

**CONSTITUTIONAL TORTS**

**Third Edition**

**2011 Supplement**

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# CONSTITUTIONAL TORTS

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*THIRD EDITION*  
*2011 SUPPLEMENT*

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Editorial Offices  
121 Chanlon Road, New Providence, NJ 07974  
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200  
[www.lexisnexis.com](http://www.lexisnexis.com)

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**This 2011 Supplement to Constitutional Torts (3d ed. 2010) includes all six of the section 1983-related decisions handed down in the Supreme Court’s 2010 Term, as well as two section 1983 cases—*Rehberg* and *Messerschmidt*—that the Court will consider in its forthcoming 2011 Term.**

**July 6, 2011**

## CHAPTER 1

### CONSTITUTIONAL TORTS: A FIRST LOOK

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Page 42: Insert after Note 3

More recently, in *Hui v. Castaneda*, [130 S.Ct. 1845, 1848](#) (2010), the Supreme Court held that plaintiffs may not file constitutional claims for personal injuries against employees of the United States Public Health Service (PHS) for alleged inadequate medical care. In reaching this conclusion, the Court relied on the language of [42 U.S.C. § 233\(a\)](#), a provision of the Federal Tort Claims Act. Section 233(a) permits plaintiffs to initiate suits against the United States for personal injuries arising from medical treatment performed by PHS officials acting within the scope of their employment. The section also provides that suits initiated directly against the United States “shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee.” The Court concluded that the existence of a federal remedy against the United States, accompanied by this clear language of exclusivity, precluded petitioner’s claims against PHS employees for deliberate indifference to serious medical needs in violation of his Fifth, Eighth, and Fourteenth Amendment rights.

Page 45: Insert after Note 6

9. In *Iqbal*, the Court assumed without deciding that plaintiffs could rely on *Bivens* to vindicate alleged violations of First Amendment Free Exercise claims. Before doing so, however, the Court reiterated its traditional reluctance toward expanding *Bivens* liability “to any new context.” As noted, the Court has been especially reluctant to expand *Bivens* to new contexts when (1) alternative remedies were available, or (2) “special factors” counsel hesitation before finding an implied constitutional cause of action. “That reluctance” the majority wrote in *Iqbal*, “might well have disposed of respondent’s First Amendment claim of religious discrimination.” Noting that the defendants did not press that particular argument, however, the Court declined to further engage it.

10. An open question after *Iqbal* is whether the Court’s reluctance toward expanding *Bivens* to new contexts applies only to new legal contexts, or whether it applies to new factual contexts as well. The Second Circuit recently relied primarily on a plaintiff’s factual allegations in concluding that he sought to expand *Bivens* to “a new context.” *Arar v. Ashcroft*, [585 F.3d 559, 564](#) (2d Cir. 2009) (*en banc*).

Maher Arar, a dual Syrian-Canadian citizen who resided in Canada, alleged that he was stopped during a layover at John F. Kennedy Airport in New York, New York in 2002. Based on a tip, federal officials suspected Arar of terrorism and detained him. He alleged that he was then interrogated for six-hours, during which his requests for a lawyer went unheeded. He further alleged that in accordance with a practice of the

federal government known as “extraordinary rendition,” that he was transported to Syria so that officials there could torture him. Arar contended that when federal officials shipped him to a foreign country to be tortured, his conduct violated his Substantive Due Process rights.

While the Second Circuit had previously recognized Substantive Due Process damages claims against federal officials, the Second Circuit concluded 6-4 that “extraordinary rendition” constituted a new context. The majority explained that no other court had yet recognized a *Bivens* claim for the practice of extraordinary rendition. The court then observed that special factors hesitated against extending *Bivens* to Arar’s claims. Specifically, Arar’s suit implicated national security, an area in which the judiciary often defers to executive branch. In addition, federal courts would have to review classified information to adjudicate Arar’s claims. This reality carried one of two risks. On the one hand, public disclosure of classified information could compromise the federal government’s relationship with other countries. On the other hand, reviewing key evidence through limited *in camera* review would undermine the United States’ commitment to open courts.

The dissenters disagreed that Arar’s claims constituted a new context, marshaling prior cases within that circuit that recognized *Bivens* claims for conduct against federal detainees that “shocked the conscience.” They also weighed the special factors differently than the majority. “The conduct of foreign policy and the maintenance of national security are surely executive and legislative powers,” Judge Barrington Parker wrote in dissent. “Yet those powers are not limitless. The bounds in both wartime and peacetime are fixed by the same Constitution. Where appropriate, deference to the coordinate branches is an essential element of our work. But there is, in my view, an enormous difference between being deferential and being supine in the face of governmental misconduct.” Judge Guido Calabresi authored a dissent that used similarly strong language, charging that the majority had engaged in “extraordinary judicial activism,” unjustifiably leaving a victim of lawless conduct with no remedy.

How narrowly should courts define “new context” when determining whether to apply *Bivens* liability? Consider that each case comes with unique facts, and the level of generality a court uses to characterize those facts is important. Consider also that unlike constitutional claims against state actors, Congress has not yet created a similar private cause of action for most constitutional violations committed by officials acting under the color of federal law. Which federal branches are best equipped to fashion the scope of remedies for constitutional violations?

## CHAPTER 2

### "UNDER COLOR OF" STATE LAW

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Page 50, Note 3:

The panel decision discussed in the casebook was reversed by the 6<sup>th</sup> circuit en banc. See Chapman v. Higbee Co., [319 F. 3d 825](#) (6<sup>th</sup> Cir. 2003)(en banc).

## CHAPTER 3

### "SECURED BY THE CONSTITUTION AND LAWS"

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Page 100:

In *McDonald v. City of Chicago*, [130 S. Ct. 3020](#) (2010) the Court ruled that the 2<sup>nd</sup> amendment right to keep and bear arms is incorporated into the Due Process Clause of the 14<sup>th</sup> amendment.

Add at the end of **Note on *Garcetti*** in Chapter 3 at p. 209:

Chief Guarnieri successfully filed a union grievance against his governmental employer that led to his reinstatement. Guarnieri claimed that the borough council then issued certain directives instructing him on how to perform his job and that these directives were issued in retaliation for the filing of his union grievance. Instead of asserting that these actions violated his rights under the *Speech Clause*, Guarnieri claimed that the defendant's action violated his rights under the *Petition Clause* of the first amendment. The lower courts ruled that the filing of a lawsuit or grievance was protected from retaliation by the *Petition Clause* even if the petition addressed a matter of solely private concern. The Supreme Court vacated and remanded. It noted that the right to speak and the right to petition are "cognate rights." The same policy considerations that led the Court to require a public employee to show the *speech* which allegedly gave rise to retaliation pertained to a matter of public concern also applied when the retaliation was prompted by a *petition*. Consequently, the "matter of public concern" requirement applies regardless of whether the complaint is framed in terms of the *Speech* or *Petition* clauses of the first amendment.

## CHAPTER 5

### “EVERY PERSON”: GOVERNMENTAL LIABILITY

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Page 268: Insert after Notes

#### **NOTE ON *LOS ANGELES COUNTY V. HUMPHRIES* AND PROSPECTIVE RELIEF**

Does the reasoning of *Monell*--rejecting respondeat superior liability and imposing an official policy or custom requirement for local government *damages* liability—apply equally to prospective relief actions against local governments? Consider the Supreme Court’s 2010 decision in *Los Angeles County v. Humphries*, 131 S. Ct. – (2010), which held that the official policy or custom requirement does indeed apply to prospective relief actions brought against local governments sued in their own names.

In this case, the plaintiffs, accused but later exonerated of child abuse, sued the attorney general of California, the Los Angeles County sheriff, two detectives in the sheriff’s department and Los Angeles County, and sought damages and prospective relief under § 1983 against all of them. They sought this relief because they were unable to have their names removed from a state-mandated Child Abuse Central Index even after they were exonerated. Ultimately, the Ninth Circuit held that the state was required by procedural due process to provide those included on the Index with notice and some sort of hearing; that the plaintiffs were entitled to declaratory relief against all of the defendants; and that they were prevailing parties entitled to attorney’s fees under [42 U.S.C. § 1988](#)—see Chapter 12--against all of the defendants, including Los Angeles County.

The County argued that it was not responsible for any portion of the attorney’s fees awarded because it was not liable for prospective relief to the plaintiffs. The County contended that it was *state* policy, not county policy, which caused the plaintiffs’ constitutional deprivation. However, the Ninth Circuit rejected the County’s argument that it was not liable for any attorney’s fees because “in our circuit ... the limitations to liability established in *Monell* do not apply to claims for prospective relief” of the sort ordered here.

In a unanimous opinion by Justice Breyer, the Supreme Court reversed, stating: “We conclude that *Monell*’s holding [requiring an official policy or custom] applies to § 1983 claims against municipalities for prospective relief as well as to claims for damages.” In rejecting the plaintiffs’ arguments for a bifurcated reading of § 1983 that depended on the remedy sought, the Court relied on the rationale of *Monell*, on § 1983’s legislative history as recounted in *Monell* and on § 1983’s causation language that precluded respondeat superior liability generally. Interestingly, the Court conceded that its holding might have limited practical significance if the plaintiffs were correct that “a court cannot grant prospective relief against a municipality unless the municipality’s own conduct has caused the violation.” Nevertheless, it would only create added confusion if the Court were to adopt a “bifurcated relief-based approach to municipal liability that the Court has previously rejected.”

*Quere*: suppose a § 1983 plaintiff sues a *local government official* for prospective relief, rather than the local government in its own name. Does *Humphries* mean that an official policy or custom is still required? Does it matter whether the prospective relief is in effect directed at the local government? If it is so directed, that suggests that the official policy or custom requirement should apply. But could there still be situations, even after *Humphries*, where a local government official alone and independently, and not pursuant to an official policy or custom, is engaging in the allegedly unconstitutional conduct that is the object of the § 1983

prospective relief action against the official? In thinking about this question, recall the fiction of *Ex parte Young*, [209 U.S. 123](#) (1908), namely, that a state official sued for prospective relief is somehow stripped of his official capacity and is in effect sued in his personal capacity. *Ex Parte Young* could suggest that the answer to this last question is yes.

Page 347: Insert after Notes

### **NOTE ON *CONNICK V. THOMPSON* AND FAILURE TO TRAIN LIABILITY**

In 2011, the Supreme Court handed down *Connick v. Thompson*, 131 S. Ct. – (2011), an important 5-4 decision with an opinion by Justice Thomas. In *Connick*, the Court effectively held that local government liability for failure to train cannot be based on a single incident, even in the face of an otherwise persuasive claim of deliberate indifference because the need for training was “obvious.”

In *Connick*, the § 1983 plaintiff was convicted of murder and spent fourteen years on death row for a crime that he did not commit, allegedly because prosecutors, in violation of *Brady v. Maryland*, [373 U.S. 83](#) (1963), did not turn over to his attorney a lab report in a related case in which he had previously been convicted of attempted aggravated armed robbery. This lab report indicated that the perpetrator of the attempted armed robbery had type B blood, while the plaintiff had type O blood. Because of that conviction, the plaintiff did not testify in his own defense at his murder trial, where he was convicted. Many years later, the lab report that the prosecutors had failed to turn over was discovered, with the result that, in 1999, the plaintiff’s attempted armed robbery conviction was vacated and, in 2002, his murder conviction was overturned. A subsequent murder retrial in 2003, at which plaintiff testified in his defense, resulted in a not guilty verdict.

He then sued the prosecutor’s office for damages under § 1983, in essence making a local government liability failure to train claim regarding proper training under *Brady*, and a jury awarded him \$14 million. The district court affirmed and a panel of the Fifth Circuit affirmed in a decision later vacated by the Fifth Circuit when it granted en banc review. However, since the en banc Fifth Circuit (in three opinions) was evenly divided, the district court’s decision was affirmed.

The basis of the jury verdict and district court judgment was twofold. First, the district attorney in his official capacity (meaning the prosecutor’s office) was deliberately indifferent to an obvious need to train prosecutors regarding their obligations under *Brady*. And second, the lack of *Brady* training was the *moving force* behind plaintiff’s constitutional injury. The en banc Fifth Circuit divided evenly on each of these findings.

The Court granted certiorari to decide the following Question Presented: “Does imposing failure-to-train liability on a district attorney’s office for a single *Brady* violation contravene the rigorous culpability and causation standards of *Canton* and *Bryan County* [where there is no history of similar *Brady* violations]?”

In *Connick*, despite that fact that there had apparently been no *Brady* training of prosecutors before 1985 when plaintiff was convicted of aggravated armed robbery, the Court rejected the plaintiff’s argument that this was one of those rare cases hypothesized in *City of Canton*, where a pattern of constitutional violations is not necessary to prove deliberate indifference because the need for training is “so obvious.” The Court emphasized the stringency of the deliberate indifference requirement for local government liability for failure to train, arising out the concern with avoiding respondeat superior liability under § 1983.

Furthermore, according to the Court, prosecutors, unlike police officers going through training in the use of firearms and deadly force to stop fleeing felons (the example in *City of Canton*), were already trained in law

in law school and had to pass a bar exam before they could practice. In addition, there are continuing legal education requirements imposed on all lawyers. Thus, “recurring constitutional violations are not the ‘obvious consequence’ of failing to provide prosecutors with formal in-house training about how to obey the law.” Moreover, it was undisputed in this case that prosecutors were “familiar with the general *Brady* rule,” in marked contrast to armed police officers who have no prior knowledge at all about the constitutional use of deadly force. Under these circumstances, the absence of *formal* training in *Brady* was not dispositive: this was not like the *City of Canton* hypothetical.

The Court concluded: “To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was ‘highly predictable’ that the prosecutors in his office would be confounded by those [*Brady*] gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that it was *so* predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants’ *Brady* rights.” And Thompson did not do so.

Justice Scalia, joined by Justice Alito, concurred for the purpose of responding to the arguments of the dissenters. Justice Scalia accused the dissenters of a “puzzling” and “lengthy” excavation of the trial record in a misguided attempt to broaden the scope of failure to train liability. He also rejected their contention that the defendant acquiesced in the plaintiff’s single incident theory. Furthermore, he criticized the dissenters’ position that, with proper training, “surely at least one” of the prosecutors would have turned over the exculpatory evidence. Finally, he suggested that any possible *Brady* violation in this case “was surely on the very frontier of our *Brady* jurisprudence.”

Justice Ginsburg’s dissent, joined by Justices Breyer, Sotomayor and Kagan, argued that the evidence submitted to the jury indicated that the “conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical.” From the top down, in the view of the dissent, prosecutors had inadequately addressed their *Brady* obligations. Accordingly, a jury could have found that such inattention was “standard operating procedure” in Connick’s office. For this reason, *City of Canton*’s deliberate indifference standard was met here, even though there was no proof of a pattern of similar constitutional violations: the resulting *Brady* violation was the obvious consequence of the inadequate training.

Furthermore, according to the dissenters, Connick had “effectively” conceded that his office’s *Brady* training was inadequate. Also, at the time of Thompson’s trial, Louisiana did not require continuing legal education for lawyers, thereby placing responsibility on Connick’s office for keeping prosecutors current on legal developments. Moreover, the Court’s reliance on law school and bar admission requirements “blinks reality” and was belied by the facts in this case. This case therefore fit well within *City of Canton*’s category of cases in which the need for training is so obvious that the failure to provide it can be said to demonstrate deliberate indifference proof; a prior pattern was not necessary.

What do you think of the craftsmanship of the Question Presented for review to the Supreme Court? More important, after *Connick*, do plaintiffs in *all* local government liability failure to train cases have to show a pattern of prior constitutional violations in order to prove deliberate indifference? Finally, what do *Connick* and the Supreme Court’s decisions on prosecutorial immunity set out in Chapter 7 demonstrate about the Court’s approach to prosecutors in general?

## CHAPTER 7

### “EVERY PERSON”: ABSOLUTE IMMUNITY

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Page 430: Insert after Notes

4. In its 2011 Term, the Supreme Court will consider *Rehberg v. Paulk*, 131 S. Ct. – (2011), granting certiorari in [611 F. 3d 828](#) (11<sup>th</sup> Cir. 2010), to address the following Question Presented:

In *Briscoe v. LaHue* this Court held that law enforcement officials enjoy absolute immunity from civil liability under [42 U.S.C. § 1983](#) for perjured testimony that they provide at trial. But in *Malley v. Briggs*, this Court held that law enforcement officials are *not* entitled to absolute immunity when they act as “complaining witnesses” to initiate a criminal prosecution by submitting a legally invalid arrest warrant. The federal courts of appeals have since divided about how *Briscoe* and *Malley* apply when government officials act as “complaining witnesses” by testifying before a grand jury or at another judicial proceeding. The question presented in this case is:

Whether a government official who acts as a “complaining witness” by presenting perjured testimony against an innocent citizen is entitled to absolute immunity from a Section 1983 claim for civil damages.

*Rehberg* involved a § 1983 Fourth and Fourteenth Amendment-based malicious prosecution action against, among others, a chief investigator in a district attorney’s office who, as a complaining witness, allegedly testified falsely before three different grand juries each of which separately indicted the plaintiff on various charges subsequently dismissed. The Eleventh Circuit held that the investigator was absolutely immune from damages liability for his allegedly false testimony before the grand jury. It also ruled that the investigator, together with the prosecutor who presented to the grand jury, was absolutely immune from damages liability for allegedly conspiring, pre-indictment, to make up and present the investigator’s false testimony to the grand jury. In this latter regard, though, the Eleventh Circuit was careful to note that there was no allegation here that either of these defendants fabricated or planted any evidence to create probable cause. If there had been, according to the court, the defendants would not receive absolute immunity because such conduct—investigating and gathering evidence—fell outside the prosecutor’s role as advocate.

The Court granted certiorari because of a circuit split on this issue, with the Third, Fourth and Eleventh Circuits relying on *Briscoe* to confer absolute immunity, while the District of Columbia, Second, Fifth, Sixth, Seventh, Ninth and Tenth Circuits relied on *Malley* to deny absolute immunity protection.

How should the Court apply its functional approach in *Rehberg*? On the one hand, the chief investigator in *Rehberg* functioned as a *complaining witness*, as acknowledged by the Eleventh Circuit itself. On the other, the chief investigator also functioned as a witness in a *grand jury proceeding*, and such a proceeding is “intimately associated with the judicial phase of the criminal process.” Also, there are important policy considerations in play. For example, will allowing § 1983 damages actions for such complaining witness testimony in a grand jury proceeding adversely affect the confidential nature of grand jury testimony because of the depositions that would be taken? Moreover, as is always the case with individual immunities, there is the

matter of the common law background. This is where the Court has traditionally begun its immunity analysis. What, if anything, does the common law extant in 1871 have to say about this?

Page 437: Insert after Note 5

*Pottawattamie County* was subsequently settled and certiorari was dismissed pursuant to Rule 46.

Page 444: Insert after Notes

8. In 2011, the Supreme Court handed down *Ashcroft v. Al-Kidd*, 131 S. Ct. – (2011), which avoided deciding an interesting prosecutorial immunity question dealing with the allegedly improper use of a federal material witness statute. In *Al-Kidd*, the *Bivens* plaintiff, according to his complaint, was arrested on a material witness warrant after the 9-11 terrorist attacks pursuant to then-Attorney General Ashcroft’s authorization to use the material-witness statute, [18 U.S.C. § 3144](#), to detain individuals with suspected ties to terrorist organizations. Specifically, he alleged that federal officials had detained him as a witness because he was suspected of being a terrorist but they had insufficient evidence to charge him with a crime. His detention as a material witness was thus a pretext and violated the Fourth Amendment. The Ninth Circuit ruled that the Fourth Amendment prohibited pretextual arrests without probable cause of criminal wrongdoing and, further, that defendant was not protected by either absolute or qualified immunity. The Court granted certiorari to decide the following Questions Presented:

1. Whether the Court of Appeals erred in denying [defendant] absolute immunity from the pretext claim.
2. Whether the Court of Appeals erred in denying [defendant] qualified immunity from the pretext claim based on the conclusions that (a) the Fourth Amendment prohibits an officer from executing a valid material witness warrant with the subjective intent of conducting further investigation or preventively detaining the subject; and (b) this Fourth Amendment rule was clearly established at the time of [plaintiff’s] arrest.

Reversing, the Court, in an opinion by Justice Scalia, did not have to address the prosecutorial immunity issue because it determined that there was no Fourth Amendment violation in the first place. And even if there had been (“contrafactually”), defendant was entitled to qualified immunity—see Chapter 8. There was no Fourth Amendment violation because of the principle that a validly obtained warrant cannot be challenged as unconstitutional on the basis of improper motive under *Whren v. United States*, [517 U.S. 806](#) (1996): here, the plaintiff “concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant....” And in any event, the defendant was entitled to qualified immunity because he did not violate clearly settled Fourth Amendment law. At the time of his arrest in March 2003, “not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material witness statute unconstitutional.”

Justice Kennedy, joined in this regard by Justices Ginsburg, Breyer and Sotomayor, concurred and pointed out that the Court’s opinion had left open the question of whether the use of the material witness statute in this case was constitutional in light of the fact that the plaintiff did not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the material witness warrant. Writing for himself, he went on to argue for a greater margin for error in the qualified immunity inquiry for a national officeholder like the United States Attorney General as to whom the clearly settled law inquiry should not focus on “the most stringent standard adopted anywhere in the United States.”

Justice Ginsburg, joined by Justices Breyer and Sotomayor, concurred in the judgment. Although agreeing with the qualified immunity outcome, she questioned the Court's "opening assumption—a valid material-witness warrant" and also stated that there was "equally strong reason to conclude that a merits determination was neither necessary nor proper." Justice Sotomayor, joined by Justices Ginsburg and Breyer, concurred in the judgment. She too agreed with the qualified immunity outcome. But, on the merits and despite the general rule that subjective intent is irrelevant to Fourth Amendment violations, "[w]hether the Fourth Amendment permits the pretextual use of a material witness warrant for preventive detention of an individual whom the Government has no intention of using at trial is ... a closer question than the majority's opinion suggests." (Justice Kagan recused herself).

## CHAPTER 8

### “EVERY PERSON”: QUALIFIED IMMUNITY

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Page 479: Insert after Notes

#### NOTE ON *CAMRETA V. GREENE* AND APPELLATE JURISDICTION

Suppose that a § 1983 plaintiff sues individual police officer defendants and a local government, alleging that they violated his constitutional rights and are liable in damages to him. The individual defendants move for summary judgment based on qualified immunity, as they are entitled to do under *Harlow v. Fitzgerald* and its progeny. After *Pearson*, the qualified immunity inquiry may, in the discretion of the district court, include *both* (1) whether the defendants violated the plaintiff’s constitutional rights (that is, whether the plaintiff asserted a constitutional violation) and (2) if they did, whether the defendants nevertheless are not liable because they did not violate clearly settled law as of the time of the challenged conduct.

Suppose now that the district court rules that the individual defendants *did* violate the plaintiff’s constitutional rights but that they did not violate clearly settled law and are thus entitled to qualified immunity. May the *defendants* interlocutorily appeal the district court’s determination that the defendants did in fact violate the plaintiff’s constitutional rights where the plaintiff does not appeal the grant to the defendants of qualified immunity? Consider that the defendants prevailed at the district court level; that, technically speaking, the ruling that the individual defendants violated the plaintiff’s constitutional rights is really not part of the district court’s judgment; and that the dispute between the plaintiff and the individual defendants may now be moot. The plaintiff would prefer a determination that the Circuit Court of Appeals does not have jurisdiction so that the plaintiff’s case against the local government can go forward without any further delay since local governments are not protected by qualified immunity—see Chapter 5. For the same reason, though, the local government defendant has an interest in a decision by the Circuit Court of Appeals on the constitutional merits as soon as possible. Moreover, an argument can be made that the district court’s statement of the applicable constitutional law might affect not only the defendants but all other police officers similarly situated in the jurisdiction who might consider themselves governed by the district court’s announced constitutional standard unless and until it is overturned by a Circuit Court of Appeals.

Parallel appellate jurisdiction issues, but related directly only to the *Supreme Court’s* certiorari jurisdiction, were addressed by the Supreme Court in *Camreta v. Greene*, 131 S. Ct. – (2011), which involved the question whether the Fourth Amendment was violated in connection with the temporary seizure and interview in a public school of a child who authorities suspected was being sexually assaulted by her father. Here, the district court ruled that the individual defendants did not violate the child’s Fourth Amendment rights but, even if they did, they were protected by qualified immunity. On plaintiff’s appeal, the Ninth Circuit affirmed on qualified immunity but also found, contrary to the district court, that the individual defendants violated the plaintiff’s constitutional rights. In so doing, the Ninth Circuit made new Fourth Amendment law.

The individual defendants thereafter petitioned for certiorari on the Fourth Amendment issue, which was granted by the Supreme Court. The plaintiff’s brief to the Court addressed the important Fourth Amendment merits, as did the individual defendants’ brief and a number of amici briefs. But the plaintiff also argued that the Court did not have appellate jurisdiction because (1) the defendants prevailed in the Ninth Circuit; (2) the

determination by the Ninth Circuit that the individual defendants violated the Fourth Amendment was not part of its judgment; and (3) the case between the plaintiff and the individual defendants was moot.

In an opinion by Justice Kagan, the Supreme Court vacated the Ninth Circuit's decision in part and remanded. The Court first determined that it could review the Ninth Circuit's decision under the relevant federal statute, [28 U.S.C. § 1254\(1\)](#), which conferred power on it to grant certiorari "upon the petition of any party," which included petitions brought by prevailing litigants in the court below, as well as by losing litigants. Next, the Court rejected the plaintiff's argument that the petition submitted by the prevailing defendants did not present an Article III case or controversy. The defendants had a personal stake in the case because the Ninth Circuit had ruled that the defendants violated the plaintiff's Fourth Amendment rights and this judgment had a prospective effect on the parties: these defendants, and other defendants in this situation, either have to change the way they perform their jobs or risk future damages liability. Similarly, in most such cases plaintiffs will ordinarily retain a stake in the outcome (although, as it turned out here, the plaintiff did not retain a personal stake).

In addition, sound judicial policy warranted Supreme Court review here because the Ninth Circuit's Fourth Amendment ruling was not mere dictum but rather one that had "a significant future effect on the conduct of public officials—both the prevailing parties and their co-workers—and the policies of the government units to which they belong." Indeed, this ruling was intended to establish clearly settled Fourth Amendment law. These considerations, together with the "features of the qualified immunity world and why they came to be ... support bending our usual rule to permit consideration of immunized officials' petitions." Otherwise, the defendants will either have to be governed by a Fourth Amendment ruling they cannot contest in the Supreme Court or defy the ruling and risk damages.

Significantly, the Court then went on to emphasize that in *Camreta* it was addressing only *its own authority* to review such cases, and not that of Circuit Courts of Appeals. In this case, after all, the Ninth Circuit had reviewed the *losing* plaintiff's appeal. "We therefore need not and do not decide if an appellate court, too, can entertain an appeal from a party who has prevailed on immunity grounds." In a potentially important footnote 7, the Court observed that different considerations may apply in such cases, particularly since district court decisions, which are not binding precedent, did not necessarily settle constitutional law. The Court also noted that its decision about reviewability dealt only with what it *could* review, not with what it *would necessarily* review.

Nevertheless, after determining that the immunized defendants' case was properly before the Court even though the defendants had prevailed in the Ninth Circuit, the Court concluded that the case was moot. This was *not* because of the defendants, who retained a personal stake in it, but because the plaintiff no longer did. She had moved to another state and had no intention of relocating to Oregon (where the events occurred). In addition, she was almost 18 years old and would therefore not face "the slightest possibility of being seized in the Ninth Circuit's jurisdiction as part of a child abuse investigation." While the plaintiff argued that she did indeed have a personal stake because of a municipal liability claim (dismissed by the district court and not appealed) she was seeking to reinstate, "we do not think [plaintiff's] *dismissed* claim against a *different* defendant involving a *separate* legal theory can save this case from mootness."

Consequently, the Court vacated the part of the Ninth Circuit's opinion that addressed the Fourth Amendment issue (but *not* the qualified immunity part) and remanded.

Justice Scalia concurred. He pointed out only that the approach suggested by Justice Kennedy in his dissent—“to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity”—had not been advocated by any of the parties. Justice Sotomayor, joined by Justice Breyer, concurred in the judgment. She argued that because the case was moot, the Court should not have discussed the question whether the prevailing defendants in *Camreta* should be able to obtain review of the Ninth Circuit’s Fourth Amendment ruling.

Justice Kennedy, joined by Justice Thomas, dissented. He agreed that clarification of this qualified immunity-related issue was required. Nevertheless: “In my view ... the correct solution is not to override jurisdictional rules that are basic to the functioning of the Court and to the necessity of avoiding advisory opinions [under Article III]. Dictum, though not precedent, may have its utility; but it ought not to be treated as a judgment standing on its own.”

After *Camreta*, what is the status of the Fourth Amendment issue that had been decided by the Ninth Circuit? What do you think of footnote 7 and the Court’s distinction between appellate review by the Supreme Court and that by the Circuit Courts of Appeal? Are the changes in the Supreme Court’s qualified immunity doctrines over the years primarily responsible for the procedural quandary in which the Court found itself? Finally, is the Court’s discussion of appealability advisory in nature? If so, isn’t that ironic?

Page 487: Insert after Note 13

14. In 2011, the Supreme Court granted certiorari in *Messerschmidt v. Millender*, 131 S. Ct. – (2011), to deal with the following Questions Presented:

- (1) Whether police officers are entitled to qualified immunity when they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her?
- (2) Whether *United States v. Leon*, [468 U.S. 897](#) (1984) and *Malley v. Briggs*, [475 U.S. 335](#) (1986), should be reconsidered?

The Ninth Circuit en banc had ruled, with three judges dissenting, that the warrant was overbroad and violated the Fourth Amendment because it covered all firearms, not just the particular sawed-off shotgun, and because it covered all articles related to gang membership even though the incident in question was not gang-related. Further, the defendant police officers were not protected by qualified immunity because the warrant was so facially invalid that a police officer could not have reasonably relied on it. The various opinions also discussed the relevance of reliance on advice of counsel and judicial approval of the warrant. *Millender v. County of Los Angeles*, [620 F.3d 1016](#), -- (9<sup>th</sup> Cir. 2010)(en banc).

*Malley v. Briggs* is also referred to in Chapter 6 in connection with proximate cause and in Chapter 7 in connection with *Kalina v. Fletcher* and the application of prosecutors for arrest warrants.

Page 523: Insert after Note

### **NOTE ON *ORTIZ V. JORDAN* AND INTERLOCUTORY APPEALS**

It is important to distinguish interlocutory appeals from situations of the sort that arose in the 2011 Supreme Court decision, *Ortiz v. Jordan*, 131 S. Ct. – (2011). Suppose that defendants in a §1983 case raise

qualified immunity on summary judgment and lose at the district court level because there are genuine issues of material fact in dispute. The defendants choose not to appeal, the case goes to trial and a jury finds for the plaintiff. Suppose further that defendants never contested the jury's liability finding under [F.R.C.P. 50](#) (b) and also did not request a new trial under Rule 59(a). After the district court enters judgment for the plaintiff, the defendants appeal and argue that the district court should have granted their qualified immunity motion for summary judgment in the first place. May the defendants appeal the denial of their qualified immunity motion for summary judgment after the district court has held a full trial on the merits? The Court in *Ortiz* resolved a conflict in the circuits and unanimously answered NO.

In *Ortiz*, the plaintiff, a former inmate in a state reformatory, sued two superintending prison officials alleging that they violated the Eighth and Fourteenth Amendments when they failed to protect her from a second sexual assault (after she reported the first one) and also retaliated against her when she thereafter reported that she had been sexually assaulted twice by the same corrections officer. The defendants' qualified immunity summary judgment motion was denied by the district court on the ground that there were genuine issues of material fact in dispute. Rather than appeal, the defendants proceeded to trial after unsuccessfully making motions for judgment as a matter of law under [F.R.C.P. 50](#)(a). The jury awarded \$350,000 in compensatory and punitive damages against one defendant and \$275,000 against the other. Defendants then appealed the district court's order denying their qualified immunity summary judgment motion, and the Sixth Circuit reversed on the ground that the defendants were protected by qualified immunity.

The Supreme Court in turn reversed unanimously in an opinion by Justice Ginsburg. The Court explained: "The order retains its interlocutory character as simply a step along the route to final judgment." Once there is a trial, the qualified immunity defense must be addressed "in light of the character and quality of the evidence received in court." Even though the Sixth Circuit in this case apparently reviewed the district court's pretrial order in light of some evidence submitted at trial, this was impermissible because the defendants' failure to renew their motion for judgment as a matter of law under Rule 50(b) deprived the Sixth Circuit of any "warrant to reject the appraisal of the evidence" by the district court which had seen and heard the witnesses. Furthermore, the Sixth Circuit's decision was not based on a purely legal issue pursuant to *Johnson v. Jones*: the relevant Eighth Amendment law was clearly settled at the time of the challenged conduct. Consequently, defendants' appeal was not properly before the Sixth Circuit because it involved evidentiary sufficiency, which defendants could have raised by post-trial motion under Rule 50(b) but did not.

Justice Thomas, joined by Justices Scalia and Kennedy, concurred in the judgment. They complained that the Court should have limited its decision to the impropriety of appealing a district court's denial of a qualified immunity summary judgment motion after a trial on the merits, without getting into the effect of the defendants' post-trial failure to renew their motion for judgment as a matter of law under Rule 50(b). In their view, this was a relatively easy case where the Court of Appeals did not have jurisdiction to review, and the Court should not have reached out to address "difficult and far-reaching questions of civil procedure."

Did the Court rule that the defendants waived their qualified immunity defense? Why or why not? Also, did the Court act appropriately in advising attorneys how to deal with qualified immunity under Rule 50(b), or were the concurring justices correct?

## CHAPTER 9

### **"SHALL BE LIABLE TO THE PARTY INJURED IN AN ACTION AT LAW, SUIT IN EQUITY OR OTHER PROPER PROCEEDING FOR REDRESS": CONSTITUTIONAL TORT REMEDIES**

Page 550: Insert after Note 1

*Thompson v. Connick*, discussed in note 1, was reversed on other grounds in *Connick v. Thompson*, [131 S. Ct. 1350](#) (2011). The Supreme Court case is discussed in chapter 5 of this supplement.

Page 605: Insert at Note 8

In *Los Angeles County v. Humphries*, 562 U.S. §(2010) the Court held that “*Monell*’s ‘policy or custom’ requirement applies in §1983 cases irrespective of whether the relief sought is monetary or prospective.”

## CHAPTER 10

### PROCEDURAL DEFENSES

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Page 666: Insert after Notes

In *Skinner v. Switzer*, [131 S.Ct. 1289, 1291](#) (2011), the Supreme Court addressed the scope of *Heck* within the context of federal lawsuits requesting courts to enjoin DNA testing. When a convicted state prisoner wishes to seek DNA testing of crime-scene evidence, must the prisoner bring a claim in a petition for a writ of habeas corpus, or may instead the prisoner bring a claim under §1983?

The Court held in *Skinner* that an inmate may bring a claim for DNA testing pursuant to § 1983, because a successful claim would not “necessarily imply the unlawfulness of the State’s custody,” nor would it necessarily result in “immediate or speedier” release. See *Wilkinson v. Dotson*, [544 U.S. 74](#) (2005) (holding that prisoners challenging the constitutionality of administrative decisions that denied them parole eligibility could proceed under § 1983, because the a favorable injunction would not necessarily result in earlier release, nor would it necessarily imply the unlawfulness of defendant’s detention).

Writing for the majority in *Skinner*, Justice Ginsburg reasoned that if an inmate obtains an injunction for DNA testing, this simply means that the prisoner gets access to certain evidence, evidence to could prove demonstrative of guilt, innocence, or, in some cases, nothing. “While test results might prove exculpatory, that outcome is hardly inevitable,” the majority explained. “[R]esults might prove inconclusive or they might further incriminate Skinner.”

The Court also cautioned, however, that the circumstances under which a person may actually bring a § 1983 claim for DNA evidence are necessarily limited. The breadth of the decision is cabined by the Prison Litigation Reform Act (PLRA), limitations discussed in notes 1-5. The reach of *Skinner* is also limited by *District Attorney’s Office for Third Judicial Dist. v. Osborne*, [129 S.Ct. 2308](#) (2009), in which the Court held that there is no free-standing substantive due process right to receive DNA testing on demand. Instead, relying on procedural due process, a litigant must demonstrate that there are deficiencies in a state procedure that resulted in the erroneous denial of access to DNA testing.

Justices Thomas, Kennedy and Alito dissented, reasoning that allowing such claims upsets the carefully calibrated principles of federalism and comity embodied in habeas corpus statutes. Justice Thomas wrote that the majority defined the issue too narrowly by focusing primarily on whether petitioner’s suit would necessarily result in a shorter sentence. The crux of the *Skinner*’s claim was that the State of Texas provided inadequate procedures to examine is claim that he should have access to DNA testing, procedures that included petitions for post-conviction relief in state courts. “An attack in federal court on any state judicial action concerning a state conviction must proceed with proper respect for state functions,” Justice Thomas wrote, “because the federal courts are being asked to try the regularity of proceedings had in courts of coordinate jurisdiction.”



## CHAPTER 12

### ATTORNEY'S FEES

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Page 710: Add to Note 7

What fees, if any, should be awarded to a defendant when some of the plaintiff's claims are frivolous and others are not? *Fox v. Vice*, [2011 U.S. Lexis 4182, 563](#) U.S. --, -- S.Ct. -- (June 6, 2011) involved a mix of state tort claims, including defamation, and federal civil rights claims brought pursuant to Section 1983 for alleged dirty tricks undertaken during a contested election. The federal claims ultimately were found to be frivolous and the state law claims were deemed to have some merit. Discovery taken in connection with the frivolous Section 1983 claims could be of some use in defending the non-frivolous state tort claims. Because the plaintiff's federal claims were deemed to be frivolous, the District Court awarded fees to the defendant. This fee award did not differentiate between time defending the Section 1983 claims and time spent defending the state tort claims. The District Court reasoned that the federal and state law claims were interrelated as they arose from the same transaction, i.e., the alleged dirty tricks. The court of appeals affirmed.

A unanimous Supreme Court reversed as to the amount of the fee award. The Court held that a defendant should not be awarded fees for time that would have been incurred defending the non-frivolous state law claims. "Section 1988 allows a defendant to recover reasonable attorney's fees incurred because of, but only because of a frivolous claim...In a suit of this kind involving both frivolous and non-frivolous claims, a defendant may recover the reasonable attorney's fees expended solely because of the frivolous allegations. And that is all." By way of example, the Court mentioned that if a deposition of a particular witness would be necessary to defend against the non-frivolous state tort claims as well as the frivolous federal claims, that time should not be factored into the defendant's fee award.

As we will see later in *Hensley v. Eckerhart*, *infra*, the standards for computing a fee award to a prevailing plaintiff are more generous. A prevailing plaintiff may receive a fee award based on time spent prosecuting successful and unsuccessful claims provided they involve a "common core of facts or [are] based on related legal theories." See Note 2 following *Hensley*, *infra*. As illustrated by *Fox v. Vice*, however, a defendant can only recover fees if the plaintiff's federal claim is deemed to be frivolous and, if so, only for time spent exclusively defending the frivolous claim. This disparity in treatment of plaintiffs and defendants regarding fee awards is justified in terms of legislative intent. Congress intended to be more generous to prevailing plaintiffs regarding fee awards in order encourage the vindication of civil rights laws; however, Congress only sought to protect defendants from the burdens of defending against frivolous or vexatious claims. *Fox v. Vice*, 563 U.S. at \_\_\_, n. 3.

Eliminate Note 5 from Chapter 12, pp. 738-39; Put the following in after Note 7 and before *Jane L.* (p. 741)

The Court in *Hensley* stated that "in some cases of exceptional success an enhanced [fee] award may be justified." A host of circuit court opinions have seized upon this language and found that an enhancement of a fee award may be appropriate when the results achieved and the quality of

the representation were “exceptional.” See e.g., *Grier v. Sundquist*, [372 F.3d 784](#) (6th Cir. 2004); *Hyatt v. Apfel*, [194 F.3d 188](#) (4<sup>th</sup> Cir. 1999); *Quaratino v. Tiffany & Co.*, [166 F.3d 422](#) (2d Cir. 1999); *NAACP v. City of Evergreen*, [812 F.2d 1332](#) (11<sup>th</sup> Cir. 1987). The Supreme Court revisited the issue of fee enhancements in the opinion reprinted below.

**PERDUE v. KENNY A.**  
**[130 S. Ct. 1662](#) (2010)**

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether the calculation of an attorney's fee, under federal fee-shifting statutes, based on the "lodestar," *i.e.*, the number of hours worked multiplied by the prevailing hourly rates, may be increased due to superior performance and results. We have stated in previous cases that such an increase is permitted in extraordinary circumstances, and we reaffirm that rule. But as we have also said in prior cases, there is a strong presumption that the lodestar is sufficient; factors subsumed in the lodestar calculation cannot be used as a ground for increasing an award above the lodestar; and a party seeking fees has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified. Because the District Court did not apply these standards, we reverse the decision below and remand for further proceedings consistent with this opinion.

I

A

Respondents (plaintiffs below) are children in the Georgia foster-care system and their next friends. They filed this class action on behalf of 3,000 children in foster care and named as defendants the Governor of Georgia and various state officials (petitioners in this case). Claiming that deficiencies in the foster-care system in two counties near Atlanta violated their federal and state constitutional and statutory rights, respondents sought injunctive and declaratory relief, as well as attorney's fees and expenses.

The United States District Court for the Northern District of Georgia eventually referred the case to mediation, where the parties entered into a consent decree, which the District Court approved. The consent decree resolved all pending issues other than the fees that respondents' attorneys were entitled to receive under [42 U.S.C. § 1988](#).

B

Respondents submitted a request for more than \$ 14 million in attorney's fees. Half of that amount was based on their calculation of the lodestar -- roughly 30,000 hours multiplied by hourly rates of \$ 200 to \$ 495 for attorneys and \$ 75 to \$ 150 for non-attorneys. In support of their fee request, respondents submitted affidavits asserting that these rates were within the range of prevailing market rates for legal services in the relevant market.

The other half of the amount that respondents sought represented a fee enhancement for superior work and results. Affidavits submitted in support of this request claimed that the lodestar amount

"would be generally insufficient to induce lawyers of comparable skill, judgment, professional representation and experience" to litigate this case. Petitioners objected to the fee request, contending that some of the proposed hourly rates were too high, that the hours claimed were excessive, and that the enhancement would duplicate factors that were reflected in the lodestar amount.

The District Court awarded fees of approximately \$ 10.5 million. The District Court found that the hourly rates proposed by respondents were "fair and reasonable," but that some of the entries on counsel's billing records were vague and that the hours claimed for many of the billing categories were excessive. The court therefore cut the non-travel hours by 15% and halved the hourly rate for travel hours. This resulted in a lodestar calculation of approximately \$ 6 million.

The court then enhanced this award by 75%, concluding that the lodestar calculation did not take into account "(1) the fact that class counsel were required to advance case expenses of \$ 1.7 million over a three-year period with no on[-]going reimbursement, (2) the fact that class counsel were not paid on an on-going basis as the work was being performed, and (3) the fact that class counsel's ability to recover a fee and expense reimbursement were completely contingent on the outcome of the case." The court stated that respondents' attorneys had exhibited "a higher degree of skill, commitment, dedication, and professionalism . . . than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." The court also commented that the results obtained were "extraordinary" and added that "[a]fter 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale." The enhancement resulted in an additional \$ 4.5 million fee award.

\* \* \*

## II

The general rule in our legal system is that each party must pay its own attorney's fees and expenses, but Congress enacted [42 U.S.C. § 1988](#) in order to ensure that federal rights are adequately enforced. *Section 1988* provides that a prevailing party in certain civil rights actions may recover "a reasonable attorney's fee as part of the costs." Unfortunately, the statute does not explain what Congress meant by a "reasonable" fee, and therefore the task of identifying an appropriate methodology for determining a "reasonable" fee was left for the courts.

One possible method was set out in *Johnson v. Georgia Highway Express, Inc.*, [488 F.2d 714, 717-719](#) (CA5 1974), which listed 12 factors that a court should consider in determining a reasonable fee. This method, however, "gave very little actual guidance to district courts. Setting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results."

An alternative, the lodestar approach, was pioneered by the Third Circuit and "achieved dominance in the federal courts" after our decision in *Hensley*. "Since that time, [t]he "lodestar" figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence."

Although the lodestar method is not perfect, it has several important virtues. First, in accordance with our understanding of the aim of fee-shifting statutes, the lodestar looks to "the prevailing market

rates in the relevant community." Developed after the practice of hourly billing had become widespread, the lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case. Second, the lodestar method is readily administrable, and unlike the *Johnson* approach, the lodestar calculation is "objective," and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results.

### III

Our prior decisions concerning the federal fee-shifting statutes have established six important rules that lead to our decision in this case.

First, a "reasonable" fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case.

\* \* \*

Second, the lodestar method yields a fee that is presumptively sufficient to achieve this objective. Indeed, we have said that the presumption is a "strong" one.

Third, although we have never sustained an enhancement of a lodestar amount for performance, we have repeatedly said that enhancements may be awarded in "rare" and "exceptional" circumstances.

Fourth, we have noted that "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee," and have held that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation. We have thus held that the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors "presumably [are] fully reflected in the number of billable hours recorded by counsel." We have also held that the quality of an attorney's performance generally should not be used to adjust the lodestar "[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate."

Fifth, the burden of proving that an enhancement is necessary must be borne by the fee applicant

Finally, a fee applicant seeking an enhancement must produce "specific evidence" that supports the award. This requirement is essential if the lodestar method is to realize one of its chief virtues, *i.e.*, providing a calculation that is objective and capable of being reviewed on appeal.

### IV

#### A

In light of what we have said in prior cases, we reject any contention that a fee determined by the lodestar method may not be enhanced in any situation. The lodestar method was never intended to be conclusive in all circumstances. Instead, there is a "strong presumption" that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar

does not adequately take into account a factor that may properly be considered in determining a reasonable fee.

## B

In this case, we are asked to decide whether either the quality of an attorney's performance or the results obtained are factors that may properly provide a basis for an enhancement. We treat these two factors as one. When a plaintiff's attorney achieves results that are more favorable than would have been predicted based on the governing law and the available evidence, the outcome may be attributable to superior performance and commitment of resources by plaintiff's counsel. Or the outcome may result from inferior performance by defense counsel, unanticipated defense concessions, unexpectedly favorable rulings by the court, an unexpectedly sympathetic jury, or simple luck. Since none of these latter causes can justify an enhanced award, superior results are relevant only to the extent it can be shown that they are the result of superior attorney performance. Thus, we need only consider whether superior attorney performance can justify an enhancement. And in light of the principles derived from our prior cases, we inquire whether there are circumstances in which superior attorney performance is not adequately taken into account in the lodestar calculation. We conclude that there are a few such circumstances but that these circumstances are indeed "rare" and "exceptional," and require specific evidence that the lodestar fee would not have been "adequate to attract competent counsel,"

First, an enhancement may be appropriate where the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during the litigation. 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. In such a case, an enhancement may be appropriate so that an attorney is compensated at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes. But in order to provide a calculation that is objective and reviewable, 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.

Second, an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. As Judge Carnes noted below, when an attorney agrees to represent a civil rights plaintiff who cannot afford to pay the attorney, the attorney presumably understands that no reimbursement is likely to be received until the successful resolution of the case, and therefore enhancements to compensate for delay in reimbursement for expenses must be reserved for unusual cases. In such exceptional cases, however, an enhancement may be allowed, but the amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses.

Third, there may be extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees. An attorney who expects to be compensated under § 1988 presumably understands that payment of fees will generally not come until the end of the case, if at all. Compensation for this delay 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." But we do not rule out the possibility that an enhancement may be appropriate where an attorney assumes these costs in the face

of unanticipated delay, particularly where the delay is unjustifiably caused by the defense. In such a case, however, the enhancement should be calculated by applying a method similar to that described above in connection with exceptional delay in obtaining reimbursement for expenses.

We reject the suggestion that it is appropriate to grant performance enhancements on the ground that departures from hourly billing are becoming more common. As we have noted, the lodestar was adopted in part because it provides a rough approximation of general billing practices, and accordingly, if hourly billing becomes unusual, an alternative to the lodestar method may have to be found. However, neither respondents nor their *amici* contend that that day has arrived. Nor have they shown that permitting the award of enhancements on top of the lodestar figure corresponds to prevailing practice in the general run of cases.

We are told that, under an increasingly popular arrangement, attorneys are paid at a reduced hourly rate but receive a bonus if certain specified results are obtained, and this practice is analogized to the award of an enhancement such as the one in this case. The analogy, however, is flawed. An attorney who agrees, at the outset of the representation, to a *reduced hourly rate* in exchange for the opportunity to earn a performance bonus is in a position far different from an attorney in a § 1988 case who is compensated at the *full prevailing rate* and then seeks a performance enhancement in addition to the lodestar amount after the litigation has concluded. Reliance on these comparisons for the purposes of administering enhancements, therefore, is not appropriate.

## V

In the present case, the District Court did not provide proper justification for the large enhancement that it awarded. The court increased the lodestar award by 75% but, as far as the court's opinion reveals, this figure appears to have been essentially arbitrary. Why, for example, did the court grant a 75% enhancement instead of the 100% increase that respondents sought? And why 75% rather than 50% or 25% or 10%?

The District Court commented that the enhancement was the "minimum enhancement of the lodestar necessary to reasonably compensate [respondents'] counsel." But the effect of the enhancement was to increase the top rate for the attorneys to more than \$ 866 per hour,<sup>1</sup> and the District Court did not point to anything in the record that shows that this is an appropriate figure for the relevant market.

The District Court pointed to the fact that respondents' counsel had to make extraordinary outlays for expenses and had to wait for reimbursement, but the court did not calculate the amount of the enhancement that is attributable to this factor. Similarly, the District Court noted that respondents'

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<sup>1</sup> [7] JUSTICE BREYER's reliance on the *average* hourly rate for all of respondents' attorneys is highly misleading. In calculating the lodestar, the District Court found that the hourly rate for each of these attorneys was "eminently fair and reasonable" and "consistent with the prevailing market rates in Atlanta for comparable work." JUSTICE BREYER's calculation of an average hourly rate for all attorney hours reflects nothing more than the fact that much of the work was performed by attorneys whose "fair and reasonable" market rate was below the market average. There is nothing unfair about compensating these attorneys *at the very rate that they requested*.

counsel did not receive fees on an ongoing basis while the case was pending, but the court did not sufficiently link this factor to proof in the record that the delay here was outside the normal range expected by attorneys who rely on § 1988 for the payment of their fees or quantify the disparity. Nor did the court provide a calculation of the cost to counsel of any extraordinary and unwarranted delay. And the court's reliance on the contingency of the outcome contravenes our holding in *Dague*.

Finally, insofar as the District Court relied on a comparison of the performance of counsel in this case with the performance of counsel in unnamed prior cases, the District Court did not employ a methodology that permitted meaningful appellate review. Needless to say, we do not question the sincerity of the District Court's observations, and we are in no position to assess their accuracy. But when a trial judge awards an enhancement on an impressionistic basis, a major purpose of the lodestar method -- providing an objective and reviewable basis for fees, -- is undermined.

Determining a "reasonable attorney's fee" is a matter that is committed to the sound discretion of a trial judge, see [42 U.S.C. § 1988](#) but the judge's discretion is not unlimited. It is essential that the judge provide a reasonably specific explanation for all aspects of a fee determination, including any award of an enhancement. Unless such an explanation is given, adequate appellate review is not feasible, and without such review, widely disparate awards may be made, and awards may be influenced (or at least, may appear to be influenced) by a judge's subjective opinion regarding particular attorneys or the importance of the case. In addition, in future cases, defendants contemplating the possibility of settlement will have no way to estimate the likelihood of having to pay a potentially huge enhancement.

*Section 1988* serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights. But unjustified enhancements that serve only to enrich attorneys are not consistent with the statute's aim.<sup>2</sup> In many cases, attorney's fees awarded under § 1988 are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based. Instead, the fees are paid in effect by state and local taxpayers, and because state and local governments have limited budgets, money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services.

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<sup>2</sup> [8] JUSTICE BREYER's opinion dramatically illustrates the danger of allowing a trial judge to award a huge enhancement not supported by any discernible methodology. That approach would retain the \$ 4.5 million enhancement here so that respondents' attorneys would earn as much as the attorneys at some of the richest law firms in the country. *Post*, at 10-11. These fees would be paid by the taxpayers of Georgia, where the annual per capita income is less than \$ 34,000, see Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2010, p. 437 (2009) (Table 665) (figures for 2008), and the annual salaries of attorneys employed by the State range from \$ 48,000 for entry-level lawyers to \$ 118,000 for the highest paid division chief, see Brief for State of Alabama et al. as *Amici Curiae*, 10, and n. 3 (citing National Association of Attorneys General, Statistics on the Office of the Attorney General, Fiscal Year 2006, pp. 37-39). *Section 1988* was enacted to ensure that civil rights plaintiffs are adequately represented, not to provide such a windfall.

For all these reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE KENNEDY, concurring. [omitted]

JUSTICE THOMAS, concurring. [omitted]

## **DISSENT**

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join, concurring in part and dissenting in part.

We granted certiorari in this case to consider "whether the calculation of an attorney's fee" that is "based on the 'lodestar,'" can "*ever* be enhanced based solely on [the] quality of [the lawyers'] performance and [the] results obtained." The Court answers that question in the affirmative. As our prior precedents make clear, the lodestar calculation "does not end the [fee] inquiry" because there "remain other considerations that may lead the district court to adjust the fee upward." For that reason, "[t]he lodestar method was never intended to be conclusive in all circumstances." Instead, as the Court today reaffirms, when "superior attorney performance," leads to "exceptional success an enhanced award may be justified,"

Where the majority and I part ways is with respect to a question that is not presented, but that the Court obliquely, and in my view inappropriately, appears to consider nonetheless -- namely, whether the lower courts correctly determined *in this case* that exceptional circumstances justify a lodestar enhancement. I would not reach that issue, which lies beyond the narrow question that we agreed to consider. Nor do I believe that this Court, which is twice removed from the litigation underlying the fee determination, is properly suited to resolve the fact-intensive inquiry that [42 U.S.C. § 1988](#) demands. But even were I to engage in that inquiry, I would hold that the District Court did not abuse its discretion in awarding an enhancement. And I would therefore affirm the judgment of the Court of Appeals.

\* \* \*

This case well illustrates why our tiered and functionally specialized judicial system places the task of determining an attorney's fee award primarily in the district court's hands. The plaintiffs' lawyers spent eight years investigating the underlying facts, developing the initial complaint, conducting court proceedings, and working out final relief. The District Court's docket, with over 600 entries, consists of more than 18,000 pages. Transcripts of hearings and depositions, along with other documents, have produced a record that fills 20 large boxes. Neither we, nor an appellate panel, can easily read that entire record. Nor should we attempt to second-guess a district judge who is aware of the many intangible matters that the written page cannot reflect.

My own review of this expansive record cannot possibly be exhaustive. But those portions of the record I have reviewed lead me to conclude, like the Court of Appeals, that the District Judge did not

abuse his discretion when awarding an enhanced fee. I reach this conclusion based on four considerations.

*First*, the record indicates that the lawyers' objective in this case was unusually important and fully consistent with the central objectives of the basic federal civil-rights statute, [42 U.S.C. § 1983](#). Moreover, the problem the attorneys faced demanded an exceptionally high degree of skill and effort. Specifically, these lawyers and their clients sought to have the State of Georgia reform its entire foster-care system -- a system that much in the record describes as well below the level of minimal constitutional acceptability.

\* \* \*

[Justice Breyer's lengthy review of the constitutional flaws of the Georgia foster-care system and the need for litigation to bring about reform are omitted.]

The upshot is that the plaintiffs' attorneys did what the child advocate could not do: They initiated this lawsuit. They thereby assumed the role of "a 'private attorney general'" by filling an enforcement void in the State's own legal system, a function "that Congress considered of the highest priority."

*Second*, the course of the lawsuit was lengthy and arduous. The plaintiffs and their lawyers began with factual investigations beyond those which the child advocate had already conducted. They then filed suit. And the State met the plaintiffs' efforts with a host of complex procedural, as well as substantive, objections. The State, for example, argued that the law forbade the plaintiffs to investigate the shelters; on the eve of a state-court decision that might have approved the investigations, the State then removed the case to federal court; the State then sought protective orders preventing the attorneys from speaking to the shelters' staff; and, after losing its motions, the State delayed to the point where the District Court "was forced to admonish [the] State Defendants for 'relying on technical legal objections to discovery requests in order to delay and hinder the discovery process.'"

In the meantime, the State moved for dismissal, basing the motion on complex legal doctrines such as *Younger* abstention and the *Rooker-Feldman* doctrine, which the District Court found inapplicable. The State also opposed the petitioners' request to certify a class of the 3,000 children in foster care, but the District Court again rejected the State's argument. And, after that, the State filed a lengthy motion for summary judgment, which plaintiffs' attorneys opposed in thorough briefing supported by comprehensive exhibits. After losing that motion and eventually agreeing to mediation, the State forced protracted litigation as to who should be the mediator. All told, in opposing the plaintiffs' efforts to have the foster-care system reformed, the State spent \$ 2.4 million on outside counsel (who, because they charge the State reduced rates, worked significantly more hours than that figure alone indicates) and tapped its own law department for an additional 5,200 hours of work.

*Third*, in the face of this opposition, the results obtained by the plaintiffs' attorneys appear to have been exceptional. The 47-page consent decree negotiated over the course of the mediation sets forth 31 specific steps that the State will take in order to address the specific deficiencies of the sort that I described above. And it establishes a reporting and oversight mechanism that is backed up by the District Court's enforcement authority. As a result of the decree, the State agreed to comprehensive

reforms of its foster-care system, to the benefit of children in many different communities. And informed observers have described the decree as having brought about significant positive results.

*Fourth* and finally, the District Judge, who supervised these proceedings, who saw the plaintiffs amass, process, compile, and convincingly present vast amounts of factual information, who witnessed their defeat of numerous state procedural and substantive motions, and who was in a position to evaluate the ultimate mediation effort, said:

1. the "mediation effort in this case went far beyond anything that this Court has seen in any previous case,"

2. "based on its personal observation of plaintiffs' counsel's performance throughout this litigation, the Court finds that . . . counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench,";

3. the Consent Decree "provided extraordinary benefits to the plaintiff class . . . ." "[T]he settlement achieved by plaintiffs' counsel is comprehensive in its scope and detailed in its coverage . . . . After 58 years as a practicing attorney and federal judge, the Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale."

Based on these observations and on its assessment of the attorneys' performance during the course of the litigation, the District Court concluded that "the evidence establishes that the quality of service rendered by class counsel . . . was far superior to what consumers of legal services in the legal marketplace . . . could reasonably expect to receive for the rates used in the lodestar calculation."

On the basis of what I have read, I believe that assessment was correct. I recognize that the ordinary lodestar calculation yields a large fee award. But by my assessment, the lodestar calculation in this case translates to an average hourly fee per attorney of \$ 249 refers to the rate associated with the *single highest* paid of the 17 attorneys under the *enhanced* fee, not the *average* hourly rate under the *lodestar*. The lay reader should also bear in mind that a lawyer's "fee" is substantially greater than his "profit," given that attorneys must sometimes cover case-specific costs (which in this case exceeded \$ 800,000) and also must cover routine overhead expenses, which typically consume 40% of their fees, see Altman Weil Publications, Inc., Survey of Law Firm Economics 30 (2007 ed.)).

At \$ 249 per hour, the lodestar would compensate this group of attorneys -- whom the District Court described as extraordinary -- at a rate *lower* than the *average* rate charged by attorneys practicing law in the State of Georgia, where the average hourly rate is \$ 268. See *id.*, at 89. Accordingly, even the majority would seem to acknowledge that some form of an enhancement is appropriate in this case. Indeed, the fact that these exceptional results were achieved in a case where "much of the work," was performed by relatively inexperienced attorneys (who, accordingly, would be compensated by the lodestar "below the market average,") is all the more reason to think that their service rendered their outstanding performance worthy of an enhancement. By comparison, the District Court's enhanced award -- a special one-time adjustment unique to this exceptional case -- would compensate these attorneys, on this one occasion, at an average hourly rate of \$ 435, which is comparable to the rates charged by the Nation's leading law firms on average on every occasion. See

Firm-by-Firm Sampling of Billing Rates Nationwide, National Law Journal, Dec. 11, 2006, p. S2 (listing 13 firms at which average hourly rate is between \$ 400 and \$ 510). Thus, it would appear that the enhanced award is wholly consistent with the purpose of § 1988, which was enacted to ensure that "counsel for prevailing parties [are] paid as is traditional with attorneys compensated by a fee-paying client."

In any event, the circumstances I have listed likely make this a "rare" or "exceptional" case warranting an enhanced fee award. And they certainly make clear that it was neither unreasonable nor an abuse of discretion for the District Court to reach that conclusion. Indeed, if the facts and circumstances that I have described are even roughly correct, then it is fair to ask: If this is not an exceptional case, what is?

\* \* \*

## Notes

1. As a general proposition, do you think fee enhancements are ever needed to achieve the Congressional goals set forth in the legislative history? Consider the following argument:

The lodestar award, without the possibility of enhancement does not provide [sufficient incentives for attorneys to represent plaintiffs in civil rights cases]. This is partly because the "trend in the marketplace is toward great use of performance-or result based fee structures." The basic lodestar calculation...cannot account for this trend. Therefore, without the possibility of enhancements, "the potential remuneration [attorneys] can earn from civil rights cases will be, on average, lower than they can earn in matters requiring comparable skills."

Rebecca Friedman, The Lodestar Ranger: Calculating Attorneys' Fee Awards in *Perdue v. Kenny A*, 5 Duke J. Const. Law & PP Sidebar 58, 72 (2010) (summarizing and quoting from Brief for Law and Economic Scholars, et al. as Amici Curiae Supporting Respondents, *Purdue v. Kenny A.*, No. 08-970 (August 28, 2009)).

2. Note that this case was remanded for further proceedings. Is there room for the plaintiffs to argue that a fee enhancement is still appropriate in this case? What sort of evidence would you attempt to present to the District Court in support of a motion to enhance the fees?