bankruptcy case, the Seventh Circuit Court of Appeals simply affirmed the District Court's decision that the bankruptcy judge's denial of a multiplier under 11 U.S.C. §330 was not clearly erroneous. *UNR, supra* at 211. *UNR* did not involve 42 U.S.C. §1988 or any fee shifting statute. Most importantly, the discussion and analysis of fee enhancement in *UNR* is entirely consistent with the decisions in this case.

***26** In *Cooper v. Pentecost,* 77 F.3d 829 (5th Cir. 1996), a 1983 class action brought on behalf of prisoners against a County jail, the Circuit Court affirmed the District Court's Order awarding attorney's fees and denying a multiplier. Again, unlike this case, the District Court in *Cooper* found that the Plaintiff submitted duplicative, repetitive and excessive hours. *Cooper, supra* at 832. Such is not the case here. Moreover, directly contrary to the record in this case, the record in *Cooper* showed no "oppressive, unpleasant or intimidating conditions" affecting Plaintiffs' counsel which would support an enhancement. *Cooper, supra* at 834.

In *Watkins v. Fordice,* 7 F.3d 453 (5th Cir. 1993) the Fifth Circuit Court of Appeals, relying on the virtually axiomatic legal principle that a District Court has "broad discretion in setting reasonable attorney's fees" and concluded the District Court "did not abuse its discretion" by refusing to either enhance or reduce the lodestar in a Voting Rights Act case. *Watkins, supra* at 460. There is therefore no conflict between *Fordice* and the decisions in this case.

Finally, Defendants rely on *Hendrickson v. Branstad,* 934 F.2d 158 (8th Cir. 1991). *Hendrickson* is also distinguishable from the case at bar and is not inconsistent with this case. *Hendrickson*, unlike this case, is a case where the Plaintiff was only partially successful in his claims. *Hendrickson, supra* at 161. As the Court in *Hendrickson* noted the enhancement was based in part on a contingency risk multiplier, not a factor here. *Hendrickson, supra* at 163.

Moreover, the District Court in *Hendrickson* found that counsel was awarded a large amount of billable hours in the case and the Court of Appeals found therefore that the lodestar was reasonable. *Hendrickson, supra* at 164. In ***27** contrast, Plaintiffs in this case billed a "relatively low number" of hours, as found by District Court. Pet. App. 8.

C. No Lack of Uniformity Exists in the Circuit Court Decisions

Defendants suggest that certiorari in this case is required due to lack of "uniformity" and "caprice" in Circuit Court decisions on this issue. Petition at 15. Defendants cite to *Hyatt v. Apfel,* 195 F.3d 188 (4th Cir. 1999). Defendants state that the Fourth

Circuit in *Hyatt* "ignored or skirted the requirement for specific facts in the record to justify an enhancement." Petition at 14. This allegation is simply wrong and even a cursory review of the Fourth Circuit's decision in *Hyatt* establishes the inaccuracy of this statement. As the Fourth Circuit explained in its well reasoned opinion, the litigation in that case was over a decade old and had been the subject of "four published opinions of this court, a remand by the United States Supreme Court, and numerous District Court decisions leading up to the appeals." *Hyatt, supra* at 189-90.

In its lengthy opinion, the Fourth Circuit quoted the District Court's findings supporting an enhancement in that case. The District Court's findings were detailed and specific. *Hyatt supra* at 191-93. As a portion of the District Court's decision reproduced in the Fourth Circuit opinion noted, "the success achieved by Plaintiff is properly characterized as exceptional. Plaintiffs have succeeded in bringing about fundamental change to a recalcitrant agency which brought all of the power of the federal government to bear on Plaintiffs and their counsel while it resisted Plaintiffs' efforts to enforce the orders of this Court and the Fourth Circuit each step of the way." *Hyatt, supra* at 191-193.

***28** Defendants also again overreach when they describe the *Miniscribe Corp.* decision also as having "ignored or skirted the requirements for specific facts in the record to justify an enhancement." *In re Miniscribe Corp.,* 309 F.3d 1234 (10th Cir. 2002), a bankruptcy case, the Tenth Circuit Court of Appeals in a detailed opinion exhaustively described the proceedings below which involved a claim for attorney's fees by a trustee. The Tenth Circuit found that the lodestar test is the appropriate method of calculating reasonable compensation for a Chapter 7 trustee. The Court reduced the hourly rate of $500 per hour, and affirmed the 2.57 lodestar multiplier awarded by the bankruptcy court, "given the strong findings by the bankruptcy court in support of its determination that the result achieved was sufficiently extraordinary to justify a multiplier, and the reasoning of the District Court flowing from these findings, we cannot conclude, based on our standard of review, that the District Court erred by applying a 2.57 multiplier." *Miniscribe, supra* at 1245.

The Defendants' characterization of the Sixth Circuit Court of Appeals' decision in *Paschal v. Flagstar Bank, FSB,* 297 F.3d 431 (6th Cir. 2002) is simply wrong. Defendants' statement that the "circuit court approved a 50% enhancement where the District Court concluded *only* that the hourly rate awarded was 'modest' " is not accurate. Petition at 15 (emphasis added). In fact, the Sixth Circuit in *Paschal* noted that in addition to the relatively low hourly rate awarded, the District Court's decision to enhance the attorney's fee award was also expressly based on the "excellent job the attorneys did at trial, the fact that the case involved claims that were difficult to prove, and the fact that the marshalling of evidence was an arduous and time consuming task." *Paschal, supra* at 435-37. The Sixth Circuit found that ***29** based on the relevant law, the record and those findings, the District Court did not abuse its discretion. *Paschal, supra* at 436.

III. DEFENDANTS' CRITICISM OF THE FACTORS ESTABLISHED BY THIS COURT FOR THE DETERMINATION OF A REASONABLE FEE ARE MERITLESS

Defendants complain that this Court's intervention is necessary for the uniform application of these standards. Defendants' petition fails to provide any convincing reason for further clarification or formulation of standards governing attorney's fee awards in general or as to public bodies in particular. The Defendants' suggestion that this Court eliminate one of the factors relevant to determination of a reasonable fee award, i.e., that other counsel were not available and that the Plaintiffs were unpopular because of differences as to those facts is meritless. Trial courts are well-suited for weighing facts and applying the law. As this Court has indicated these cases are fact specific. Changing the law as requested by Defendants would not produce predictability of decisions or uniformity among courts. Significantly, there was no difference of opinion between the District Court and the Eleventh Circuit Court of Appeals in this case, nor among the members of the panel that affirmed this decision.

Defendants are understandably unhappy with the results of this litigation and of the attorney's fee award. However, Defendants failed to rebut substantial evidence submitted by the Plaintiffs establishing the existence of all the factors relevant to the fees ultimately awarded by the District Court and affirmed by the Court of Appeals in this case. Thus while the Defendants hypothize that "improperly ***30** imposed fee enhancements" "threaten the financial stability of public programs and services and could result in diminished public services for all" (Plaintiffs' Petition at 16), in the case at bar the end result was quite predictable and could have been avoided by Defendants. Defendants moreover failed to controvert, rebut or address this evidence, including affidavits and other evidence expressly establishing the appropriateness of a fee enhancement. See, e.g., R. 490-91, 599, 624.

Defendants' intent in requesting this Court to change the law and disturb well-established precedent is no doubt motivated by their dissatisfaction with the factual findings upon which the legal conclusions of the District Court and the Eleventh Circuit rest in this case. However, this Court does not normally grant certiorari in such cases. See, e.g., *United States v. Johnston,* 268 U.S. 220, 221 (1925) "we do not grant a certiorari to review evidence and discuss the specific facts."

CONCLUSION

The Petition for Certiorari should be denied since the lower Courts correctly applied the standard.

Footnotes

[*] Counsel of Record

[1] Colodny Fass and Talenfeld represented a single, individual capacity Defendant and were paid $328,789.50 by the Defendant State officials. R. 464 at 7, n.10.

[2] **Margulies Declaration** — Professor Margulies, a respected lawyer experienced in federal court litigation provided evidence on the factors which the District Court was required to consider in setting a fee. Professor Margulies explained that the hours requested in the charts attached to the Motion for attorney's fees were "reasonable and necessary", that the case was "handled extremely efficiently", that the "results obtained were exceptional"; that he knew "from personal knowledge that the individuals who benefit from this ruling had been unsuccessful in finding any advocacy group or attorney … willing to perform the task of representing these individuals but for the agreement of Steven M. Weinger, Esquire, to represent them in this case"; "that the case was extremely complex and required a thorough knowledge of highly specialized areas of law such as Federal Medicaid Statutes and Regulations, the inner workings of the Florida Medicaid Plan, and a comprehensive knowledge of general civil rights law", that "at the time the claim was brought the claim was unique and novel", and that "without Steven M. Weinger, Esq.'s creativity and broad legal knowledge, I do not believe this case would have been brought to a successful conclusion." R. 454, 499 at Tab 3, paragraphs 4-8, R. 624, Tab 4, ¶4-8.
Finally, Plaintiffs' counsel's acceptance of this case adversely affected his reputation and/or that of his law firm. Margulies attested, "as a result of the litigation, Steven M. Weinger, Esquire's reputation among elected officials and state executive branch officials has been severely hurt Although I know that Steven M. Weinger, Esquire, has engaged in the highest form of advocacy for the individuals he served, the hard fought battle to win benefits for these individuals has due to the unpopularity of this cause, and the unpopularity of providing additional funds for individuals with developmental disabilities, made the balance of his practice more difficult." R. 454, 499 at Tab 3, R. 624, Tab 4, Margulies Declaration at ¶9.

[3] **Rossman Affidavit** — Jonathan Rossman, Esq. represented individuals with disabilities in private practice after serving as the Executive Director of the Medicaid funded Florida Advocacy Center for Persons with Disabilities for 15 years. R. 499, Tab 4, ¶2.
Mr. Rossman explained that Plaintiff's counsel has "an exceptional range of skills all of which are needed in this case, including significant healthcare experience, significant personal experience with developmentally disabled individuals and direct personal experience in successfully litigating a massive, multi-party case against the Department of Health & Rehabilitative Services to obtain a preliminary injunction under the very same statute which is the basis for *Doe v. Chiles,* 42 U.S.C. 1396a(a). *Id.* at ¶9. Mr. Rossman testified that he was professionally familiar with Plaintiff's lead counsel, and met with him on numerous occasions from "1990 through the present in regard to matters affecting developmentally disabled individuals. I have personal knowledge of Mr. Weinger's work and I have reviewed portions of some of the filings prepared by Mr. Weinger in the lawsuit entitled *John/Jane Does No.'s 1-13, et al. v. Lawton Chiles, et al.*" R. 453, Rossman Affidavit at ¶4. Mr. Rossman further attested in his Affidavit that "both Mr. Weinger and his law firm have established extremely positive reputations for their legal talents and public service, particularly for their work in complex Federal Court litigation." Rossman Affidavit at ¶8.

[4] **Plaintiffs' Counsel's Affidavit** — Plaintiffs' lead counsel was uniquely qualified to represent these Plaintiffs. Plaintiff is a 1978 graduate of the University of Chicago Law School, who was also an instructor at the University of Miami School of Law and who taught courses in Section 1983 litigation. Mr. Weinger was also involved in preparation of a case book on Section 1983 litigation. R. 453, 499, Ex. 2 Affidavit of Steven M. Weinger, Tab 2, ¶¶ 1, 3 and 4.
In addition to his educational background, membership in relevant professional associations and national recognition (R. 453), he has substantial relevant legal experience. For over 20 years, his practice has been devoted almost exclusively to litigation, largely in Federal Court and more often then not involving complex litigation. R. 453. Plaintiffs' lead counsel has a significant experience in class actions and was first recognized as having substantial experience in representing Plaintiffs in class actions by former Chief

Judge for the Southern District of Florida, The Honorable James Lawrence King in 1982. R. 453, Ex. 2. R. 499 Tab 2 ¶11(a). Thus, Mr. Weinger had substantial experience in litigating complex class action cases in federal court prior to filing the instant case in 1992. R. 499 Tab 2 at ¶11(b).

In addition to experience in complex class action litigation, Mr. Weinger was uniquely well-suited to represent the Plaintiffs in the instant case due to his expertise in the area of health law. See R. 453, Ex. 2, 499 ¶11 documenting his experience in federal litigation against state officials who were Defendants in this case, or their predecessors, for violation of the Medicaid Act, and experience in administrative litigation against the State and Department of Health and Rehabilitative Services.

Mr. Weinger's law firm "was the only firm, sole practitioner or legal advocacy group willing to undertake legal representation of the Plaintiffs against the State of Florida in the instant matter." R. 453, Ex. 2, R. 499, Tab 3 Affidavit 2.

"As a result of this litigation, Plaintiffs' counsel has been criticized by Florida officials and has, as a result lost potential clientele who have determined that their interests would be better served by engaging an attorney who is not actively litigating such a controversial case against state officials." R. 499 Tab 3 at ¶6. "Numerous facets of this lawsuit constituted priority work which required substantial expenditures of time and effort within a relatively short period of time. This summer in particular, I was precluded from accepting other employment due to my commitment to this case." Weinger also verified that "all of the factual assertions in the Memorandum of Law are true and correct to the best of my knowledge," and that "our law firm expended 1,193 hours as described in detail in time records attached hereto." R. 453, Ex. 2, R. 499 Tab 3 ¶8 and 9.

[5] In her affidavit filed in 1996 in the case, federally recognized Qualified Mental Retarded Professional ("QMRP") Kathryn Whitaker advised that John Doe 3 died in an non-ICF/DD group home in the summer of 1993 during a "seizure- status-epileptics." Ms. Whitaker noted that "the group home did not have any nurses on staff or staff trained in the manner which meets the requirements of the training of staff at an ICF/DD facility and by the time the home finally dialed 911 John Doe 3 was deceased." R. 453 Whitaker Affidavit, Ex. 8.

[6] Apart from an enhancement because of the rare and exceptional nature of this case, Plaintiffs in this eleven year old case are entitled to an upward adjustment of the fee based upon the seven year delay in the receipt of payment since entry of the Final Judgment in 1996. In *Missouri v. Jenkins,* 491 U.S. 274, 283 (1989), this Court approved the enhancement of fees to compensate attorneys for delay in payment. As this Court explained:

[C]ases have repeatedly stressed that attorney's fees awarded under this statute [§1988] are to be based on market rates for services rendered. Clearly, compensation received several years after the services were rendered — as they frequently are in complex civil rights litigation — is not equivalent to the same dollar amount received reasonably and promptly as legal services are performed, as would normally be the case with private billings. We agree, therefore, that an appropriate adjustment for delay in payment — whether by the application of current rather than historic hourly rates ***or otherwise*** — is within the contemplation of the statute. *Id. at* 283-284 (citations omitted) (emphasis added).

See also, *Norman v. Housing Authority of City Montgomery,* 836 F.2d 1292, 1300 (11th Cir. 1988) ["In this Circuit, where there is a delay the court should take into account the time value of money and the effects of inflation and generally award compensation at current rates rather than at historic rates"]; *Davis v. Locke,* 936 F.2d 1208 (11th Cir. 1991), (multiplier for delay and difficulty obtaining counsel and risk); *Formby v. Farmers and Merchants Bank,* 904 F.2d 627, 633-34 (11th Cir. 1990) (1.33 multiplier for delay); *Tufaro v. Willie,* 756 F. Supp. 556, 563 (S.D. Fla. 1991); *Amico v. Newcastle County,* 654 F. Supp. 982, 1008 (D. Del. 1987); *Weiss v. York Hospital,* 628 F. Supp. 1392, 1414-15 (N.D. Pa. 1986); *Institutionalized Juveniles v. Secretary of Public Welfare,* 568 F. Supp. 1020, 1033 (E.D. Pa. 1983); *In re Baldwin-United Corp.,* 79 BR 321, 346-350 (Bkrtcy. S.D. Ohio 1987); *Cerva v. EBR Enterprises,* 740 F. Supp. 1099, 1106-1109 (E.D. Pa. 1990); *Williams v. Marriott Corp.,* 669 F. Supp. 2, 6 (D.C. 1987); *U.S. v. Aisenberg,* 247 F. Supp. 2d 1272 (N.D. Fla. 2003) (1.5 multiplier based on five year delay).

End of Document