No. 16-

IN THE

Supreme Court of the United States

DOROTHY L. BIERY, GORDON HOLLOWAY, GEORGE A. HOLLOWAY, STACY E. JUDY TRUST, JULIA R. CHALFANT ETVIR TRUST, K.A.K. FARMS, INC., AMERICAN PACKING CORPORATION, COLLINS INDUSTRIES, INC., JERRAMY PANKRATZ, ERIN PANKRATZ, DONALD E. WEDDELL, EVANGELINE WEDDELL, THAD J. COLLING, THICK GON MAR, TRUSTEE OF THE THICK GON MAR REVOCABLE TRUST, MICHAEL A. WOODS, MARCIA J. WOODS, FLOYD E. MYERS, AND BECKY MYERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARK F. (THOR) HEARNE, II
Counsel of Record
MEGHAN S. LARGENT
STEPHEN S. DAVIS
ARENT FOX, LLP
1717 K Street, NW
Washington, DC 20006
(202) 857-6000
thor@arentfox.com

Counsel for Petitioners

267278

QUESTIONS PRESENTED

1. Whether trial courts have discretion to make across-the-board percentage adjustments to the lodestar fee and, if so, what "specific proof" or "explanation" must the court provide so the adjustment is "objective and reviewable"?

2. Whether a trial court must consider "specific proof" to determine prevailing market rates for legal services and, if the trial court uses *Laffey*-rates to calculate a lodestar fee, should the thirty-year-old *Laffey*-rates be adjusted for inflation using (a) the Consumer Price Index (CPI) (what the court below did); or, (b) the Legal Services Index (LSI) – which is how the Third Circuit and DC Circuit adjust *Laffey*-rates?

3. Whether the "no-interest-rule" in *Shaw* v. *Library of Congress,* 478 U.S. 310 (1986), prohibits trial courts from following this Court's direction in *Missouri* v. *Jenkins*, 491 U.S. 274 (1989), and *Perdue* v. *Kenny A. ex. Rel. Winn*, 559 U.S. 542 (2010), that attorney fees should be calculated using hourly rates in effect on the date of payment?

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STATUTES AND OTHER AUTHORITIES

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The Federal Circuit's opinion (App. 7a-26a) is reported at 818 F.3d 704 (2016). The Federal Circuit's denial of rehearing is at App. 1a. The Court of Federal Claims' (CFC) three decisions are at App. 45a, 50a, and 99a.

JURISDICTION

The Federal Circuit entered judgment on March 23, 2016. The Federal Circuit denied rehearing June 1, 2016. App. 3a. This Court's jurisdiction is timely invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

The Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA), 42 U.S.C. 4654(c), is reproduced at App. 168a.

STATEMENT

A. Factual background

In 2004 the federal government violated the Fifth Amendment by taking land from eight Kansas families. The only way these owners could vindicate their right to be justly compensated was to sue the federal government.[1] Owners forced to bring an inverse condemnation lawsuit are "placed at a significant disadvantage" and must bear "the burden to . . . take affirmative action to recover just

1. See *Preseault* v. *Interstate Commerce Commission*, 494 U.S. 1 (1990), and 28 U.S.C. 1491 (Tucker Act).

compensation. *United States* v. *Clarke*, 445 U.S. 253, 257 (1980).

These owners endured more than a decade of litigation, including briefing and argument before the Kansas Supreme Court, to establish the government's obligation to compensate them. The government then disputed its obligation to pay interest for its decade-long delay compensating these owners. This launched yet another round of litigation with economists retained and deposed, and more briefing. The owners prevailed again.

After these owners won every issue, the government disputed these owners' attorney fees and litigation expenses. This launched a further round of litigation consuming more than three years with more experts, more depositions, and three more rounds of briefing and argument.

These Kansas families are not wealthy. Were it not for Congress adopting the URA fee-shifting statute, these owners could not have endured this decade-long lawsuit. Dorothy Biery is an elderly widow. As a result of this litigation the government eventually paid her $1,300. Thick Gon Mar and his family emigrated from Vietnam to Kansas and bought a farm with their savings. As a result of this litigation the government paid Thick Gon Mar $194,653. In total, the government paid these eight Kansas families about $200,000 for the land it took and $75,000 in interest. Yet the government spent millions trying to deny these owners compensation.

Twenty-three government lawyers and eighteen government paralegals spent more than 4,800 hours

opposing these Kansas families' right to compensation. App. 34a, 41a-44a. The Justice Department allocated more than $200,000 in expert fees opposing these owners. App. 37a.

These owners incurred more than $2.2 million in legal fees and $200,000 in expenses.[2] The attorneys and paralegals representing these owners devoted more than 3,900 hours to *win* this lawsuit – 1,000 less hours than the government lawyers spent to *lose* this lawsuit.

The government and its *attaque à outrance* strategy protracted this litigation and made it cost millions to resolve a $200,000 liability. "The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by plaintiff in response." *City of Riverside* v. *Rivera*, 477 U.S. 561, 581 n.11 (1986).

B. Proceedings in the Court of Federal Claims

1. The owners requested an unadjusted lodestar fee supported by a wealth of uncontested evidence.

Section 4654(c) of the URA provides the CFC "*shall*" award owners a "reasonable attorney fee" and reimburse their litigation expenses. After prevailing on the merits, the owners submitted their attorney fees and expenses. The owners only asked the court to reimburse their unadjusted lodestar fee and actual out-of-pocket expenses. For work after 2010, when Washington DC-based Arent Fox became involved, the lodestar fee was calculated

2. Through October 2013.

using the usual hourly rates Arent Fox charged private clients for complex federal litigation. The fee submission was supported with detailed billing records, expert declarations, and market surveys including:

• Declarations from Thor Hearne, the owners' lead counsel and senior partner with Arent Fox, explain the lodestar fee was calculated using the hourly rates Arent Fox charges private clients for comparable litigation. App. 75a-77a. Hearne also explained, "[g]iven the substantial cost and expense necessary [to bring this litigation] and the substantial delay between when the work is performed and the attorney fee is ultimately paid, it [is not] financially feasible . . . to represent these landowner[s] at the hourly rates proposed by the government." App. 129a.

• Jeremy Pankratz, the lead plaintiff-owner, testified that no lawyer in Wichita Kansas possessed the experience or ability to represent these owners and that Hearne and his co-counsel were the only attorneys he could find to represent him. App. 140a-143a.

• Arent Fox's Chief Financial Officer, Elizabeth Munno, testified that Arent Fox establishes its usual and customary hourly rates based upon the marketplace for comparable legal services. App. 82a-85a. Munno also said Arent Fox continually adjusts its hourly rates to remain competitive and charges hourly rates slightly less than similar firms charge. App. 82a-83a.

• Dr. Laura Malowane is an economist and expert on law firm economics. Malowane is the Justice Department's leading expert witness in attorney fee litigation. See, *e.g.*, *Makray* v. *Perez,* 2016 WL 471271, *18-20 (D.D.C. Feb. 8, 2016). In *Makray* the DC district court relied

upon Malowane's testimony *in this case* to conclude "that hourly partner rates of between $705 and $706 per hour are 'within the range of rates charged' by 'national firms based in Washington DC [which] range between $195 and $990.'" *Id.* at *19. The district court found, "consistent with [Malowane's testimony] in *Biery,* survey data reflecting rates charged by attorneys at national law firms fairly estimates the prevailing rate . . . ." *Id.* Malowane testified that Arent Fox's hourly rates "are competitive with market rates." App. 144a-145a.

• Three surveys of prevailing market rates – the *National Law Journal Billing Survey*, *Valeo Partners* survey of "rates actually billed to clients," and the *PriceWaterhouseCoopers* survey. These surveys demonstrate Arent Fox's hourly rates are consistent with, or lower than, the hourly rates charged by comparable firms.[3] The owners also provided the LSI-adjusted *Laffey*-rates which corresponded almost exactly with Arent Fox's usual hourly rates. App. 91a.

The government provided no opposing evidence concerning Washington DC rates. And the government agreed Arent Fox's 2013 rates of between $706 and $375 were consistent with prevailing Washington DC rates.[4]

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3. Arent Fox's high and low hourly billing rate for partners was $765 and $400 and for associates was $475 and $240. See App. 92a-93a. This is slightly less than the rates other Washington DC-based firms charged which were between $935 and $406 for a partner and between $515 and $236 for associates. See *id.*

4. The government's lawyer, Kris Tardiff, admitted, "I think the Court can probably just accept for that purpose only the forum rates (for Washington DC) as plaintiffs are arguing them to be." App. 98a.

2. The CFC's attorney fee decision.

In 2012 the CFC issued an initial decision on the methodology by which the CFC would calculate the lodestar fee. App. 99a. The CFC said the lodestar method is presumptive and is only adjusted in "rare" and "exceptional" circumstances and "the party seeking to adjust the lodestar will bear the burden of persuading the court that the lodestar is unreasonable." App. 118a. The CFC held "the likelihood of approving any adjustment is quite small." *Id.* The CFC also held the lodestar fee must be calculated using historical rates because the "no-interest-rule" forbids using current hourly rates.

But then, more than two years later, in January 2014 (after another round of briefing, depositions and argument), the CFC issued a second decision. App. 50a. The CFC made an about face and, contrary to its 2012 decision, ordered a series of cumulative across-the-board percentage cuts to the lodestar fee. The CFC cut the fee more than 70% and recalculated the fee using hourly rates 38% below prevailing market rates. And the CFC made these adjustments to the lodestar fee without any specific proof or credible explanation.[5]

a. The CFC ordered a series of across-the-board percentage cuts to the lodestar fee.

The CFC ordered three questions of Kansas law certified to the Kansas Supreme Court. Then, after the

5. The CFC also made specific cuts to specific time and expense entries. Though we do not agree with these specific cuts, we do not challenge the CFC's specific cuts.

owners briefed, argued, and ultimately won these issues, the CFC cut the 624 hours owners' counsel spent working on these issues. The CFC allowed owners' counsel only 156 hours for this work. The CFC provided no explanation for this 75% cut.

The irrationality of the CFC's 75% cut is demonstrated by the fact that *a single government lawyer,* Ellen Durkee, spent almost as much time (nearly 600 hours) as the owners' *entire legal team* (one partner, two associates and a paralegal), and the government lost. App. 37a, 42a.

The owners devoted more than 700 hours over three years trying to resolve attorney fees. This included expert depositions, hearings, and three rounds of substantive briefing. Yet the CFC ordered a blanket-cut of more than 88%, arbitrarily allowing compensation for only 20 hours of paralegal time, 30 hours of associate time, and 30 hours of partner time. App. 57a-59a. The CFC provided no explanation for this cut nor any reason for the limited hours it allowed.

The CFC also cut the lodestar fee 30% because the CFC dismissed five owners. The CFC's dismissal was overturned and three of the five owners subsequently prevailed and were paid. *Biery* v. *United States*, 753 F.3d 1279 (Fed. Cir. 2014). The fee submission did not include any time for any work exclusively for any "dismissed" owner. And, the work the CFC cut, was for work on matters common to the prevailing owners. App. 63a, n.5. The CFC noted, "there were overlapping issues between the successful and unsuccessful plaintiffs" and "there is no feasible way to separate out the hours spent by counsel on individual parcels." App. 63a-64a. The CFC provided

no explanation for its 30% cut for work on these common issues.

The CFC then imposed an additional cumulative "overall" 10% cut providing only the perfunctory statement that "given the limited number of properties at issue, the court finds that an overall 10% reduction in the remaining hours is appropriate. . . ." App. 64a.

b. The CFC calculated the lodestar fee using rates 38% below prevailing market rates.

The CFC further reduced the lodestar fee by (a) using supposed "St. Louis" hourly rates for work before February 2010;[6] and, (b) for work after February 2010, using the thirty-year old *Laffey*-rates adjusted for inflation based on the CPI instead of using the Legal Services Index which is how the Third Circuit and DC Circuit adjust *Laffey*-rates.[7]

The only support the CFC provided for the hourly rates it used to calculate the lodestar fee was a footnote referencing the Justice Department's website. App. 69a-70a, n.10. The CFC had *no evidence* the CPI is an economically sound method to adjust *Laffey*-rates nor that

6. Neither party has appealed the CFC's decision to use "St. Louis rates" for work before 2010. We do not agree with the CFC but we did not appeal this aspect of the CFC's decision. The government similarly has not appealed the CFC's decision to use Washington DC forum rates for work after 2010 when Arent Fox became the owners' law firm.

7. The DC Circuit found the CPI-adjusted rates 38% lower. *Salazar* v. *District of Columbia*, 809 F.3d 58, 65 (2015) (*Salazar VI*).

CPI-adjusted *Laffey*-rates are equivalent to Washington DC market rates. The Third Circuit, DC Circuit, and a series of district courts have found the CPI-method is an economically unsound way to adjust *Laffey*-rates. This contrary authority was presented to the CFC and Federal Circuit.

Again, *the government agreed* Arent Fox's hourly rates are consistent with the prevailing market rates for complex litigation in Washington DC and the government offered *no evidence* to rebut the owners' submission of prevailing Washington DC rates.[8] Thus the CFC's decision to calculate the lodestar fee using CPI-adjusted *Laffey*-rates was *sua sponte* and contrary to the government's admissions and all this evidence which demonstrated the CPI-adjusted *Laffey*-rates are 38% lower than prevailing market rates. The CFC's decision was also contrary to the government's own admission.

c. The CFC only reimbursed one-half of the owners' out-of-pocket costs.

As an extension of its across-the-board cut related to the supposedly "dismissed" owners, the CFC likewise cut all costs incurred prior to February 2009 including the filing fees. The CFC also denied reimbursement of Westlaw charges and expenses for Dr. Malowane's expert testimony, including costs incurred by the owners for *the government* to depose Malowane. App. 71a-72a.

8. The only "evidence" the government offered concerned what the government supposed to be "St. Louis rates" for work before 2010.

In sum, though these landowners prevailed *entirely*, the CFC reimbursed them less than 25% of their legal fees (an effective rate of only $150 per-hour for close to four thousand hours devoted to this decade-long litigation) and only half their out-of-pocket costs.

3. The Justice Department unlawfully withheld its time and expense records.

In January 2014 the owners filed a Freedom of Information Act request directing the Justice Department to provide records of the time and costs it devoted to this litigation. App. 32a. The Justice Department is required to respond within twenty days. See 5 U.S.C. § 552. The Justice Department refused to respond. The owners renewed their FOIA request in March 2014 but the Justice Department did not provide this information until almost two years later.

The Federal Circuit found, "[t]here is no dispute that the government's response to the initial request was not timely. . . . [H]ad the government responded immediately . . . the government's records would necessarily have been part of its motion for reconsideration." App. 16a.

When the Justice Department finally responded (and only partially complied by providing an eight-page summary not its actual time records), the government's records demonstrated the government lawyers spent almost 1,000 *more* hours to *lose* this lawsuit than the owners spent to *win*. The government knew it spent 4,800 hours opposing these Kansas families and yet it argued the 3,900 hours the owners spent winning the case were "unreasonable."

The government should not benefit from wrongly withholding obviously relevant and probative time records. See *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-15 (1945) (a party acting with unclean hands should not profit from their misconduct). While the panel wrongly excluded the government's time records, the panel's decision is not binding upon this Court. This Court holds subsequently available information may be considered. See *Alabama Legislative Black Caucus* v. *Alabama*, 135 S.Ct. 1257, 1269 (2015) ("elementary principles of procedural fairness" allow a party to supplement the record); *Warth* v. *Seldin*, 422 U.S. 490, 501-02 (1975) (court may "allow or [r]equire" a plaintiff to supplement the record); *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U.S. 701, 718 (2007) (supplementing the record with a lodged affidavit).

C. Proceedings in the Federal Circuit

After appealing the CFC's decision, the owners asked the Federal Circuit to order the government to pay the uncontested portion of fees and expenses. App. 4a-5a. The government opposed paying the uncontested amount. The Federal Circuit sided with the government and denied the owners' request. *Id.*

On the merits of the appeal, the Federal Circuit paid lip-service to this Court's fee-shifting decisions but then proceeded to do exactly what this Court forbids. The Federal Circuit affirmed every cut the CFC made to the lodestar fee, failed to exercise meaningful appellate review, and failed to consider whether the CFC's decision was supported by specific proof.

For example, the Federal Circuit affirmed the 30% cut for "dismissed" owners, even while noting, "we reversed the [CFC's] summary judgment order regarding three of the five plaintiffs." App. 9a, n.1. The Federal Circuit then made the Orwellian statement, "we will refer to these plaintiffs as 'the unsuccessful plaintiffs.'" *Biery*, 818 F.3d at 708 n.1. *But these owners won!* These "dismissed" owners' were paid *before* the Federal Circuit heard this appeal. See Order for Entry of Judgment of July 15, 2015, No. 263. And still, the Federal Circuit affirmed a 30% cut in the lodestar fee "based upon the degree and success obtained" pretending these owners lost. The Federal Circuit also affirmed this cut even though it recognized the work for these "dismissed-but-later-successful" owners was "inextricably linked" with and involved "overlapping issues" common to the owners who prevailed in the first instance. The Federal Circuit never reconciled its holding with this Court's contrary holdings in *Hensley* v. *Eckerhart,* 461 U.S. 424 (1983), *Blum* v. *Stenson,* 465 U.S. 886 (1984), *Jenkins*, and *Riverside*.

The owners sought rehearing and renewed their motion for payment of the uncontested portion of the fees. The government opposed paying the uncontested fees and the Federal Circuit again denied the owners' motion for payment of the uncontested fees. The Federal Circuit denied rehearing. See App. 2a-3a. So a decade after suit was filed, the government has still reimbursed these owners *nothing.*

REASONS FOR GRANTING THIS PETITION

This petition for certiorari should be granted because the circuits are divided and the trial courts are confused about how to calculate a lodestar fee. The result is "widely disparate" fee awards that are not "objective or reviewable."

The Federal Circuit made this situation significantly worse by ruling directly contrary to this Court's decisions, splitting with the DC and Third Circuits; and, undermining (if not nullifying) the purpose for which Congress adopted the URA and other civil rights fee-shifting-statutes. There are almost 2,000 pending cases in which the trial court will need to determine a fee award. And, as district court Judge Howell noted in *Makray,* the trial courts need "clarity" on the "specific proof" a trial court must consider to determine an attorney fee award capable of appellate review.

I. The Federal Circuit's decision conflicts directly with this Court's decisions and undermines this Court's fee-shifting jurisprudence.

A. The lodestar fee is "strongly presumed" to be a reasonable attorney fee and adjustments to the lodestar fee should be "rare" and "exceptional."

A reasonable attorney fee is the amount private clients would pay an attorney of similar skill, experience, and reputation for comparable work. "In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." *Pennsylvania* v. *Delaware Valley Citizens Council for Clean Air,* 483 U.S. 711, 725 (1987) (*Delaware Valley II*)

(quotations omitted). A reasonable attorney fee under fee-shifting statutes must be "sufficient to induce a capable attorney to undertake the representation . . . ." *Perdue*, 559 U.S. at 552.

The lodestar method is the presumptive standard. "The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence." *Gisbrecht* v. *Barnhart,* 535 U.S. 789, 801 (2002). "[T]he most useful starting point for [determining] a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 802 (quoting *Hensley*, 461 U.S. at 433, 437). "The lodestar method yields a fee that is presumptively sufficient to achieve this objective [of inducing capable counsel to undertake the representation]." *Perdue*, 559 U.S. at 552. "We have said that the [lodestar] presumption is a 'strong' one." *Id.* (citing *Dague*, 505 U.S. at 562, and *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (*Delaware Valley I*).

The number of hours includes all work on all matters involving the "common core of facts" or "based on related legal theories." *Hensley*, 461 U.S. at 433, 435. This Court recognized, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims." *Id.* at 435. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." *Id.*

Turning to the second step – reasonable hourly rates – this Court directs, "[T]he critical inquiry in determining reasonableness is now generally recognized as the appropriate hourly rate. And the rates charged in private representations may afford relevant comparisons." *Blum*, 465 U.S. at 896 n.11. In *Jenkins*, 491 U.S. at 285, this Court declared, "we have consistently looked to the marketplace as our guide to what is 'reasonable.'" The reasonable hourly rate is "calculated according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895. The hourly rates employed in the lodestar calculation should "adequately measure the attorney's true market value." *Perdue*, 559 U.S. at 563.

The lodestar fee is presumptive. "When . . . 'the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee' to which counsel is entitled." *Delaware Valley I*, 478 U.S. at 565 (quoting *Blum*, 465 U.S. at 897).

An adjustment (whether an enhancement or a reduction) to the lodestar calculation is "proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Delaware Valley I*, 478 U.S. at 565; see also *Perdue*, 559 U.S. at 555.

In *Perdue* this Court identified four reasons to increase the lodestar fee: (1) "where the…the hourly rate…does not adequately measure the attorney's true market value;" (2) "[if there is] an extraordinary outlay of expenses and the litigation is exceptionally protracted;" (3) where there is "exceptional delay in the payment of fees;" and, (4) "where an attorney assumes these costs in the face of unanticipated delay, particularly where the

delay is unjustifiably caused by the defense." 559 U.S. at 554-56. Even though all four of these reasons for an upward adjustment exist here, the owners sought only an unadjusted lodestar fee.

The trial court cannot adjust the lodestar fee by making mechanical across-the-board percentage cuts. In *Hensley* this Court held "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." 461 U.S. at 435. When "*distinctly different* claims for relief . . . *based on different facts and legal theories*" are brought and fail, then the work on these matters may be excluded from the lodestar calculation. *Id.* at 434 (emphasis added). But, this Court continued, when the claim "involve[s] *a common core of facts or will be based upon related legal theories*. . . . [s]uch a lawsuit cannot be viewed as a series of discrete claims." *Id.* at 435 (emphasis added). In such a case, the plaintiff's attorney "should recover a fully compensatory fee." *Id.*

In *Riverside* four plaintiffs sued thirty-two defendants alleging at least three different legal theories seeking money damages as well as injunctive and declaratory relief. Seventeen defendants were dismissed on summary judgment, and the plaintiffs prevailed against only five defendants with an award of only $33,000 and received no injunctive or declaratory relief. Given this limited success, Riverside and the Solicitor General said the fee should be limited to a proportion of the damages awarded and should not include work on the dismissed claims. The district court, however, awarded the full lodestar fee.

This Court affirmed the full lodestar fee noting "all claims made by plaintiffs were based on a common core of facts. The claims on which plaintiffs did not prevail were

closely related to the claims on which they did prevail. The time devoted to claims on which plaintiffs did not prevail cannot reasonably be separated from time devoted to claims on which plaintiffs did prevail." 477 U.S. at 583.

It is impossible to reconcile the CFC's and Federal Circuit's 30% cut for work on matters common to the prevailing and "dismissed" owners with this Court's decisions in *Riverside*, *Jenkins*, *Hensley*, and *Blum*.

B. The Federal Circuit broke with this Court's holdings and split with the Third Circuit by affirming a series of arbitrary across-the-board cuts to the lodestar fee.

This Court directs the trial court to make a comprehensive and careful analysis of the hours submitted in a fee application. See, *e.g.*, *Blum*, 465 U.S. at 902 n.19 (unexplained blanket percentage cuts are incompatible with this command). But the CFC did exactly what this Court said it should not do. The CFC made a series of arbitrary percentage cuts to the lodestar fee that are incapable of rationale appellate review.[9]

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9. The Federal Circuit wrongly believed a mechanical percentage adjustment to the number of hours *before* multiplying the hours by the hourly rate was somehow different than making a percentage adjustment *after* multiplying the hours by the hourly rate. App. 18a. The Federal Circuit admitted this is a distinction without a difference because, "the end result may be mathematically identical. . . ." *Id.*

What the Federal Circuit overlooks is that the CFC's error was not about whether it made the percentage adjustment before or after it multiplied the hours by an hourly rate, but the CFC's error was that percentage adjustments (upward or downward) are inherently arbitrary and contrary to the command that a trial court only make "objective" adjustments based upon "proof capable of appellate review." See *Blum*, 465 U.S. at 898-900; *Perdue*, 559 U.S. at 557-58.

Take, for example, the 30% cut for the "dismissed" plaintiffs. The Federal Circuit affirmed this cut even though it recognized that work on the "dismissed" owners' claims could not be separated from the work on the prevailing claims and that none of the work cut was for work exclusively for the "dismissed" landowners but was work inextricably intertwined with the prevailing owners' claims. App. 63a, n.5. This is precisely what this Court rejected in *Riverside.*

The irrationality of the across-the-board cuts is most easily illustrated by the 30% cut in the $500 filing fees.[10] The eight prevailing landowners (and three "dismissed" but later reinstated landowners) had to pay a filing fee to bring this case. The filing fee is the same whether the case was filed by one owner or a hundred owners. And the subsequent dismissal of five owners, three of whom later prevailed on appeal, did not mean the prevailing owners paid only 70% of the filing fees they actually paid.

Consider also the additional cumulative 10% cut with no explanation other than a perfunctory statement that it was due to "the limited number of properties at issue." How is this capable of meaningful appellate review? How many properties must be included for the owners to be reimbursed a full fee? There is nothing "objective or reviewable" about the CFC's arbitrary cut and yet the Federal Circuit affirmed the cut.

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10. This case was originally filed as two separate actions each requiring a $250 filing fee. The first-filed case, *Pankratz* v. *United States,* involved six owners, all of whom were paid. The "dismissed" but later prevailing owners were in the *Biery* case. The CFC cut *both* the *Pankratz* and *Biery* filing fee by 30% even though no owner in *Pankratz* was ever dismissed.

The Federal Circuit broke with the Third Circuit. In *Interfaith Community Org.* v. *Honeywell Inter.*, 726 F.3d 403 (3rd Cir. 2013), the Third Circuit reversed a trial court for doing exactly what the CFC did here. "The District Court reduced the fees in this category [of work] by 10% but gave no explanation as to why a 10% reduction was adequate." *Id.* at 417 n.10. The Third Circuit held, "this perfunctory statement does not allow meaningful appellate review. . . . '[W]here the opinion of the District Court 'is so terse, vague, or conclusory that we have no basis to review it, we must vacate the fee-award order and remand. . . .'" *Id.* at 417 (citations omitted). Similarly in *Bell* v. *United Princeton Prop. Inc.*, 884 F.2d 713, 720 (3rd Cir. 1989), the Third Circuit held a trial court may not *sua sponte* reduce a request for attorney fees and the party challenging a fee petition must produce affidavits or other evidence supporting its challenge. "[T]he adverse party's submissions cannot merely allege in general terms that the time spent was excessive. . . . [Rather they] must identify the type of work being challenged . . . and must specifically state the adverse party's grounds for contending the hours . . . are unreasonable."

Here the government produced no such contrary evidence or allegations.

If the Third Circuit reviewed the CFC's fee-award, the Third Circuit would have overturned the CFC's order. But, because the Federal Circuit reviewed the CFC's fee decision under its different standard, the CFC's order was affirmed. This division between the circuits confuses litigants, their counsel, and the trial courts. It also undermines this Court's desire for "objective and reviewable" fee awards.

II. The Federal Circuit split with the DC and Third Circuits on how to determine a "prevailing market rate."

A. To be "objective and reviewable" the lodestar fee must be calculated using market rates for which the trial court had "specific proof."

Grounding the lodestar fee upon prevailing market rates arises directly from the reason for which Congress adopted fee-shifting statutes. If the fee is not based upon market-rates, the fee-shifting statute will fail its essential purpose of attracting capable counsel to accept civil rights cases.

"Setting a market rate for legal services is inherently difficult." *Laffey* v. *Northwest Airlines*, 746 F.2d 4, 16 (DC Cir. 1984) (citing *Blum*, *supra*). Trial courts have struggled to determine market rates for legal services. The circuits have likewise found this difficult and have split on what "specific proof" a trial court must consider to determine a "prevailing market rate."

This Court has established certain governing principles as in *Blum* when this Court noted the hourly rate must be one "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation," 465 U.S. at 896 n.11, and observed that, "the rates charged in private representations may afford relevant comparisons." *Id.* This Court "consistently look[s] to the marketplace as our guide to what is 'reasonable.'" *Jenkins*, 491 U.S. at 285. Most recently, in *Perdue*, this Court instructed, "the trial judge should adjust the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate." 559 U.S. at 555.

In *Jenkins*, 491 U.S. at 286, this Court held a reasonable attorney fee "is one calculated on the basis of rates and practices *prevailing in the relevant market* . . . and one that grants successful civil rights plaintiffs a 'fully compensatory fee' . . . comparable to what 'is traditional with attorneys compensated by a fee-paying client.'"[11] The corollary to this rule is that hourly rates in other markets are irrelevant. Thus hourly rates paid in California or New York are not relevant evidence of prevailing rates paid by private clients in Washington DC.

The party seeking an attorney fee award satisfies the presumption that the lodestar fee is proper when they provide that evidence this Court specified in *Blum*, *Jenkins* and *Perdue*. The burden then shifts to the opposing party to rebut the reasonableness of the fee. "When . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee . . . ." *Blum*, 465 U.S. at 897.[12] See also *Delaware Valley I*, 478 U.S. at 565.

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11. Emphasis added, citations omitted.

12. The DC Circuit follows this Court's direction. "Once the fee applicant has provided support for the requested rate, the burden falls on the Government to go forward with evidence that the rate is erroneous. And, when the Government attempts to rebut the case for a requested rate, it must do so by equally specific countervailing evidence." *Nat'l Assoc. of Concerned Veterans* v. *Sec'y of Defense*, 675 F.2d 1319, 1326 (DC Cir. 1982) (quoted and followed in *Covington* v. *Dist. of Columbia*, 57 F.3d 1101, 1109 (DC Cir. 1995)).

B. The Circuits are divided on the "specific proof" necessary to establish a market rate.

The DC Circuit found the following evidence sufficient to use LSI-adjusted *Laffey*-rates to calculate the lodestar fee: "Plaintiffs submitted 'a great deal of evidence regarding prevailing market rates for complex federal litigation' . . . including the affidavit of the economist… [who] explained why the LSI is a better measure of change in prices for legal services in Washington DC than the [CPI-adjusted] update to the Matrix." *Salazar* v. *District of Columbia*, 809 F.3d 58, 64 (DC Cir. 2015) (*Salazar VI*). Billing-rate tables demonstrating the difference between the CPI-adjusted and LSI-adjusted *Laffey*-rates, and "*National Law Journal Rates Surveys* showing that rates for partners in Washington DC on the high-end of the market far exceeds the rates in the LSI update." *Id.*

Like the DC Circuit, the Third Circuit required the trial court to have specific proof validating the use of the *Laffey*-rates. *Interfaith*, 726 F.3d at 417 (remanding because district court's opinion was "terse, vague, or conclusory that we have no basis to review it").

One piece of evidence trial courts consider are attorney fee matrices. In *Eley* v. *District of Columbia*, 793 F.3d 97, 100 (DC Cir. 2015), the DC Circuit noted, "[W]e allow a fee applicant to submit attorney's fee matrices as one type of evidence." But, the DC Circuit cautioned that "[f]ee matrices in general are 'somewhat crude' . . . [f]or this reason fee applicant [must] supplement fee matrices with other evidence such as 'surveys to update the[m]; affidavits reciting the precise fees that attorneys

with similar qualifications have received from fee-paying clients in comparable cases. . . ." *Id.* at 101.[13]

The most common matrix for Washington DC is the *Laffey* matrix. The *Laffey*-rates are a schedule of hourly rates for legal services originally established in *Laffey* v. *Northwest Airlines*, 572 F. Supp. 354, 371 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4 (DC Cir. 1984), *overruled in part on other grounds en banc* in *Save Our Cumberland Mountains, Inc.* v. *Hodel,* 857 F.2d 1516 (DC Cir. 1988). The DC district court, DC Circuit and Third Circuit have adopted *Laffey*-rates as a "crude" guide and adjusted the rates for inflation.

But *Laffey*-rates approximate prevailing market rates only if they are properly adjusted for inflation. There are two ways to adjust *Laffey*-rates for inflation. The government advocates using the CPI, which measures the cost of consumer goods including "breakfast cereal, milk, coffee, chicken, wine . . . men's shirts and sweaters, women's dresses, jewelry [and] pet supplies" among other items such as pizza delivery, haircuts and cigarettes.[14]

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13. This Court was similarly skeptical of relying solely upon a matrix, which "does not adequately measure the attorney's true market value…. This may occur if the hourly 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." *Perdue*, 559 U.S. at 554-55.

14. See Bureau of Labor Statistics website at: <http://stats.bls.gov/cpi/cpifaq.htm#Question_7> (last visited August 23, 2016).

The second way to adjust the thirty-year-old *Laffey*-rates is the Legal Services Index. This index, unlike the CPI, is specific to legal services. The DC Circuit, Third Circuit and DC district court find the LSI to be the "more reliable index for measuring legal hourly billing in the Washington DC area." See *Salazar* v. *District of Columbia*, 991 F. Supp.2d 39, 47 (D.D.C. 2014).

The DC Circuit and Third Circuit have explicitly rejected the CPI-adjusted *Laffey*-rates in favor of LSI-adjusted *Laffey*-rates. In *Salazar* v. *District of Columbia,* 809 F.3d 58 (DC Cir. 2015) (*Salazar VI*), the DC Circuit "'confirmed the superior accuracy of the LSI/*Salazar* rates" and found "the *Salazar*/LSI Matrix represents *a conservative* estimate of the prevailing rates for legal services, at least for complex federal litigation in the District DC Circuit." *Makray* v. *Perez*, 2016 WL 471271, at *5. The DC Circuit held that, where the litigation is complex federal litigation, "the only issue is whether [plaintiff] submitted sufficient evidence for the . . . court to conclude that the LSI *Laffey* Matrix applies." *Salazar VI*, 809 F.3d at 64. The DC Circuit concluded, "The district court's selection of LSI *Laffey*-rates is consistent with this Court's intervening decision in *Eley.*" *Id.*

Following *Salazar VI* and *Eley* district Judge Howell observed, "In light of the DC Circuit's recent observation that the *Salazar*/LSI Matrix represents a conservative estimate of the prevailing market rate for legal services in the District, this evidence demonstrates the plaintiff's requested rate is presumptively reasonable." *Makray*, 2016 WL 471271, *17.

As noted above, the Third Circuit similarly adopted the LSI-adjusted *Laffey*-rates for complex federal litigation in Washington DC. "We thus affirm the District Court's use of the LSI-updated Laffey Matrix to determine the prevailing rates in the Washington D.C. market." *Interfaith*, 726 F.3d at 416.[15]

The Third Circuit and DC Circuit follow this Court's holding that the hourly rates used to calculate a lodestar fee must be based upon "*specific proof*" of market rates *in the relevant community.* The Federal Circuit, however, did not follow this Court's holding but instead affirmed a fee award based blindly upon the CPI-adjusted *Laffey*-rates and, to the extent "evidence" of other fee awards was considered, it was "awards from other jurisdictions" in decades-earlier litigation. *Biery*, 818 F.3d at 714; see also App. 78a-80a.

The Federal Circuit's approach is akin to speculating on the market rate for gasoline in Washington DC by looking at gas prices ten years ago in California. This Court directs the lodestar fee must be calculated using "prevailing market rates" based upon "rates charged in private representations *in the relevant marketplace*." See *Blum,* 465 U.S. at 896 n.11, and *Jenkins,* 491 U.S. at 285 (emphasis added).

The Federal Circuit also broke with its sister circuits and "declin[ed] to endorse either [the CPI- or LSI-adjusted

15. The Third Circuit is especially authoritative on fee-shifting jurisprudence because the Third Circuit pioneered the lodestar method. See *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973), and *Report of the Third Circuit Task Force on Court Awarded Attorney Fees*, 108 F.R.D. 237 (1985).

Laffey-rates] for use in a lodestar calculation. The decision to use either as a starting point to determine the lodestar is within the discretion of a trial court." 818 F.3d at 714.[16]

The Federal Circuit's "use-whatever-rate-you-want" approach cannot be right as a matter of law. It is impossible to have two "prevailing market rates" that are 38% different. The CPI-adjusted *Laffey*-rates and the LSI-adjusted *Laffey*-rates cannot *both* be prevailing market rates for complex federal litigation in Washington DC. The market rate for a gallon of gasoline in Washington DC may be either $2.00 or $3.00 but it cannot be *both* $2.00 and $3.00.

The Federal Circuit has struggled with this Court's fee-shifting jurisprudence. See *Bywaters* v. *United States*, 670 F.3d 1221, 1229 (Fed. Cir. 2012) ("the Supreme Court has not always been clear . . . the Supreme Court's standards have evolved . . . the Supreme Court's view on the degree of discretion afforded district courts in adjusting the lodestar figure has undergone change"). *Bywaters* involved a district court cutting the lodestar fee 50% because of the "amount involved and results obtained." *Id.* Two members of the Federal Circuit remanded the case to the trial court to justify its 50% cut in the lodestar fee but provided no standard for justifying a percentage cut to the lodestar fee. *Id.* at 1231. Judge Plager dissented because he rightly understood this

16. The Federal Circuit's reference to these rates as a "starting point" is a meaningless semantic because the Federal Circuit affirmed the CFC adopting CPI-adjusted *Laffey*-rates with *no evidence* supporting this rate and a wealth of contrary evidence finding CPI-adjusted rates to be substantially below market rates. The CFC did not use the CPI-adjusted rates as a "starting point" but as an end-point.

Court's decisions directed the trial court to award the unadjusted lodestar fee. Rehearing was sought and the panel issued an "addition" to the opinion, 684 F.3d 1295 (Fed. Cir. 2012). *Bywaters'* split decision demonstrates the confusion the Federal Cirdcuit has created for trial courts seeking to decide when and how to adjust the lodestar fee. See also *Richlin Security Serv. Co.* v. *Chertoff*, 553 U.S. 571, 581 (2008). (This Court overturned the Federal Circuit's method of calculating paralegal fees because it split with other circuits and this Court's decisions.)

The Federal Circuit's latest decision allowing the trial courts to arbitrarily choose the CPI-adjusted or the LSI-adjusted *Laffey*-rates sanctions exactly what this Court forbids – widely-disparate fee awards not based upon specific proof which are not objective or capable of meaningful appellate review.[17]

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17. The Federal Circuit's only justification for CPI-adjusted *Laffey*-rates was its statement that "the Court of Federal Claims compared the [CPI-]Adjusted *Laffey* Matrix with fees awarded to counsel's law firm in two district court cases and found those rates lower than, if not comparable to the Adjusted *Laffey* rates." App. 23a.

There are a host of problems with this statement. Most importantly, it is entirely untrue. The CFC *did not* establish Washington DC rates by doing what the Federal Circuit thought the CFC did. The CFC wrote, "contrary to plaintiffs' contentions, that there is ample evidence available to determine reasonable hourly rates *for the St. Louis market* for use in the lodestar calculation…. *for the period preceding* the move of the lead counsel…to Arent Fox. App. 65a, 69a (emphasis added). Second, the reference to the "fees awarded…two district court cases" did not involve fees awarded Arent Fox but involved fees awarded a small firm that later joined Arent Fox. See App. 79a-80a. And, the district court fee awards had *nothing* to do with Washington DC rates. The district court cases the Federal Circuit references were in California and New York

These Kansas landowners submitted all that evidence, and more, the *Salazar* and *Interfaith* plaintiffs submitted. See pp. 4-5, *supra*. The government offered no rebuttal evidence and the government admitted Arent Fox's hourly rates were consistent with prevailing Washington DC rates. App. 98a.

Given this record, had these owners' fee submission been made to the DC district court and reviewed by the DC or Third Circuits, those courts would have calculated the lodestar fee using hourly rates consistent with the LSI-adjusted *Laffey*-rates. Correspondingly, had the CFC's decision to calculate the lodestar fee using the CPI-adjusted *Laffey*-rates been reviewed by the DC or Third Circuits, those courts would have overturned the CFC's decision.

C. The "no-interest-rule" in *Shaw* does not prohibit courts from following this Court's direction in *Jenkins* and *Perdue* that attorney fees should be calculated using current rates.

In *Perdue*, this Court held, "compensation for this delay [in payment of attorney fees] is generally made either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." 559 U.S. at 556. This Court looks to the "practices prevailing in the relevant market place." *Jenkins*, 491 U.S. at 286. The customary practice is for a private client to pay their legal fee within thirty-days of receiving a bill.

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and involved litigation originating decades earlier. Finally, the CFC did not reference these other fee awards as support for the CFC's determination of a market rate in Washington DC but in the context of the government's "St. Louis forum-rate" argument.

See App. 84a, 88a. Arent Fox and other law firms establish their hourly rates with this expectation.

This litigation began a decade ago and the government has not yet reimbursed *any* fee. Nonetheless the Federal Circuit held a "reasonable attorney fee" should be calculated using hourly rates from a decade ago because "under the no-interest rule, recovery of interest on an award of attorney fees is barred unless an award of interest is expressly and unambiguously authorized by statute." App. 24a. The Federal Circuit believed "this rule has been broadly read to reach any attempt to provide compensation based on delayed payment." *Id.* (citing *Shaw*, 478 U.S. at 322). The Federal Circuit's "broad" reading of *Shaw* instructs trial courts to ignore this Court's subsequent decisions in *Jenkins* and *Perdue*.

Shaw was a Title VII case in which the trial court awarded attorney fees, stayed final judgment three years to await the appellate court's decision on a related issue, and then made *a separate award* of pre-judgment interest of ten-percent per annum increasing the attorney fee award a total thirty-percent. The government argued the "no-interest-rule" prohibited an award of pre-judgment interest against the United States. This Court agreed. *Shaw*, 478 U.S. at 311.

Shaw did not, however, involve an award of attorney fees calculated at current, as opposed to historical, hourly rates. *Shaw* cannot be extrapolated to forbid calculating a "reasonable attorney fee" using market rates in effect when the fee is paid. Using current hourly rates to determine a reasonable attorney fee is not a separate award of pre-judgment interest.

Furthermore, even if one believed using current hourly rates is an award of "pre-judgment interest," Congress *did* waive sovereign immunity when it said the court "*shall*" award a "*reasonable attorney fee*." As this Court holds, a reasonable attorney fee is based upon current hourly rates given "practices prevailing in the relevant market place." *Jenkins*, 491 U.S. at 286. Private clients do not pay their attorneys a fee in 2016 using historical rates from 2007.

In *Newport News Shipbuilding & Dry Dock* v. *Holiday*, 591 F.3d 219, 228 (4th Cir. 2009), the Fourth Circuit explained the Federal Circuit's error:

> [The tribunal] took a ten-year old hourly rate, assumed it was a reasonable basis for an hourly rate today, and adjusted it upwards by the arbitrary amount of $50. This is an abuse of discretion. *** an hourly rate appropriate ten years ago, arbitrarily adjusted with no regard to the facts of the case or the lodestar factors, is not necessarily appropriate today.[18]

The Federal Circuit also ignored this Court's decision in *Perdue* and *Jenkins* which explicitly cabined *Shaw*. In *Jenkins*, this Court explained, "*Shaw* thus does not represent a general-purpose definition of compensation

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18. Citing *Barber* v. *Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978); and *Christensen* v. *Stevedoring Servs. of Am.*, 557 F.3d 1049, 1054-55 (9th Cir. 2009) (The [tribunal] must "make…determinations [of the relevant community and the reasonable hourly rate] with sufficient frequency that it can be confident—and we can be confident in reviewing its decisions – that its fee awards are based on current rather than merely historical market conditions.").

for delay that governs here. Outside the context of the 'no-interest rule' of federal immunity, we see no reason why compensation for delay cannot be included within §1988 attorney's fee awards. . . ." *Jenkins*, 491 U.S. at 282 n.3.

III. The Federal Circuit effectively nullified the URA fee-shifting statute and its decision will result in widely disparate fee awards.

A. The Federal Circuit's decision undermines the reason Congress enacted the URA fee-shifting statute.

"First thing we do, let's kill all the lawyers." *Henry VI*, Part 2 Act 4, Scene 2. Justice Stevens explained, "the independent lawyer [is] a guardian of our freedom." Justice Stevens then explained the line from *Henry VI* is not a disparagement of lawyers but the opposite: "[The line] was spoken by a rebel, not a friend of liberty. . . . Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government." *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 335, 371, n.24 (1985).

Congress adopted fee-shifting statutes to "ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley,* 461 U.S. at 429. The URA, like other civil rights fee-shifting statutes, was adopted because "if the citizen does not have the resources, his day in court is denied him; the congressional policy he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." *Riverside*, 477 U.S. at 575. This Court "reject[ed] the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefitting only the

individual plaintiffs whose rights were violated. …[these cases] vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Id.* at 574.

The "important public purpose" of a fee-shifting statute is to "[make] it possible for persons without means to bring suit to vindicate their rights." *Perdue*, 559 U.S. at 559. To realize this purpose, "an attorney is [to be] compensated at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes." *Id.* at 555.

The URA was adopted to "to establish a uniform policy for the fair and equitable treatment of [land] owners…to the end that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." *Alexander* v. *United States Dept. of Housing & Urban Dev.*, 441 U.S. 39, 51 (1979) (quoting "Declaration of Policy," S.1, 91st Cong., 1st Sess., §201 (1969)).[19]

Senator Muskie, a chief sponsor of the URA, explained the fee-shifting provision was adopted to "'assure that the person whose property is taken is no worse off economically than before the property was taken.'" *Id.* (quoting 115 Cong. Rec. 31533 (Oct. 27, 1969)).

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19. "The Government could, of course, have taken appropriate proceedings, to condemn as early as it chose, both land and *** easements. The Government chose not to do so. *** thereby putting on the owner the onus of determining the [taking and the burden and expense of 'tak[ing] affirmative action to recover just compensation.']" *United States* v. *Dickinson,* 331 U.S. 745, 747-48 (1947); see also *Clarke, supra.*

The Solicitor General recently observed:

> The unique litigation-expense provisions in the [the URA] reflect Congress's intent to make takings plaintiffs whole by requiring the government to cover the reasonable expenses that successful plaintiffs incur in inverse-condemnation actions. *** And while most fee-shifting provisions make awards discretionary *** [the URA] is phrased in mandatory terms, requiring that courts *** "*shall* determine and award" a sum to "reimburse [the takings] plaintiff" for his reasonable litigation expenses.
>
> *Haggart* v. *Woodley*, No. 15-1072,
> Brief for the United States in Opposition, p. 10.[20]

The government violated these Kansas owners' constitutional right. There is no dispute on this point. Congress adopted fee-shifting statutes to "ensure that federal rights are adequately enforced." *Perdue*, 559 U.S. at 550, 552 (citing *Delaware Valley I*, 478 U.S. at 565).

Congress's purpose is entirely frustrated when the Federal Circuit only allowed reimbursement of an attorney fee that is a small fraction of what private clients would have paid. Affirming an almost 80% cut to the lodestar fee eviscerates the purpose of fee-shifting statutes and tells litigants and their attorneys that Congress's fee-shifting shifting is an empty promise.

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20. Emphasis by Solicitor General. Brief available at: <https://www.justice.gov/osg/supreme-court-briefs> (last visited August 23, 2016).

B. The Federal Circuit's decision will confuse and mislead trial courts awarding fees in thousands of pending cases.

Almost 2,000 cases are currently pending in the CFC and DC district court that require the trial court to determine an attorney fee.[21] These cases require the 24 district court judges (active, senior status, and magistrates) and the 18 CFC judges to calculate an attorney fee award.

Judge Howell said the trial courts desire more "clarity" on how to determine these attorney fee awards – especially the evidence necessary to determine a "prevailing market rate." See *Makray,* 2016 WL 471271, *7 ("DC Circuit has offered less clarity regarding how courts should determine whether a particular fee applicant has submitted sufficient evidence to justify a fee award based on LSI-adjusted rates.").

21. A PACER search of "open" cases subject to fee-shifting statutes filed since 2006 finds 1,878 cases are pending. This includes 1,390 Tucker Act taking cases in the CFC, and 488 cases in the DC district court subject to one of the federal fee-shifting statutes, such as Title VII.

CONCLUSION

This Court wisely observed that a "request for attorney's fee should not result in a second major litigation. Nor should it lead to years of protracted appellate review." *Perdue*, 559 U.S. at 1684 (Kennedy, J. dissenting) (citing *Hensley,* 461 U.S. at 437). Similarly, this Court noted, the losing party disputing the attorney fee due a prevailing party "must be one of the least socially productive types of litigation imaginable." *Hensley,* 461 U.S. at 442 (Brennan, J., joined by Marshall, Blackmun and Stevens, JJ, concurring and dissenting).

This Court wants to avoid attorney fees being a wasteful additional round of litigation. Toward that end this Court adopted the lodestar fee as a presumptive "reasonable attorney fee." This Court directs that adjustment from the lodestar should be "rare" and only in "exceptional" circumstances and the trial court must base its departure from lodestar fee upon "specific proof" capable of "meaningful appellate review."

The Federal Circuit has broken with this Court, split with the Third Circuit and DC Circuit, and is confusing the trial courts. If attorney fee decisions are made as the Federal Circuit directs, civil rights fee-shifting statutes are empty promises and this Court's desire that fee awards be "objective and reviewable" supported by "specific proof" is a meaningless sentiment.

This Court should grant this petition. By answering the three questions presented this Court will provide trial courts the "clarity" they need (and seek) to make "objective and reviewable" fee awards. Granting this

petition will also allow this Court to resolve the conflict between the circuits and instruct trial courts of what "specific proof" the court must consider before adjusting the lodestar fee.

Respectfully submitted,

MARK F. (THOR) HEARNE, II
Counsel of Record
MEGHAN S. LARGENT
STEPHEN S. DAVIS
ARENT FOX, LLP
1717 K Street, NW
Washington, DC 20036
(202) 857-6000
thor@arentfox.com

Counsel for Petitioners