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Fee Shifting, Nominal Damages, and the Public Interest

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Abstract

As the Supreme Court recognized in its 2021 decision in *Uzuegbunam v. Preczewski*, nominal damages can redress violations of "important, but not easily quantifiable, nonpecuniary rights." For some plaintiffs who establish a violation of their constitutional rights, nominal damages will be the only relief available. In its 1992 decision in *Farrar v. Hobby*, however, the Court disparaged the nominal-damages remedy. The case involved the interpretation of federal fee-shifting statutes, which enable prevailing civil rights plaintiffs to recover a reasonable attorney's fee from the defendant. According to Farrar, a plaintiff can prevail by obtaining the "technical" remedy of nominal damages, but the only reasonable fee for such a plaintiff might be "no fee at all."

As this Article explains, the Court's opinion in *Farrar v. Hobby* is an outlier among both the Court's nominal-damages cases and its fee-shifting cases. It has led to significant confusion in the lower courts, and in one manifestation of that confusion, many courts have resolved fee disputes by looking to their own views of the public interest value of the litigation. Not only is that approach unwise, but it is also contrary to constraints the Supreme Court has imposed in other fee-shifting cases. The Court or Congress should step in to clarify matters. In the meantime, lower courts should abandon the public-interest inquiry that many of them have adopted.

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INTRODUCTION

Half a century ago, Joseph Davis Farrar sued six defendants for seventeen million dollars.[1] Farrar had owned and operated a school for troubled teens, and after one of the students died, the State of Texas obtained a temporary injunction that closed the school.[2] Farrar alleged that the defendants—including William P. Hobby, Jr., the lieutenant governor of Texas—had violated his civil rights in connection with the closure.[3] After ten years of litigation, a jury ruled in favor of five of the six defendants,[4] but it "found that Hobby had 'committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right.'"[5]

The jury's verdict did not specify which of Hobby's actions were unlawful or which of Farrar's rights were violated.[6] Whatever the offending conduct might have been, the jury found that it had not proximately caused any damages to Farrar.[7] The district court thus entered judgment against Hobby for nominal damages.[8] Farrar then sought attorney's fees under 42 U.S.C. § 1988, which entitles a civil rights plaintiff who is a "prevailing party" to recover a "reasonable" attorney's fee from the defendant.[9]

By enacting statutes like Section 1988, Congress has made pro-plaintiff fee shifting available in civil rights litigation and other areas in which the government relies on private enforcement to further public goals.[10] Recognizing the role of private litigation in these statutory

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[1] Farrar v. Hobby, 506 U.S. 103, 106 (1992).

[2] *Id.* at 105–06.

[3] *Id.* at 106.

[4] The jury found that the other defendants conspired against Farrar, but the conspiracy did not proximately cause him any injury. *Id.*

[5] *Id.*

[6] As Farrar's counsel acknowledged, the verdict was "regrettably obtuse." *Id.* at 122 (O'Connor, J., concurring).

[7] *Id.* at 106.

[8] The trial court initially declined to award the plaintiff nominal damages, but the Fifth Circuit reversed and remanded on that point. Farrar v. Cain, 756 F.2d 1148, 1152 (5th Cir. 1985) ("Even when a violation of a civil right causes no actual injury to the plaintiff, the plaintiff is entitled to recover nominal damages." (citing Carey v. Piphus, 435 U.S. 247, 266–67 (1978))).

[9] Farrar v. Hobby, 506 U.S. 103, 107, 109 (1992).

[10] I limit my analysis in this piece to federal fee-shifting statutes that are asymmetrically interpreted in favor of plaintiffs, in the sense that they require a defendant to pay a

schemes, the Supreme Court has referred to plaintiffs in fee-shifting cases as "private attorneys general."[11] It is sometimes said that private attorneys general fill enforcement gaps left by public actors, but in many of these areas, private lawsuits vastly outnumber government actions.[12] Accordingly, it would be more accurate to describe government actions as the gap-filler, and private enforcement as the main event.

In theory, fee-shifting statutes support private enforcement by helping civil rights claimants obtain qualified counsel, especially in cases involving injunctive relief or relatively low amounts of monetary damages.[13] Those types of civil rights cases are unlikely to attract

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reasonable fee to a plaintiff who qualifies as a prevailing party, but they do not require a plaintiff to pay a reasonable fee to a prevailing defendant unless the plaintiff's claim was "frivolous, unreasonable, or without foundation." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); *see also* Maureen Carroll, *Fee-Shifting Statutes and Compensation for Risk*, 95 IND. L.J. 1021, 1022–23 n.2 (2020) (discussing the interpretation and goals of this universe of fee-shifting statutes). Courts and scholars have sometimes referred to this arrangement as "one-way" fee shifting. Because the provisions allow both plaintiffs and defendants to recover fees, albeit under asymmetrical standards, I will instead use the label "pro-plaintiff."

[11] *See, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) ("If [the plaintiff] obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."). Judge Jerome Frank appears to have coined the term "private attorney general" in 1943. *See* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 n.19 (2003) (citing Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943)).

[12] For example, over the period between 2000 and 2013, private plaintiffs filed fifty-five times as many employment discrimination lawsuits as the EEOC in federal district courts each year. Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL'Y REV. 119, 130 (2014).

[13] Carroll, *supra* note 10, at 1035–36. I use the phrase "relatively low" (rather than simply "low") because the same dollar amount will mean different things to differently situated people. From the perspective of a law firm deciding whether to take on a client, tens of thousands of dollars might be too low a potential recovery to make the representation economically viable. *Cf.* Paul Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. LAW & PUB. POL'Y 1, 19 n.57 (2008) (reporting that the author's law school clinic was unable refer fee-shifting cases involving less than $100,000 in damages to the private bar). From the perspective of the potential client, that same amount might be life-changing. *See* Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 DEPAUL L. REV. 269, 285 (2020).

representation on the basis of a contingent percentage fee.[14] In reality, most practitioners will not take on a civil rights case unless the contingent percentage fee alone will provide adequate compensation for their efforts.[15] The potential for a fee-shifting award does not meaningfully affect their case selection decisions.[16]

Federal judges have been central characters in the story of fee-shifting's failure.[17] In the 1970s, even as fee-shifting statutes proliferated, they became a major target of deregulatory efforts.[18] The Reagan Administration largely failed to curtail fee shifting through the political branches,[19] but in the mid-1980s, the Supreme Court began issuing decisions that furthered the same goal under the guise of statutory

[14] Carroll, *supra* note 10, at 1046.

[15] *See* Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 657–59 (2023).

[16] *Id.*

[17] As I have argued elsewhere, "parsimonious interpretations of federal fee-shifting provisions" in the federal courts have led to a fee-shifting regime that is "structurally undercompensatory." Carroll, *supra* note 10, at 1045.

[18] Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1551–53 (2014).

[19] *Id.* at 1562-67. Ronald Reagan appointed Clarence Thomas to be Assistant Secretary of Education for the Office of Civil Rights in 1981, then chairman of the EEOC in 1982. Thomas served in the latter position until 1990, when George H.W. Bush nominated him to the D.C. Circuit. Two years after that, having ascended to the Supreme Court, Thomas wrote the majority opinion in *Farrar v. Hobby*.

interpretation.[20] *Farrar v. Hobby*, which the Court decided in 1992, was one of those cases.[21]

The Court granted certiorari in *Farrar* to resolve a straightforward question: "Does 42 U.S.C. § 1988 authorize the award of reasonable attorney's fees to civil rights plaintiffs who recover nominal damages?"[22] The Court unanimously agreed on a straightforward answer: "a plaintiff who wins nominal damages is a prevailing party."[23] Ordinarily, a plaintiff who achieves prevailing-party status is entitled to recover an attorney's fee from the defendant; ordinarily, the court will base that fee on the reasonable value of the time the plaintiff's attorneys reasonably spent on the litigation.[24] Yet in *Farrar*, the five-justice majority held that the prevailing plaintiff was not entitled to any fees at all.[25]

In explaining why not, the Court began by reiterating the holding of one of its prior decisions: a district court might need to reduce a fee award "if a plaintiff has achieved only partial or limited success."[26] It

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[20] *See* Marek v. Chesny, 473 U.S. 1, 11–12 (1985) (holding that the plaintiff could not recover attorney's fees accrued after the defendant's unaccepted offer of judgment under Rule 68 of the Federal Rules of Civil Procedure); Evans v. Jeff D., 475 U.S. 717, 741–743 (1986) (authorizing settlement agreements that eliminate a defendant's fee-shifting obligations); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 102 (1991) (holding that the plaintiff could not recover expert fees as part of a fee-shifting award), *superseded by statute*, 42 U.S.C. § 1988(c); City of Burlington v. Dague, 505 U.S. 557, 567 (1992) (prohibiting adjustments to fee-shifting awards to reflect the contingent nature of the fee); Farrar v. Hobby, 506 U.S. 103 (1992) (holding that the plaintiff, who obtained only nominal damages, was not entitled to attorney's fees despite qualifying as a prevailing party); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598 (2001) (rejecting the "catalyst theory" for fee recovery and holding that a plaintiff must obtain court-ordered relief in order to qualify as a prevailing party).

[21] *Farrar*, 506 U.S. at 103. For analysis of another, *see generally* Carroll, *supra* note 10, (discussing City of Burlington v. Dague).

[22] Petition for Writ of Certiorari, Farrar v. Hobby, 506 U.S. 103 (No. 91-990).

[23] *Farrar*, 506 U.S. at 112; *see also id.* at 122 (White, J., concurring in part and dissenting in part) (agreeing with the majority on this point).

[24] *See infra* Section II.A.

[25] *Farrar*, 506 U.S. at 115–16. The district court had awarded the plaintiffs $280,000 in fees, reflecting more than a decade of litigation, a six-week trial, and two appeals. *Id.* at 123 (White, J., concurring in part and dissenting in part). The appellate court did not review the fee amount because it found that Farrar was not a prevailing party. The dissent faulted the majority for reaching the question of the fee amount instead of remanding for further proceedings. *Id.*

[26] *Id.* at 114 (citing Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)).

could have gone on to explain that Farrar's success was exceptionally limited, as demonstrated by the absence of a liability finding against six of the seven defendants, the ambiguous jury verdict as to the remaining defendant, and the $17-million-to-one disparity between the damages sought and the damages received.[27] Explicitly stating that those facts were central to its decision would have brought *Farrar* into better alignment with the Supreme Court's other case law about the calculation of statutory fee-shifting awards, in which it has attempted (however unsuccessfully) to provide bright-line rules and administrable standards.[28]

Instead, the Court's short and murky opinion in *Farrar* seemed preoccupied with what it viewed as "the 'technical' nature of a nominal damages award."[29] It emphasized that, for a plaintiff who seeks compensatory damages, "the awarding of nominal damages . . . highlights the plaintiff's failure to prove actual, compensable injury."[30] The Court did not hold that district courts should *always* deny fees to plaintiffs who receive nominal damages after seeking compensatory damages, but it asserted that they "often"[31] or "usually"[32] should do so.

The opinion's characterization of nominal damages makes *Farrar* an outlier among the Supreme Court's other decisions about that remedy.[33] In its 1978 decision in *Carey v. Piphus*, for example, the Court wrote that nominal damages "vindicated deprivations of certain 'absolute' rights," thereby "recogniz[ing] the importance to organized society that those rights be scrupulously observed."[34] More recently, the Court wrote in *Uzuegbunam v. Preczewski* that "[n]ominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory

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[27] *See infra* Section II.B.
[28] *See infra* Part II.
[29] *Farrar*, 506 U.S. at 114.
[30] *Id.* at 115.
[31] *Id.* ("In some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party.").
[32] *Id.* ("When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.") (citation omitted).
[33] *See infra* Part I.
[34] Carey v. Piphus, 435 U.S. 247, 266 (1978).

damages."[35] Rather, the Court explained, nominal damages are a "concrete"[36] remedy that can redress violations of "important, but not easily quantifiable, nonpecuniary rights."[37]

The imprecision of the majority opinion in *Farrar* has led to interpretations that make it an outlier in another way as well.[38] Relying on Justice O'Connor's concurrence in *Farrar*,[39] some lower courts have resolved fee disputes in nominal-damages cases on the basis of their own views about the public interest value of the litigation.[40] But the Supreme Court has never authorized courts to determine fees in that manner. To the contrary, the Court has made clear that a federal judge's role is to carry out *congressional* views about whether a case involves a public policy important enough to warrant fee shifting, not to implement the judge's own views on that question.[41]

In addition to contributing to doctrinal confusion, *Farrar* has undermined the efficacy of fee-shifting statutes, as lower courts have relied on the decision to deny fees to prevailing plaintiffs in a wide range of cases. In one case, "a law enforcement officer, acting as a school resource officer, . . . handcuff[ed] a compliant nine-year-old child for purely punitive purposes" in violation of her Fourth Amendment rights.[42] A jury awarded nominal damages, but the prevailing plaintiff received no attorney's fees.[43] In another, a high school teacher removed a student from class in violation of his First Amendment right to free expression.[44] A court awarded nominal damages, but the prevailing plaintiff received no attorney's fees.[45] And in another, "two children . . . were denied seats at their preferred [public] schools because of their race" in violation of their Fourteenth Amendment right to equal

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[35] Uzuegbunam v. Preczewski, 141 S. Ct. 792, 800 (2021); *see also id.* at 800–01 (rejecting "the flawed premise that nominal damages are purely symbolic, a mere judicial token that provides no actual benefit to the plaintiff").
[36] *Id.* at 801 ("Despite being small, nominal damages are certainly concrete.").
[37] *Id.* at 800.
[38] *See infra* Part III.
[39] *See* Farrar v. Hobby, 506 U.S. 103, 116 (O'Connor, J., concurring).
[40] *See infra* Section III.B.
[41] *See infra* Section III.A.
[42] Gray ex rel. Alexander v. Bostic, 720 F.3d 887, 892 (11th Cir. 2013).
[43] *Id.* at 899–900.
[44] Glowacki v. Howell Pub. Sch. Dist., 566 Fed. App'x 451, 453 (6th Cir. 2014).
[45] *Id.* at 456.

protection.[46] A court awarded nominal damages, but the prevailing plaintiffs received no attorney's fees.[47] The list could go on and on.

It is past time to clean up this mess. Ideally, Congress would address the nominal-damages issue as part of a broader overhaul of fee-shifting statutes.[48] Although Republican support for fee-shifting statutes has grown in recent years,[49] political polarization and congressional dysfunction still make that outcome unlikely. A second-best solution would be for the Supreme Court to revisit the standard governing fee-shifting awards in nominal-damages cases. That outcome might seem unlikely as well, but recent cases provide some reason for hope.[50]

Regardless of what Congress or the Supreme Court may do in the future, lower federal courts should start applying *Farrar* in a manner that produces more sensible and predictable results. Those district and appellate courts that have looked to their own views of the public interest should immediately abandon that approach, instead focusing on relatively objective indicia of the extent to which the plaintiffs prevailed on their claims.[51] Doing so would better comply with the judicial role in interpreting fee-shifting statutes. It would also mitigate the practical harms and doctrinal incoherence that *Farrar* has engendered.

This article proceeds as follows. Part I examines the relationship between the majority opinion in *Farrar* and the Supreme Court's other case law about nominal damages, concluding that *Farrar* is an outlier among those cases. Part II examines the relationship between the majority opinion in *Farrar* and the Supreme Court's other case law about statutory fee shifting, concluding that *Farrar* is an outlier among those cases as well. Part III turns to the public-interest inquiry that many lower courts have adopted, concluding that such an inquiry deviates from the Supreme Court's pronouncements about judicial authority over fee-shifting awards. Finally, Part IV identifies actions that Congress, the

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[46] Boston's Child. First v. City of Bos., 395 F.3d 10, 11 (1st Cir. 2005).
[47] *Id.* at 18.
[48] *See infra* Section IV.A.
[49] *See generally* Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 UC IRVINE L. REV. 657 (2021) (documenting increases in Republican support for private enforcement, including through fee-shifting provisions, during the period from 2010 through 2018).
[50] *See infra* Section IV.B (discussing Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021) and New York State Rifle & Pistol Ass'n, Inc. v. City of N.Y., 140 S. Ct. 1525 (2020)).
[51] *See infra* Section IV.C.

Supreme Court, and the lower federal courts can take to improve upon the current state of affairs.

I. THE SUPREME COURT AND NOMINAL DAMAGES

What role do nominal damages play in the panoply of remedies for civil rights violations? That question has reached the U.S. Supreme Court in a variety of contexts, ranging from a breach of contract case with national security implications[52] to a religious liberty case that raised questions about Article III standing.[53] Among other things, the Court's decisions have made nominal damages the only relief available for some constitutional violations.[54] In keeping with that relationship between rights and relief, the Court has usually recognized nominal damages as a meaningful remedy that vindicates important public values.[55] But there are two troublesome outliers, of which *Farrar v. Hobby* is one, in which the Court disparaged the remedy as "hollow"[56] or "technical."[57]

A. *Vindication and Redressability*

The Supreme Court conducted its most detailed examination of the nominal-damages remedy in three opinions: *Carey v. Piphus* in 1978,[58] *Memphis Community School District v. Stachura* in 1986,[59] and *Uzuegbunam v. Preczewski* in 2021.[60] As explained below, those decisions tend to characterize the remedy in a way that reflects its central role in constitutional litigation.

The Court first established nominal damages as the default remedy for a violation of constitutional rights, available without proof of actual injury, in *Carey v. Piphus*.[61] The plaintiffs in *Carey* had been suspended from public school in violation of their procedural due process rights.[62] Finding that they had presented no evidence about the extent of their

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[52] Snepp v. United States, 444 U.S. 507, 507–08 (1980).
[53] Uzuegbunam v. Preczewski, 141 S. Ct. 792, 796 (2021).
[54] *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 315–16 (1986); Carey v. Piphus, 435 U.S. 247, 266–67 (1978).
[55] *See infra* Section I.A.
[56] *See* Snepp v. United States, 444 U.S. 507, 514 (1980); *see also infra* Section I.B.
[57] *See* Farrar v. Hobby, 506 U.S. 103, 114 (1992); *see also infra* Section I.C.
[58] *Carey*, 435 U.S. 247 (1978).
[59] *Stachura*, 477 U.S. 299 (1986).
[60] Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021).
[61] *Carey*, 435 U.S. 247, 248 (1978).
[62] *Id.* at 250–51 (1978).

injuries, however, the district court refused to award damages.[63] The Seventh Circuit reversed, holding that the plaintiffs could recover substantial damages even if their suspensions had been justified and they could not otherwise demonstrate any actual injury.[64]

The Supreme Court held that if the plaintiffs did not prove any actual injury, they should receive nominal damages—no more, but no less.[65] The Court reasoned that "the principle of compensation" should apply to damages for constitutional claims,[66] such that the plaintiffs could recover substantial damages only upon a showing of the extent of the injuries caused by the violation.[67] The Court rejected the idea that the plaintiffs should receive no remedy at all, however, because "the fact remains that they were deprived of their right to procedural due process."[68] Making "the denial of procedural due process . . . actionable for nominal damages without proof of actual injury" would recognize "the importance to organized society that procedural due process be observed."[69]

Eight years later, the Court reaffirmed the relationship between nominal damages and constitutional litigation in *Memphis Community School District v. Stachura*.[70] The plaintiff in *Stachura*, a public-school teacher, had been suspended with pay in violation of his First Amendment right to academic freedom.[71] In addition to instructing the jury about standard measures of compensatory and punitive damages, the district court allowed the jury to calculate damages based on "the jury's subjective perception of the importance of constitutional rights as an abstract matter." [72]

The Supreme Court disapproved of that approach. The Court explained that "nominal damages, and not damages based on some

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[63] *Id.* at 251–52.
[64] *Id.* at 252–53.
[65] *Id.* at 266–67.
[66] *Id.* at 257–58.
[67] *Id.* at 262–64.
[68] *Id.* at 266.
[69] *Id.* The Court noted that "[c]ommon-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money." *Id.*
[70] Memphis Cmty. Sch. Dist v. Stachura, 477 U.S. 299 (1986).
[71] *Id.* at 300–302.
[72] *Id.* at 308.

undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury."[73] It rejected the proposition that nominal damages were a sufficient remedy only for "'mere' procedural safeguards" like those at issue in *Carey*.[74] Instead, the Court made clear that nominal damages would be the default remedy for "procedural" and "substantive" violations alike.[75]

After *Carey* and *Stachura* established nominal damages as an appropriate remedy for constitutional violations—and, in some cases, the *only* permissible remedy for constitutional violations—most circuits deemed it unobjectionable that a request for nominal damages would be enough to avoid mootness.[76] The Eleventh Circuit broke with that consensus in 2017, holding that "a prayer for nominal damages, by itself, is insufficient to satisfy Article III's jurisdictional requirements."[77] The court reasoned that a request for nominal damages could save a case from mootness only in limited circumstances—for example, if a plaintiff sought but failed to prove compensatory damages (as occurred in *Carey* and *Stachura*.)[78] Otherwise, an award of nominal damages would provide the plaintiffs with "judicial validation" and "psychic satisfaction," but it would have no accompanying practical effect.[79]

The Eleventh Circuit's standard lasted only until the Supreme Court decided *Uzuegbunam v. Preczewski* in 2021.[80] In *Uzuegbunam*, college officials violated the plaintiff's First Amendment rights by prohibiting him from speaking and distributing materials about his religion.[81] After the college eliminated the challenged policies, the plaintiff's claim for injunctive relief became moot, but his request for nominal damages

[73] *Id.* at 308 n.11. For a discussion of the ways in which the nominal-damages remedy provides vindication, *see* Sadie Blanchard, *Nominal Damages as Vindication*, 30 GEO. MASON L. REV 228 (2022).
[74] *Stachura*, 477 U.S. at 309.
[75] *Id.* at 308 n.11.
[76] Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, Ga., 868 F.3d 1248, 1265 n.17 (11th Cir. 2017) (en banc) (discussing cases from other circuits).
[77] *Id.* at 1253. The court distinguished *Carey* and *Stachura* on the basis that, in those cases, "a live claim for actual damages existed at all levels of the litigation." *Id.* at 1266.
[78] *Id.* at 1266.
[79] *Id.* at 1268.
[80] Uzuegbunam v. Preczewski,141 S. Ct. 792, 802 (2021).
[81] *Id.* at 797.

remained.[82] The district court dismissed the case for failure to satisfy the redressability element of standing, and the Eleventh Circuit affirmed.[83]

The Supreme Court held that a plaintiff's request for nominal damages does satisfy the redressability element of standing, regardless of whether the plaintiff has also sought compensatory damages. The Court noted that, at common law, courts awarded nominal damages under the rationale that "*every* legal injury necessarily causes damage."[84] Its opinion characterized that rule as not just traditional, but also sensible, as it allowed common-law courts to provide a remedy for "noneconomic rights . . . such as due process or voting rights, that were not readily reducible to monetary valuation."[85] Moreover, the rule "avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights."[86]

The Court rejected the proposition that a request for compensatory damages should be a prerequisite for redressability, reasoning that "[n]ominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages."[87] That notion "rests on the flawed premise that nominal damages are purely symbolic, a mere judicial token that provides no actual benefit to the plaintiff."[88] "Because every violation of a right imports damage," the Court concluded, "nominal damages can redress [the plaintiff's] injury even if he cannot or chooses not to quantify that harm in economic terms."[89]

B. *Disagreement about Deterrence*

Nominal damages can provide redress, but can they deter misconduct? In *Stachura*, the Supreme Court rejected the proposition that "damages measured by the jury's perception of the abstract 'importance' of a constitutional right" were "necessary to vindicate the constitutional rights that § 1983 protects."[90] According to the Court,

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[82] *Id.*
[83] *Id.*
[84] *Id.* at 798 (emphasis in the original).
[85] *Id.* at 800 (citing *Carey v. Piphus* in support of the assertion that certain rights are not easily reduced to monetary valuations).
[86] *Id.*
[87] *Id.*
[88] *Id.* at 800–01.
[89] *Id.* at 802 (citation and alteration omitted).
[90] Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986).

"Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations."[91] This analysis echoed (and quoted) the Court's discussion of the deterrence question in *Carey*.[92]

Although *Carey* and *Stachura* leave some room for doubt,[93] one might have concluded from those cases that the Court deemed nominal damages to be a meaningfully deterrent remedy. Yet in *Snepp v. United States*, a case decided in the years between *Carey* and *Stachura*, the Court referred to nominal damages as a "hollow alternative" to the plaintiff's preferred remedy, one that was "certain to deter no one."[94]

In *Snepp*, the government sued a former CIA agent for breach of contract after he published a book about the agency's activities in Vietnam.[95] The agent had not submitted the manuscript for prepublication review, and the district court found that failure to be a breach of his contract with the government.[96] As a remedy, the court enjoined future breaches and imposed a constructive trust on the defendant's profits from the book.[97] The Fourth Circuit upheld the injunction, but not the imposition of a constructive trust.[98] Instead, the appellate court held that the government's monetary recovery should be limited to nominal damages, unless it could prove tortious conduct, in which case it could recover punitive damages as well.[99]

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[91] *Id.*

[92] Carey v. Piphus, 435 U.S. 247, 256–57 (1978) ("To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."). The Court added that a defendant's potential liability for a statutory fee-shifting award "provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights." *Id.* at 257 n.11.

[93] One plausible reading of the cases is that, rather than embracing the deterrent potential of nominal damages, the Court was discounting the need for deterrence of constitutional violations unaccompanied by proof of substantial compensatory damages.

[94] Snepp v. United States, 444 U.S. 507, 514 (1980).

[95] *Id.* at 507.

[96] *Id.* at 508.

[97] *Id.* at 509.

[98] *Id.*

[99] *Id.* at 510.

In a per curiam opinion, the Supreme Court reversed. The Court wrote that the Fourth Circuit's decision "denies the Government the most appropriate remedy for [the defendant's] acknowledged wrong" and "may well leave the Government with no reliable deterrent against similar breaches of security."[100] Asserting that nominal damages "are a hollow alternative, certain to deter no one," the Court held that the government was entitled to the constructive trust imposed by the district court.[101]

It would probably be a mistake to read too much into the Court's characterization of nominal damages in *Snepp*. The Court decided the case summarily on the government's conditional cross-petition for certiorari;[102] its opinion did not discuss or even cite *Carey*; and its analysis of the nominal-damages remedy consisted of a single sentence.[103] Moreover, in the decades since *Snepp* was decided, the Court has not cited it for any proposition related to nominal damages. The per curiam decision thus appears to reflect a Court stumbling slightly, rather than consciously changing course, from the path it started down in *Carey*.

C. *Fee Shifting and "Failure"*

The Court's 1992 decision in *Farrar v. Hobby*[104] represents a more unambiguous departure from the path of its nominal-damages precedents. As explained previously, *Farrar* involved a fee-shifting petition by a plaintiff who obtained nominal damages for an unspecified violation of his civil rights.[105] The Court held that the plaintiff in that case was a "prevailing part[y]" for fee-shifting purposes but was not entitled to any fees.[106]

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[100] *Id.* at 514.

[101] Snepp v. United States, 444 U.S. 507, 514-16 (1980).

[102] In a dissenting opinion joined by Justices Brennan and Marshall, Justice Stevens criticized the Court for deciding the case in this posture, deeming it "just as unprecedented as [the Court's] disposition of the merits." *Id.* at 524 (Stevens, J., dissenting).

[103] *See id.* at 514 (per curiam). The dissenting opinion did not mention nominal damages at all. *Id.* at 524 (Stevens, J. dissenting).

[104] 506 U.S. 103, 103 (1992).

[105] *See supra* notes 1–8 and accompanying text.

[106] *Farrar*, 506 U.S. at 116.

Much of the Court's analysis in *Farrar* centered on the character of the nominal-damages remedy. On one hand, the Court rejected the proposition that nominal damages represented "a technical victory . . . so insignificant . . . as to be insufficient to support prevailing party status."[107] On the other hand, the Court asserted that "the 'technical' nature of a nominal damages award . . . does bear on the propriety of fees awarded under § 1988."[108]

The Court emphasized the "failure" reflected in a judgment for nominal damages, writing that "[i]n a civil rights suit for damages," such a remedy "highlights the plaintiff's failure to prove actual, compensable injury."[109] The Court concluded that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all."[110]

Justice Thomas wrote for the majority in both *Farrar* and *Uzuegbunam*, but the two opinions characterize nominal damages quite differently.[111] *Farrar* refers to "the 'technical' nature of a nominal damages award,"[112] while *Uzuegbunam* rejects the proposition that historically "courts awarded nominal damages merely as a technical matter."[113] *Farrar* asserts that "the awarding of nominal damages . . . highlights the plaintiff's failure to prove actual, compensable injury,"[114] while *Uzuegbunam* rejects the proposition that nominal damages are "a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages."[115] *Farrar* asserts that "[t]his

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[107] *Id.* at 113 (quoting Texas State Teachers Ass'n. v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (second alteration in the original)).
[108] *Id.* at 114.
[109] *Farrar*, 506 U.S.at115 (citing Carey v. Piphus, 435 U.S. 247, 254 (1978)).
[110] *Id.* (citing *Carey*, 435 U.S. at 256–57).
[111] *Uzuegbunam* cites *Farrar*, but only in support of the proposition that "a person who is awarded nominal damages receives 'relief on the merits of his claim' and 'may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages.'" Uzuegbunam v. Preczewski, 141 S. Ct. 792, 801 (2021) (quoting *Farrar*, 506 U.S. at 113).
[112] *Farrar,* 506 U.S. at 114.
[113] *Uzuegbunam*, 141 S. Ct. at 800.
[114] *Farrar*, 506 U.S. at 115 (citing Carey, 435 U.S. at 266).
[115] *Uzuegbunam*, 141 S. Ct. at 800. These two assertions are doctrinally reconcilable: Article III does not require a plaintiff to seek compensatory damages, but if he did, obtaining only nominal damages would mean getting less than he sought.

litigation accomplished little beyond giving petitioners the moral satisfaction of knowing that a federal court concluded that their rights had been violated in some unspecified way,"[116] while *Uzuegbunam* describes as "flawed" the proposition "that nominal damages are purely symbolic, a mere judicial token that provides no actual benefit to the plaintiff."[117]

If the only trouble with *Farrar* were its characterization of the nominal-damages remedy, perhaps these contradictions would be no great cause for concern. Because of the central role that *Carey* and *Stachura* assign to nominal damages in civil rights litigation, however, the decision's impact has been wide-ranging. Not only has *Farrar* been cited in thousands of judicial decisions,[118] but it also has significantly undermined the consistency and comprehensibility of statutory fee-shifting doctrine, as the next two Parts explain.

II. NOMINAL DAMAGES AND FEE SHIFTING

This Part explores the ways in which *Farrar v. Hobby*,[119] on its own terms,[120] coheres poorly with the Supreme Court's other case law about statutory fee-shifting. In its other case law, the Court has emphasized the need for bright lines and clear standards, and it has required district courts to use the "lodestar" approach when setting fees.[121] For decades, the lodestar method has been so central to the determination of a reasonable fee that the Court has repeatedly described it as "the guiding

[116] *Farrar*, 506 U.S. at 114.
[117] *Uzuegbunam*,141 S. Ct. at 800–01.
[118] As of February 6 2023, Westlaw's Citing References for *Farrar* listed 4,598 state and federal judicial decisions. The actual number is likely to be far higher, as a great many district court decisions do not appear in electronic databases like Westlaw. *See generally* Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 517 (2016) ("While the high-profile debate rages over appellate courts' designation of opinions as 'unpublished' and therefore non-precedential, the study of submerged precedent presented here identifies a deeper layer of 'unpublication' in district courts—one that not only limits public *use* of court opinions, but largely prevents public *knowledge* of those opinions' existence.") (emphases in the original).
[119] 506 U.S. 103 (1992).
[120] As the next Part explains, some lower courts have adopted an erroneous interpretation of *Farrar* that exacerbates this incoherence. *See infra* Part III.
[121] *See infra* Section II.A.

light of our fee-shifting jurisprudence."[122] Under *Farrar*, however, district courts must ignore the lodestar in an ill-defined set of circumstances; there are no bright lines or clear standards to be found.[123]

A. *Standard Fee-Shifting Doctrine*

Though fee-shifting statutes can take other forms, the ones at issue here allow a plaintiff who is a "prevailing party" to recover a "reasonable" fee from the defendant.[124] These statutes provide that the court "may" award such a fee, but in light of their purpose of providing claimants with "effective access to the judicial process," the Supreme Court has interpreted them to require that "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[125]

If the parties do not reach an agreement on the question,[126] a plaintiff can qualify as a "prevailing party" only by obtaining court-ordered relief.[127] A consent decree carries sufficient "judicial imprimatur" to qualify a plaintiff for prevailing-party status, but a purely private settlement or unilateral change in the defendant's conduct does not.[128] In adopting this bright-line standard, the Court emphasized the

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[122] *See* Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 551 (2010) (describing the lodestar method in these terms); Gisbrecht v. Barnhart, 535 U.S. 789, 801 (2002) (same); City of Burlington v. Dague, 505 U.S. 557, 562 (1992) (same).

[123] *See infra* Section II.B.

[124] *See supra* note 10 and accompanying text (explaining the universe of fee-shifting statutes addressed in this Article).

[125] Hensley v. Eckerhart, 461 U.S. 424, 426, 429 (1983) (citation and internal quotation marks omitted). The Court has reaffirmed this proposition repeatedly. *See*, *e.g.*, Lefemine v. Wideman, 568 U.S. 1, 5 (2012) ("Because Lefemine is a prevailing party, he should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.") (citation and internal quotation marks omitted); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) ("[O]ne who succeeds in obtaining an injunction under [Title II of the Civil Rights Act of 1964] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.").

[126] Litigants can enter into settlements that waive a successful plaintiff's entitlement to fees, or that otherwise resolve issues bearing on the defendant's liability for a fee-shifting award, including the question whether the plaintiff qualifies as a prevailing party. *See* Evans v. Jeff D., 475 U.S. 717, 720 (1986).

[127] *See* Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res., 532 U.S. 598, 604–05 n.7 (2001).

[128] *Id.*

need to "avoid[ ] an interpretation of the fee-shifting statutes that would have spawned a second litigation of significant dimension."[129]

The Court has asserted similar priorities with respect to the determination of a reasonable fee. It has held that district courts must base such fees on the "lodestar" amount, which consists of an attorney's reasonable hourly rate multiplied by the number of hours the attorney reasonably worked.[130] The Court has opined that the lodestar method is "objective" and "administrable,"[131] and thus "cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results."[132]

The Court has relied on those supposed benefits in adopting a "strong presumption" that the lodestar amount is reasonable.[133] This presumption weighs heavily against upward adjustments; district courts may not increase the lodestar amount to account for the contingent nature of the fee,[134] and they may grant an upward adjustment for an attorney's superior performance only in "rare" and "exceptional" circumstances.[135] A downward adjustment, by contrast, may be required if a plaintiff has not succeeded on all of her claims.[136] In such cases, the Court has declared the inquiry into the "degree of success obtained" to be "the most critical factor" in the analysis.[137]

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[129] *Id.* at 609.

[130] Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 546 (2010). A district court must make such a calculation whenever the plaintiff qualifies as a prevailing party but the parties have not reached an agreement as to the fee amount.

[131] *Id.* at 551–52 (citing City of Burlington v. Dague, 505 U.S. 557, 566 (1992); *Buckhannon*, 532 U.S. at 598; and Hensley v. Eckerhart, 461 U.S. 424 (1983)).

[132] *Perdue*, 559 U.S. at 552.

[133] *Id.* at 554.

[134] *Dague*, 505 U.S. at 567; *see also* Carroll, *supra* note 10, at 1045 (explaining that fee-shifting awards are structurally under-compensatory because courts calculate the lodestar using non-contingent hourly rates, and plaintiffs receive fee awards only if they achieve prevailing party status, but district courts cannot adjust the lodestar to reflect the contingent nature of the fee).

[135] *Perdue*, 559 U.S. at 554. The Supreme Court has never actually heard a case in which it approved an upward adjustment for superior performance. *Id.* at 560–61 (Thomas, J., concurring).

[136] Hensley v. Eckerhart, 461 U.S. 424, 436 (1983). A district court must consider a reduction for partial success even if the plaintiff's successful and unsuccessful claims "were interrelated, nonfrivolous, and raised in good faith." *Id.*

[137] *Id.*

B. *The Nominal-Damages Wrinkle*

It is contestable, at best, whether the Supreme Court's statutory fee-shifting decisions actually serve the goals of objectivity, administrability, and predictability.[138] Nonetheless, it remains the case that the Court has repeatedly cited those goals as support for its holdings.[139] The Court's decision in *Farrar* disrupts this doctrinal landscape. As explained below, the majority opinion does not even purport to offer an administrable standard; it decouples fee eligibility from prevailing-party status; and it displaces the lodestar mechanism in an ill-defined subset of cases.

If the opinion had been about two pages shorter, it could have generated significantly less confusion. The Court granted certiorari to consider whether a plaintiff who receives only nominal damages qualifies as a "prevailing party" for purposes of statutory fee shifting.[140] It answered that question in the affirmative, explaining that a nominal-damages award is an enforceable judgment that constitutes a "material alteration of the legal relationship between the parties."[141] A straightforward question, and a clear answer; so far, so good.

Unfortunately, the Court went on to consider what amount of fees would be "reasonable" under the facts of the case.[142] The Court of Appeals had not considered that question, because it had held that nominal damages did not suffice for prevailing-party status.[143] Nor had the question been presented in the petition for certiorari or briefed by

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[138] *See, e.g.*, Maureen Carroll, *The Central Tensions of Statutory Fee Shifting* (2023) (unpublished manuscript) (on file with author) (discussing the "hopelessly muddled" state of fee-shifting doctrine); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1453 (1998) (criticizing "the complexity and uncertainty of fee litigation"); Charles Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 REV. LITIG. 301 (1993) (the title says it all).

[139] *See supra* Section II.A.

[140] The petition for certiorari framed the question as follows: "Does 42 U.S.C. § 1988 authorize the award of reasonable attorney's fees to civil rights plaintiffs who recover nominal damages?" Petition for Writ of Certiorari, Farrar v. Hobby, 502 U.S. 1090 (1992) (No. 91-9990). The Court granted the petition without modifying the question presented. *See* Farrar v. Hobby, 502 U.S. 1090 (1992).

[141] *Farrar*, 506 U.S. at 112–13.

[142] *Id.* at 114–16.

[143] *See* Est. of Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991), *aff'd sub nom.* Farrar v. Hobby, 506 U.S. 103 (1992).

the petitioners.[144] The Court devoted only two paragraphs of analysis to it,[145] and those two paragraphs made only one thing clear: Joseph Davis Farrar would not be receiving any attorney's fees.[146]

The Court grounded its analysis in the proposition that, in cases of partial success, "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'"[147] With regard to the extent of Farrar's success, the Court noted that he "received nominal damages instead of the $17 million in compensatory damages that [he] sought."[148] That discrepancy, in the Court's view, deserved "primary consideration" in the setting of the fee amount.[149] The Court did not explicitly identify the lack of specificity in the jury's verdict as another limitation on the extent of Farrar's success, but it obliquely referenced that lack of specificity, asserting that "[t]his litigation accomplished little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way."[150]

The majority opinion in *Farrar* is difficult to parse, but it can be rendered more comprehensible by looking at what the Court did—the facts of the case and the outcome it reached—rather than just what it said.[151] On those terms, the majority opinion supports the proposition

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[144] *See Farrar*, 506 U.S. at 123 (White, J., concurring in part and dissenting in part); *see also* Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829, 843–44 (2016) (arguing that remanding for further proceedings as to the amount of a reasonable fee "would have produced a more fully developed record than the record before the Court in *Farrar* and would have provided a firmer basis for proclaiming a general principle governing fee awards in nominal damages cases").

[145] *Farrar*, 506 U.S. at 114–16.

[146] *Id.* at 116. To be more precise, it was Farrar's estate that would not be receiving any attorney's fees. Farrar died before his case went to trial, at which point the co-administrators of his estate were substituted as plaintiffs. *Id.* at 106.

[147] *Id.* at 114 (quoting Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)).

[148] *Id.*

[149] *Id.* ("'Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.'" (quoting Riverside v. Rivera, 477 U.S. 561, 585 (1986) (Powell, J., concurring) (alteration in original)).

[150] *Id.* (quoting Hewitt v. Helms, 482 U.S. 755, 762 (1987) (first alteration added; second alteration in original)).

[151] *Cf.* Crawford-El v. Britton, 523 U.S. 574, 585 (1998) ("There is, of course, an important difference between the holding in a case and the reasoning that supports

that there are nominal-damages cases in which the "degree of success obtained" is so miniscule—as demonstrated in *Farrar* by the failure of almost all claims, the absence of a liability finding against almost all defendants, the ambiguous liability finding against the remaining defendant, and the $17-million-to-one disparity between damages sought and damages received—that it would be a waste of time for a district court to go through the motions of calculating and then reducing the lodestar.[152]

The opinion's disparagement of the nominal-damages remedy has stood as an obstacle to this interpretation.[153] In one case, for example, the Sixth Circuit upheld the district court's denial of fees on the basis that the plaintiff had "obtained only technical relief warranting no attorney's fees."[154] The plaintiff emphasized that, unlike Joseph Davis Farrar, he had not sought any compensatory or punitive damages.[155] "Consequently," the plaintiff argued, "the fact that [he] was awarded nominal damages, and not compensatory or punitive damages, does not evidence a lack of success."[156] The Sixth Circuit rejected that distinction,

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that holding."). In the specific context of statutory fee-shifting, the Court has expressly acknowledged its willingness to reach decisions that contradict language in its prior cases. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 605–06 (2001) (rejecting the "catalyst theory" for prevailing-party status, notwithstanding that "several Courts of Appeals have relied upon dicta in our prior cases in approving" that theory).

[152] The majority's characterization of the district court's error supports this reading:

> We have already observed that if 'a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. . . .'Yet the District Court calculated petitioners' fee award in precisely this fashion, without engaging in any measured exercise of discretion.

Farrar, 506 U.S. at 114 (quoting *Hensley*, 461 U.S. at 436); *see also id.* at 115–16 (admonishing the district court for awarding fees "without 'consider[ing] the relationship between the extent of success and the amount of the fee award'" (quoting *Hensley*, 461 U.S. at 438) (alterations in original)).

[153] For a discussion of the *Farrar* opinion's characterization of the nominal-damages remedy, *see supra* Section I.C.

[154] Glowacki v. Howell Pub. Sch. Dist., 566 F. App'x 451, 456 (6th Cir. 2014).

[155] *Id.* at 454.

[156] Brief of Petitioner-Appellant at *12–*13, Daniel Glowacki v. Johnson Jay McDowell, No. 13-2231, 2013 WL 6144198 (6th Cir. Nov. 15, 2013).

reasoning that "nothing in *Farrar* confines its technical-judgment analysis to unsuccessful claims for monetary damages."[157]

Another obstacle has been the Court's use of the word "usually" in one crucial sentence:[158] "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief . . . the only reasonable fee is usually no fee at all."[159] This language raises more questions than it answers. For example, what did the Court have in mind when it envisioned the "usual" case that would warrant a denial of fees? Was the Court assuming that civil rights plaintiffs would usually request a large amount of damages, like Farrar did, such that a plaintiff who requested a relatively low amount of monetary relief would be an unusual one? As the Third Circuit put it, "the majority in *Farrar* stated that a reasonable fee is *usually* no fee when a plaintiff receives only nominal damages, [but] the case involved extreme facts and the majority provided no guidance for distinguishing the usual from the unusual case."[160]

Because of the lack of guidance in the majority opinion, several circuits have adopted a test set forth in a concurring opinion by Justice O'Connor[161]—notwithstanding that the principal opinion garnered

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[157] *Glowacki*, 566 F. App'x at 454–55. The Ninth Circuit, by contrast, has concluded that "'*Farrar*'s holding is limited to cases in which the plaintiff seeks substantial monetary damages but obtains only a nominal award.'" Klein v. City of Laguna Beach, 810 F.3d 693, 699 (9th Cir. 2016) (quoting Stivers v. Pierce, 71 F.3d 732, 753 (9th Cir. 1995)). According to the Ninth Circuit, "[t]he Supreme Court in *Farrar* concluded that because Farrar sought $17 million and was awarded only $1, he essentially lost—his victory was only 'technical.'" *Id.* at 700 (quoting *Farrar*, 506 U.S. at 121).

[158] *See* Eaton & Wells, *supra* note 144, at 847 (arguing that several appellate courts have "put too much weight on a single adverb by emphasizing the Court's assertion that nominal damages 'usually' warrant no fee").

[159] Farrar v. Hobby, 506 U.S. 103, 115 (1992) (citing Carey v. Piphus, 435 U.S. 247, 256–257 (1978)). The Court used the word "often" in a similarly cryptic way: "In some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party." *Id.*

[160] Jama v. Esmor Corr. Servs., Inc., 577 F.3d 169, 186 n.8 (3d Cir. 2009) (emphasis in original).

[161] *Farrar*, 506 U.S. at 116–118 (O'Connor, J., concurring). *See Jama*, 577 F.3d at 176 ("[A] district court determining the degree of a plaintiff's success should consider not only the difference between the relief sought and achieved, but also the significance of the legal issue decided and whether the litigation served a public purpose."); Mercer v. Duke Univ., 401 F.3d 199, 204 (4th Cir. 2005) ("We believe that the factors set forth

majority rather than plurality support,[162] Justice O'Connor joined the majority opinion without reservation,[163] and no other member of the Court joined her concurrence. Justice O'Connor deemed three factors relevant to a district court's decision whether to award fees to a plaintiff who obtained only nominal damages: "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served."[164] As the next Part explains, the last of these factors has proved especially troublesome.

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by Justice O'Connor help separate the usual nominal-damage case, which warrants no fee award, from the unusual case that does warrant an award of attorney's fees."); Johnson v. Lafayette Fire Fighters Ass'n Local 472, 51 F.3d 726, 731 (7th Cir.1995) ("This circuit has adopted the three-part test laid out in the concurring opinion of Justice O'Connor in *Farrar* to determine whether a prevailing party has achieved a mere technical victory inappropriate for fees."); Jones v. Lockhart, 29 F.3d 422, 423–24 (8th Cir.1994) (adopting Justice O'Connor's three-part test for "determin[ing] whether the plaintiff had won a mere technical victory in a civil rights case"); Cummings v. Connell, 402 F.3d 936, 947 (9th Cir.2005) (directing district courts to consider the factors that Justice O'Connor identified in her concurrence); Phelps v. Hamilton, 120 F.3d 1126, 1131 (10th Cir.1997) ("In analyzing whether a plaintiff's victory is purely technical or *de minimis*, we look for guidance to Justice O'Connor's concurrence in Farrar which distills various principles from the Court's § 1988 case law into a three-part test to determine whether a prevailing party achieved enough success to be entitled to an award of attorney's fees."); Gray ex rel. Alexander v. Bostic, 613 F.3d 1035, 1040 (11th Cir. 2010) (adopting Justice O'Connor's standard for "determining whether a plaintiff's victory is substantial enough to make it one of those unusual nominal damages cases where the defendant is required to pay the plaintiff's attorney's fees"). The Fifth Circuit has explained that it "ha[s] not adopted Justice O'Connor's concurrence as circuit law, but district courts may consider these factors if they are helpful in structuring the fee analysis." Shelton v. La. State, 919 F.3d 325, 330 n.2 (5th Cir. 2019).

[162] *See, e.g.*, Hescott v. City of Saginaw, 757 F.3d 518, 525 (6th Cir. 2014) ("The district court couched its analysis in terms of a three-factor test Justice O'Connor articulated in her concurring opinion in *Farrar* . . . We question whether use of this test was proper given that the controlling opinion of the Supreme Court did not adopt it."); *Jama*, 577 F.3d at 185 (Garth, C.J., dissenting) ("There was no plurality for Justice O'Connor's concurring opinion to join or to bolster, and therefore we do not look to it for the 'narrowest grounds' of a splintered decision." (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).

[163] *Farrar*, 506 U.S. at 116 (O'Connor, J., concurring) ("I join the Court's opinion and concur in its judgment. I write separately only to explain more fully why, in my view, it is appropriate to deny fees in this case.").

[164] *Id.* at 122.

III. FEE SHIFTING AND THE PUBLIC INTEREST

For district courts deciding whether to award attorney's fees to a plaintiff who prevailed by obtaining nominal damages, the Supreme Court's majority opinion in *Farrar v. Hobby*[165] offers more confusion than guidance.[166] Due in part to the opinion's ambiguities, several appellate courts have adopted an approach in which they assess the public interest value of the litigation as part of the fee-shifting analysis.[167] As explained below, however, that approach conflicts with Supreme Court precedent about the relationship between fee shifting and the public interest.[168] Like the opinion itself, this misinterpretation of *Farrar* thus contributes to the doctrinal incoherence the decision has engendered.

A. *The Supreme Court and the Public Interest*

In addition to Justice O'Connor's concurrence in *Farrar*,[169] some courts have found support for a public-interest inquiry in Justice Powell's concurrence in *City of Riverside v. Rivera*,[170] especially in cases involving a relatively low amount of monetary relief.[171] The following discussion contextualizes those two concurrences by placing them alongside the Supreme Court's majority opinions in *Alyeska Pipeline Services Company v. Wilderness Society*[172] and *Perdue v. Kenny A.*[173] As explained below, those majority opinions constrain lower courts' authority over fee-shifting awards in ways that conflict with the public-interest approach.

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[165] *See, e.g.*, 506 U.S. 103 .
[166] *See supra* Section II.B.
[167] *See infra* Section III.B; *see also supra* note 162 and accompanying text. For a thorough discussion of lower courts' approaches to fee shifting in cases involving nominal damages or relatively low amounts of monetary relief, *see* Eaton & Wells, *supra* note 144, at 844.
[168] *See infra* Section III.A.
[169] 506 U.S. 103, 116 (O'Connor, J., concurring); *see also infra* Section III.A.3.
[170] 477 U.S. 561, 586 (Powell, J., concurring in the judgment).
[171] *See infra* Section III.A.2.
[172] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); *see also infra* Section III.A.1.
[173] Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 554 (2010); *see also infra* Section III.A.4.

1. The Court's majority opinion in *Alyeska*

In *Alyeska Pipeline Services Company v. Wilderness Society*,[174] the Supreme Court expressly limited federal judges' ability to make fee-shifting decisions based on their own views of the public interest. Before the Court decided the case in 1975, some district courts had asserted a roving authority to shift fees under a "private Attorney-General" theory.[175] Under this approach, if a district court deemed a lawsuit to serve the public interest, it could order the losing defendants to pay the plaintiff's attorney's fees, even if no rule or statute authorized it to do so.

The *Alyeska* decision put an end to that practice, holding that federal courts have no authority to shift fees for public interest purposes in the absence of statutory authority.[176] The Supreme Court reasoned that Congress, not the federal judiciary, has the prerogative to define the set of cases in which a plaintiff's victory would serve the public interest:

> [C]ourts are not free . . . to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases.[177]

According to the Court, federal judges "invade the legislature's province"[178] when they enact their own views as to whether a particular case involves a public policy important enough to warrant fee shifting.[179] Instead, the Court asserted that judges should defer to congressional decisions about "the circumstances under which attorneys' fees are to be

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[174] *Alyeska*, 421 U.S. 240, 241 (1975).

[175] *See, e.g.*, Lytle v. Comm'rs Election Union Cnty., 65 F.R.D. 699, 703 (1975).

[176] *Alyeska*, 421 U.S. at 263–64. The *Alyeska* decision addresses federal courts' authority to shift fees under a "private-attorney-general" theory; it does not constrain fee shifting based on other rationales, such as the courts' inherent authority to impose sanctions for bad-faith conduct. *Id.* Moreover, the *Alyeska* prohibition applies only in the federal courts, and some state judicial systems have taken a different approach. *See, e.g.*, Serrano v. Priest, 569 P.2d 1303, 1315 (Cal. 1977) (permitting non-statutory fee shifting in California state courts).

[177] *Alyeska*, 421 U.S. at 269.

[178] *Id.* at 271.

[179] *Id.* at 271; *see also id.* at 263 (disclaiming judicial authority "to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award").

awarded and the range of discretion of the courts in making those awards."[180]

Congress has manifested those decisions through fee-shifting statutes, which "make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights."[181] Fee-shifting statutes represent a congressional judgment that, when successful, cases brought to enforce the enumerated statutes serve important public policies.[182] This approach is categorical in nature: if a plaintiff prevails on a claim brought to enforce one of the enumerated statutes, she has served the public interest.[183] In

[180] *Id.* at 262. This obligation applies to the Supreme Court as well as the lower federal courts. *Accord* Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 372 (1990) ("The Court's obligation is to effectuate congressional policies based on congressional assumptions, central to which are the public benefits of its fee-shifting scheme.").

[181] *Alyeska*, 421 U.S. at 260. In response to the Court's decision in *Alyeska*, Congress enacted Section 1988, which authorizes fee-shifting awards to plaintiffs who prevail in litigation brought to enforce various civil rights statutes. *See* 42 U.S.C. § 1988; *see also* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (explaining this relationship between *Alyeska* and Section 1988).

[182] *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401–02 (1968); *see also* Charles Silver, *Unloading the Lodestar: Toward A New Fee Award Procedure*, 70 TEX. L. REV. 865, 893–94 (1992) ("[J]udges should treat all successful fee-shifting cases the same way. They should assume that all such cases yield substantial external benefits that justify substantial expenditures of resources."); Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L. J. 435, 483–84 (1986) ("The fee-shifting statutes appear to rest on the belief that all cases within their ambit entail public benefits . . . ."). In the context of the proportionality requirement for discovery, courts and scholars have similarly recognized that "[w]hether the claims at issue include a fee shifting provision that is applied asymmetrically in favor of prevailing plaintiffs . . . will be a strong indication of the importance of the public policy implications of the case." Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 61 (2015).

[183] As the House Report for Section 1988 put it, such a plaintiff "appear[s] before the court cloaked in a mantle of public interest." H.R. REP. NO. 94–1558, at 6 (1976) (quoting U.S. Steel Corp. v. United States, 519 F.2d 359, 364 (3d Cir. 1975)). As noted previously, the Supreme Court has held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416–17 (1978) (quoting *Newman*, 390 U.S. at 402). Courts have interpreted this "special circumstances" exception narrowly, applying it only in truly unusual cases that present a compelling basis for the denial of fees. *See, e.g.*, Robinson v. First State Cmty. Action Agency, 811

an unusual case, a court might be called upon to decide whether a plaintiff's claim falls within the statutory scope.[184] But if it does, courts lack the authority to override the statute by "pick[ing] and choos[ing] among [prevailing] plaintiffs"[185] and awarding fees on the basis of their own policy views.[186]

This categorical approach distinguishes federal fee-shifting statutes from some of their state counterparts. For example, instead of enumerating particular statutory or constitutional provisions that the state legislature has deemed important enough to warrant fee shifting, a California statute authorizes courts to determine whether the litigation "has resulted in the enforcement of an important right affecting the public interest."[187] Congress chose not to take that approach with respect to federal fee-shifting statutes, and under the separation-of-powers principles set forth in *Alyeska*, federal courts are not free to override that choice.

F. App'x 808, 809 (3d Cir. 2020) (affirming the district court's denial of appellate attorney's fees because "[the plaintiff's] claim was legally meritless and [the appellate court] affirmed only due to [the defendant's] waiver of any argument on this ground"). In *Farrar*, Justice O'Connor's concurrence suggested that Farrar's victory might fall within the "special circumstances" exception, but the majority opinion made no reference to that exception. *See* Farrar v. Hobby, 506 U.S. 103, 118 (O'Connor, J., concurring).

[184] In Shelby County v. Holder, for example, the plaintiff county sued the United States Attorney General in an effort to have portions of the Voting Rights Act ("VRA") declared unconstitutional. *See* 570 U.S. 529, 540–41 (2013). After the county succeeded on the merits, it sought attorney's fees as a prevailing plaintiff. *See* Shelby Cnty. v. Lynch, 799 F.3d 1173, 1175 (D.C. Cir. 2015). The VRA provides for fee shifting "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10310(e). Accordingly, in order to obtain a fee-shifting award, Shelby County would have had to show that its lawsuit qualified as such an action or proceeding. *See Shelby Cnty.*, 799 F.3d at 1181.

[185] *Alyeska*, 421 U.S. at 269.

[186] *Cf.* Silver, *supra* note 182, at 894 (explaining that federal fee-shifting statutes take the approach of "authoriz[ing] fee shifting in whole groups of cases rather than, for example, only in cases where classes of plaintiffs seek broad-based relief").

[187] CAL. CIV. PROC. CODE § 1021.5. The statute directs courts to evaluate whether "(a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." *Id.*

Congress has the authority to expand or constrict statutory fee shifting based on its own views about the public interest,[188] and it has done so on a number of occasions. In 1996, for example, Congress enacted the Prison Litigation Reform Act ("PLRA").[189] Among other things, the PLRA limits fee-shifting awards in certain cases to 150% of the value of the monetary judgment.[190] When a plaintiff obtains only nominal damages, this limitation can result in fee-shifting awards of $1.50 or less.[191] Whatever the wisdom or desirability of such limitations,[192] the authority to impose them lies with Congress, not the courts.

2. Justice Powell's concurrence in *City of Riverside*

Ten years after it decided *Alyeska*, the Supreme Court again confronted the relationship between fee shifting and the public interest. In its 1986 decision in *City of Riverside v. Rivera*,[193] the Court affirmed an award of attorney's fees that greatly exceeded the prevailing plaintiffs' monetary recovery.[194] The case did not generate a majority opinion; four justices joined a plurality opinion,[195] and Justice Powell added the fifth vote in support of affirmance.[196]

The defendant in *City of Riverside* argued that the disproportionality between the fee-shifting award and the monetary recovery made the fee-shifting award unreasonable.[197] "Likening [civil rights cases where a plaintiff recovers only monetary damages] to private tort actions," the defendant proposed that "attorney's fees in such cases should be

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[188] As with other congressional prerogatives, this authority is not unlimited. *Cf.* Johnson v. Daley, 339 F.3d 582, 583 (7th Cir. 2003) (evaluating the constitutionality of the PLRA's fee-shifting restrictions).

[189] 42 U.S.C. § 1997e.

[190] 42 U.S.C. § 1997e(d)(2).

[191] *See, e.g.*, Wilkins v. Gaddy, 734 F.3d 344, 346–47 (4th Cir. 2013) (upholding a fee award of $1.40 in a case in which a jury found an Eighth Amendment violation but declined to award compensatory or punitive damages).

[192] For a detailed analysis of the PLRA's motivations and effects, *see* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1557 (2003).

[193] 477 U.S. 561 (1986).

[194] The plaintiffs recovered $33,350 in compensatory and punitive damages based on an incident in which police officers used tear gas to break up a party. The district court awarded $245,456.25 in attorney's fees. *Id.* at 564–65 (plurality opinion).

[195] *See id.* at 564 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.).

[196] *See id.* at 581 (Powell, J., concurring in the judgment).

[197] *Id.* at 573.

proportionate to the amount of damages a plaintiff recovers."[198] But the plurality "reject[ed] the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated."[199]

The plurality deemed that notion incompatible with congressional views about the public interest value of fee-shifting cases: "Congress has determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff[.]"[200] Citing *Carey v. Piphus*,[201] the plurality noted that "a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms."[202] It reasoned that, "[b]ecause damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases . . . to depend on obtaining substantial monetary relief."[203] The opinion thus supports the proposition that prevailing plaintiffs in civil rights litigation categorically serve the public interest—or, at least, that Congress has concluded that they do.[204]

Justice Powell agreed that the fee-shifting award should be upheld, but he disagreed with the plurality's reasoning, and he wrote a concurrence that no other justice joined.[205] Unlike the plurality, Justice Powell described the public value of fee-shifting litigation in conditional rather than categorical terms:[206] "*[I]n the special circumstances of this case*,

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[198] *Id.*

[199] *Id.* at 574.

[200] *Id.*

[201] 435 U.S. 247, 266 (1978); *see also supra* Section I.A (discussing Carey v. Piphus, 435 U.S. 247 (1978)).

[202] City of Riverside v. Rivera, 477 U.S. 561, 574 (citing *Carey*, 435 U.S. at 266).

[203] *Id.* at 575.

[204] The plurality opinion does contain one ambiguous assertion in this regard: "Regardless of the form of relief he actually obtains, a successful civil rights plaintiff *often* secures important social benefits that are not reflected in nominal or relatively small damages awards." *Id.* at 574 (emphasis added). Just three sentences later, however, it returns to an unambiguously categorical stance: "In addition, the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future." *Id.* at 575.

[205] *Id.* at 581 (Powell, J., concurring in the judgment).

[206] *Id.*; *see also* Thomas D. Rowe, Jr., *The Supreme Court on Attorney Fee Awards, 1985 and 1986 Terms: Economics, Ethics, and Ex Ante Analysis*, 1 GEO. J. LEGAL ETHICS 621, 626–

the vindication of the asserted Fourth Amendment right *may well have* served a public interest, supporting the amount of the fees awarded."[207] In a footnote, he added that "[i]t probably will be the rare case in which an award of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case."[208]

Justice Powell's concurrence has encouraged some lower courts to assess the public interest value of the litigation not only where a plaintiff has obtained nominal damages, but also where the plaintiff seeks a fee that exceeds the amount of monetary relief the plaintiff recovered.[209] Shortly after the Court handed down *City of Riverside*, the Third Circuit considered whether to adopt that approach.[210] It acknowledged that Justice Powell's concurrence "arguably counsels a judge to consider the extent to which the public interest was vindicated by the award if the fee sought is disproportionate to the damages awarded."[211]

The Third Circuit declined to adopt a public-interest inquiry, offering several reasons for its decision. For one thing, Justice Powell's concurrence "represents at most the view of a lone Justice and was not endorsed by any of the other eight."[212] For another, the concurrence "sets out no method or standards by which a court might calculate the public interest served by a case, evaluate that interest in light of a disproportionality between damages and fees, and eventually settle upon

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27 (1988) ("Justice Powell's narrow concurrence in the judgment insisted on a strong showing of public benefit from the ruling in the particular case.").

[207] *City of Riverside*, 477 U.S. at 586 (Powell, J., concurring) (emphasis added).

[208] *Id.* at 586 n.3 (emphasis in the original). Justice Powell noted that the plaintiffs had "[a]t some point in the proceedings . . . abandoned their claims for injunctive relief." *Id.* at 582. Perhaps as a result, he appeared to view the case as one "[w]here recovery of private damages is the purpose" of the litigation. *Id.* at 585.

[209] *See, e.g.*, Cent. Pension Fund of the Int'l Union of Operating Eng'rs & Participating Emps. v. Ray Haluch Gravel Co., 745 F.3d 1, 7 n.4 (1st Cir. 2014) (affirming the district court's 80% reduction to the lodestar, in part because the unadjusted lodestar was greater than the damages award and "there is no particular public interest in the judgment that has been returned in this case").

[210] *See* Cunningham v. City of McKeesport, 807 F.2d 49, 49 (3d Cir. 1986). Ten days after issuing its decision in *City of Riverside*, the Supreme Court vacated and remanded *Cunningham* for further consideration in light of the decision. City of McKeesport v. Cunningham, 478 U.S. 1015 (1986).

[211] *Cunningham*, 807 F.2d at 53.

[212] *Id.*

a particular negative multiplier."[213] The appellate court expressed "reluctan[ce] to begin the difficult task of developing [those] standards" in the absence of "an explicit mandate" to do so.[214]

The Third Circuit was right to reject that task. *City of Riverside* did not return to federal courts the authority to "pick and choose" among prevailing plaintiffs to decide whose lawsuits served the public interest and whose did not. The opinion of a single justice, against the backdrop of a divergent plurality opinion and existing precedent to the contrary, does not justify reliance on judicial views of the public interest value of the litigation when resolving fee-shifting disputes.[215]

3. Justice O'Connor's concurrence in *Farrar*

Unlike the plurality and concurrence in *City of Riverside*, the Supreme Court's majority opinion in *Farrar v. Hobby* does not discuss the public interest value of the litigation, categorically or otherwise. To be sure, the *Farrar* majority did adopt one sentence from Justice Powell's concurrence in *City of Riverside*: "Where recovery of private damages is the purpose of … civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought."[216] But the *Farrar* majority did not incorporate the portions of Justice Powell's concurrence in *City of Riverside* that address the public interest value of the plaintiffs' victory.

Nor did the majority in *Farrar* endorse the three-part test set forth in Justice O'Connor's concurrence in *Farrar*, which no other justice

[213] *Id.* at 54.
[214] *Id.*
[215] Decades later, the Third Circuit reached a different conclusion with respect to the public-interest inquiry suggested by Justice O'Connor in her concurrence in *Farrar v. Hobby*. *See* Farrar v. Hobby, 506 U.S. 103, 121–22 (1992) (O'Connor, J., concurring); Jama v. Esmor Corr. Servs., Inc., 577 F.3d 169, 180 (3d Cir. 2009) (directing district courts to consider "whether [the plaintiff's] victory served a public purpose").
[216] *Farrar*, 506 U.S. at 114 (quoting *City of Riverside*, 477 U.S. at 585 (Powell, J., concurring)) (ellipses in the original).

joined.[217] As noted previously,[218] Justice O'Connor deemed three factors relevant to a district court's decision whether to award fees to a plaintiff who obtained only nominal damages: "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served."[219] In Justice O'Connor's view, each of those factors "point[ed] to a single conclusion: Joseph Farrar achieved only a *de minimis* victory[,]" such that fees should be denied.[220]

With regard to the public-interest factor, Justice O'Connor argued that Farrar's "success might be considered material if it also accomplished some public goal other than occupying the time and energy of counsel, court, and client."[221] The district court had expressed the view that Farrar's victory could deter future violations, but Justice O'Connor disagreed, noting that neither the district court nor the ambiguous jury verdict had identified the conduct that might be deterred.[222] She concluded that "one searches these facts in vain for the public purpose this litigation might have served."[223]

In adopting Justice O'Connor's three-part test, some lower courts have been attempting to give effect to the majority's assertion that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is *usually* no fee at all."[224] Courts have occasionally treated

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[217] Some of the lower-court decisions applying Justice O'Connor's concurrence seem not to recognize that it did not represent the opinion of the Court. *See, e.g.*, Maul v. Constan, 23 F.3d 143, 145 (7th Cir. 1994) ("In *Cartwright* we observed that in *Farrar* the Supreme Court had set forth the following three factors to determine whether a plaintiff who has obtained only nominal damages is nonetheless entitled to receive attorney's fees: '[1] the difference between the judgment recovered and the recovery sought, [2] the significance of the legal issue on which the plaintiff prevailed and finally, [3] the public purpose served by the litigation.'" (quoting Cartwright v. Stamper, 7 F.3d 106, 109 (7th Cir.1993)).

[218] *See supra* Section II.B.

[219] *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring).

[220] *Id.*

[221] *Id.* at 121–22.

[222] *Id.* at 122.

[223] *Id.* at 121–22.

[224] *Farrar*, 506 U.S. at 115 (emphasis added). *See, e.g.*, Jama v. Esmor Corr. Servs., Inc., 577 F.3d 169, 176 n.8 (3d Cir. 2009) (adopting the approach set forth in the concurrence, notwithstanding its non-binding status, because "the majority provided no guidance for distinguishing the usual from the unusual case" and "Justice O'Connor set forth a practical method for resolving such questions").

this sentence as creating a default rule, to which Justice O'Connor's concurrence defines the complete universe of permissible exceptions.[225] This approach has little to commend it. An adverb is not a holding,[226] and rather than examining structural features of fee-shifting litigation (as the Court has done in cases that set forth default rules for fee shifting),[227] the majority grounded its decision in the specific facts of the case.[228] Even if the majority opinion did set forth a default rule, a single-justice concurrence would not be binding authority as to the complete universe of permissible exceptions.

Instead of treating Justice O'Connor's three factors as a mandatory or exclusive test, some courts have deemed them permissible considerations in the decision whether to award fees to a plaintiff who has obtained nominal damages.[229] This approach is less objectionable, but with regard to the public-interest factor, it still runs afoul of the constraints the Court laid down in *Alyeska*.[230] Justice O'Connor concluded that the litigation did not further the public interest *at all*, despite the judgment in Farrar's favor.[231] Fee-shifting statutes do not give federal judges discretion to reach that conclusion.[232]

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[225] *See, e.g.*, McGrath v. Toys "R" Us, Inc., 409 F.3d 513, 514 (2d Cir. 2005) (referring to "the general rule of *Farrar v. Hobby* . . . that no attorney's fees should be awarded to plaintiffs who recover only nominal damages, and this court's recognition of a public purpose exception to that rule.").

[226] Moreover, it is unclear why lower courts would be justified in locating the holding in the adverb "usually," when the majority used the adverb "often" in a similar manner. *See Farrar*, 506 U.S. at 575 ("In some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is *often* such a prevailing party.") (emphasis added).

[227] *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 604–10 (2001); Christiansburg Garment Co. v. EEOC., 434 U.S. 412, 417–22 (1978).

[228] *Accord* Eaton & Wells, *supra* note 144, at 842 (noting that the majority's reasons for denying fees "focus[ed] on the distinctive features of Farrar's lawsuit," including "Farrar's ambitions in the litigation, the gap between his aspirations and his level of success, and the reason for that gap").

[229] *See, e.g.*, Shelton v. La. State, 919 F.3d 325, 330 n.2 (5th Cir. 2019) ("We have not adopted Justice O'Connor's concurrence as circuit law, but district courts may consider these factors if they are helpful in structuring the fee analysis.").

[230] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 283–85 (1975).

[231] Farrar v. Hobby, 506 U.S. 103,121–22 (1992) (O'Connor, J., concurring).

[232] *See supra* Section III.A.1.

4. The Court's majority opinion in *Perdue*

To the extent that the concurrences in *City of Riverside*[233] and *Farrar*[234] could have muddied the waters with respect to fee shifting and the public interest, the Supreme Court's 2010 decision in *Perdue v. Kenny A.*[235] should have cleared them up again. In *Perdue*, the Court held that the district court had not "provide[d] proper justification" for a lodestar enhancement based on attorneys' superior performance.[236] The majority opinion reiterated that the lodestar is "the guiding light of our fee-shifting jurisprudence" and yields a presumptively reasonable fee.[237] The Court also disapproved of "award[ing] an enhancement on an impressionistic basis," because when a trial court does so, "a major purpose of the lodestar method—providing an objective and reviewable basis for fees—is undermined."[238] And, most important here, the Court disapproved of the idea that "a judge's subjective opinion regarding . . . the importance of the case" could play a valid role in the resolution of a fee-shifting dispute.[239]

Shortly after the Supreme Court decided *Perdue*, the Second Circuit evaluated its impact on the law of the circuit.[240] In particular, an earlier Second Circuit decision had held that "[w]here the damage award is nominal or modest, the injunctive relief has no systemic effect of importance, and no substantial public interest is served, a substantial fee award cannot be justified."[241] Invoking that precedent in a case brought

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[233] *See supra* Section III.A.2 (discussing City of Riverside v. Rivera, 477 U.S. 561, 581 (1986) (Powell, J., concurring in the judgment)).

[234] *See supra* Section III.A.3 (discussing Farrar v. Hobby, 506 U.S. 103, 116 (1992) (O'Connor, J., concurring)).

[235] 559 U.S. 542, 546 (2010).

[236] *Id.* at 557.

[237] *Id.* at 551 (citations omitted).

[238] *Id.* at 558–59. This reasoning applies just as strongly to a fee reduction as it does to a fee enhancement, since both upward and downward adjustments bear on the objectivity and reviewability of the fee decision.

[239] *Id.* at 558 ("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.").

[240] Millea v. Metro-N. R. Co., 658 F.3d 154, 166–67 (2d Cir. 2011).

[241] *Id.* at 167 n.3 (quoting Carroll v. Blinken, 105 F.3d 79, 81 (2d Cir. 1997)).

under the Family Medical Leave Act ("FMLA"), a district court reduced a prevailing plaintiff's fee-shifting award "because it concluded that the interference claim—the only claim on which [the plaintiff] prevailed—had no public policy significance."[242]

Noting that *Perdue* had "(at least) impaired" its earlier holding,[243] the Second Circuit reversed. Although the court viewed *Perdue*'s emphasis on the presumptive reasonableness of the lodestar as the source of this impairment, the effect of its decision was to steer the circuit back toward an *Alyeska*-style congressional deference:

> By enacting a fee-shifting provision for FMLA claims, Congress has already made the policy determination that FMLA claims serve an important public purpose disproportionate to their cash value. We cannot second-guess this legislative policy decision.[244]

Unfortunately, this understanding of congressional prerogatives has yet[245] to stop courts in the Second Circuit from requiring "a new rule of liability that served a significant public purpose" as a condition of awarding fees to a plaintiff who prevailed by obtaining nominal damages.[246]

B. *Lower Courts and the Public Interest*

Among the circuits that have adopted Justice O'Connor's three-factor test for awarding fees to a plaintiff who obtained nominal

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[242] *Id.* at 167.

[243] *Id.* at 167 n.3.

[244] *Id.* at 167.

[245] The Second Circuit last reiterated its "significant public purpose" standard in 2005. *See* McGrath v. Toys "R" Us, Inc., 409 F.3d 513, 515 (2d Cir. 2005). It therefore remains to be seen whether it will revisit that standard in light of the Supreme Court's 2010 decision in *Perdue*, 559 U.S. at 542, or in light of its own 2011 decision in *Millea*, 658 F.3d at 154.

[246] *See, e.g.*, Alvarez v. City of N.Y., No. 11-CV-5464, 2017 WL 6033425, at *3 (S.D.N.Y. Dec. 5, 2017). In *Alvarez*, police officers shot the plaintiff more than twenty times, and the jury awarded him nominal damages based on a finding that three of the police officers continued to shoot at him "after it was no longer reasonable to believe that [he] posed a significant threat of death or serious physical injury." *Id.* at *1 (alteration in the original). The court denied fees because "this case established no new law but instead involved the application of settled law to the facts of the case." *Id.* at *4.

damages,[247] the standards for the public-interest factor vary widely, both in strictness and in focus. The Second Circuit is alone in requiring "a new rule of liability that serves a significant public purpose."[248] Instead of focusing on the legal precedent generated by the plaintiff's victory, some other circuits center the inquiry on the relationship between the benefit to the plaintiff as an individual and the benefit to the public as a whole.[249]

In the Seventh Circuit, district courts "must scrutinize [the] plaintiff's complaint to determine whether the allegations made and the relief sought evince a public purpose," beyond redressing the plaintiff's own injuries.[250] This standard requires "something more than merely a determination that a constitutional guarantee was infringed."[251] By contrast, although the Eighth Circuit also directs district courts to evaluate "the public goal or purpose that the litigation served,"[252] it has noted in that context that "civil rights litigation serves an important public purpose."[253] And according to the Tenth Circuit, "a public goal

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[247] *See supra* note 162 and accompanying text.

[248] McGrath v. Toys "R" Us, Inc., 409 F.3d 513, 518 (2d Cir. 2005) ("Under our court's precedents, an 'award of fees' to a plaintiff recovering nominal damages 'will be rare,' appropriate only when a plaintiff's success relies on a 'new rule of liability that serves a significant public purpose.'"); *see also* Pino v. Locascio, 101 F.3d 235, 239 (2d Cir. 1996) ("The vast majority of civil rights litigation does not result in ground-breaking conclusions of law, and therefore, will only be appropriate candidates for fee awards if a plaintiff recovers some significant measure of damages or other meaningful relief."). The Second Circuit adopted that standard in spite of its recognition, in another fee-shifting case, that

> [t]he public interest in private civil rights enforcement is not limited to those cases that push the legal envelope; it is perhaps most meaningfully served by the day-to-day private enforcement of these rights, which secures compliance and deters future violations. Congress meant reasonable attorney's fees to be available to the private attorneys general who enforce the law, not only to those whose cases make new law.

Quaratino v. Tiffany & Co., 166 F.3d 422, 426 (2d Cir. 1999).

[249] *See, e.g.*, Mercer v. Duke Univ., 401 F.3d 199, 207 (4th Cir. 2005) (directing district courts to consider "whether the litigation served a public purpose, as opposed to simply vindicating the plaintiff's individual rights").

[250] Maul v. Constan, 23 F.3d 143, 146 (7th Cir. 1994).

[251] *Id.*

[252] Piper v. Oliver, 69 F.3d 875, 877 (8th Cir. 1995).

[253] Jones v. Lockhart, 29 F.3d 422, 424 (8th Cir. 1994) (citing Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)).

is accomplished if the plaintiff's victory encourages attorneys to represent civil rights litigants, affirms an important right, puts the defendant on notice that it needs to improve, and/or provokes a change in the defendant's conduct."[254]

These differences are significant, but even if every circuit were to articulate the same version of the public-interest inquiry, consistency would remain elusive. Questions about the public interest are complex and contested;[255] as a result, a standard tied to the public interest value of the litigation is likely to lead to unpredictable results.[256] Fee-shifting statutes cover a wide range of substantive laws, and different judges are unlikely to have identical views about the meaning and importance of

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[254] Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 1232 (10th Cir. 2001). The Eleventh Circuit has suggested that these types of considerations would be insufficient in light of the Supreme Court's use of the word "usually" in *Farrar*:

> [I]n deciding whether to award the plaintiff fees and expenses notwithstanding the fact that she received only nominal damages, the district court seems to have considered the fact, if it is a fact, that civil rights cases are unattractive to attorneys in the Northern District of Alabama because attorneys usually have to advance expenses and take the cases on a contingency basis with delayed payment, if they get paid, and have to spend time on the cases that could be more lucratively spent on other legal business. Those reasons describe the nature of the beast, and the beast is the same everywhere. If those reasons justified an award of fees and expenses in nominal damages cases in one district, they would justify an award of them in every district and in every case. Yet, the Supreme Court said in *Farrar* that in nominal damages cases "the only reasonable fee is usually no fee at all." *Farrar*, 506 U.S. at 115, 113 S.Ct. at 575. The district court's reasoning would turn that statement around so that in a nominal damages case there would usually be a fee award.

Gray ex rel. Alexander v. Bostic, 613 F.3d 1035, 1042–43 (11th Cir. 2010) (citation omitted).

[255] Indeed, scholars have long debated how to define the terms "public interest" and "public interest law." *See, e.g.*, Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 605 (2009) ("The concept of the 'public interest' is contested at the level of both theory and practice."); Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law"*, 52 UCLA L. REV. 1223, 1224 (2005).

[256] *Accord* Charles Silver, *supra* note 182, at 892 ("[A] policy requiring judges to tailor fee awards in light of the perceived value of the external benefits lawsuits produce would be arbitrary, unworkable, and unwise.").

each legal provision,[257] let alone the impact and significance of each individual case.[258] The meaning of the public interest thus varies from courtroom to courtroom,[259] and if judges look to the public interest value of the litigation when deciding whether to award fees, the meaning of fee-shifting statutes will vary as well.[260]

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[257] The least objectionable version of a public-interest inquiry would thus be specific to the substantive provision at issue, asking courts to assess the extent to which the litigation furthered the goals of that provision. Courts act at that level of specificity when deciding whether a plaintiff substantially prevailed, for fee-shifting purposes, in an action to enforce the Freedom of Information Act. McKinley v. FHFA, 739 F.3d 707, 711 (D.C. Cir. 2014). One factor in this inquiry looks to "the public benefit derived from the case" based on "the significance of the contribution that the released information makes to the fund of public knowledge." *Id.* An analogous inquiry into, for example, the extent to which an award of nominal damages served the goals of the First Amendment would likely produce arbitrary and unpredictable results.

[258] As a federal judge once put it during a speech he delivered at a Federalist Society event, "Whether a goal is pro bono publico or anti, is often a policy and political judgment. No public good is good for everybody." Dennis G. Jacobs, Pro Bono for Fun and Profit, 2 (Oct. 6, 2008), https://fedsoc.org/commentary/publications/speech-by-judge-dennis-g-jacobs.

[259] For similar reasons, the Seventh Circuit has referred to the public interest prong of the preliminary injunction standard as a "wild card." Lawson Prod., Inc. v. Avnet, Inc., 782 F.2d 1429, 1433 (7th Cir. 1986); *see also* M Devon Moore, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH. L. REV. 939, 940 (2019) (criticizing "the unstructured and often conflicting articulations of the public interest factor"); Orin H. Lewis, *"The Wild Card That Is the Public Interest": Putting A New Face on the Fourth Preliminary Injunction Factor*, 72 TEX. L. REV. 849, 850 (1994) (recounting multiple scholars' criticisms of the public interest factor); Lea B. Vaughn, *A Need for Clarity: Toward A New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 864 (1989) ("invoking the public interest as a reason for granting or denying an injunction may disguise and superficially legitimate a judge's or party's personal agenda").

[260] When the Supreme Court of New Mexico declined to adopt a "private attorney general" doctrine of non-statutory fee shifting, it mentioned similar concerns about arbitrariness, as well as concerns about judicial economy:

> Unbridled judicial authority to "pick and choose" which plaintiffs and causes of action merit an award of attorney fees under the private attorney general doctrine would not promote equal access to the courts for the resolution of good faith disputes inasmuch as it lacks sufficient guidelines to prevent courts from treating similarly situated parties differently and could easily result in decisions that favor a particular class of private litigants while unduly discouraging the government from mounting a good faith defense. Such authority also would not promote the goal of conserving judicial resources inasmuch as it calls for the courts to engage in a fact-specific

Consider that variation from the perspective of a plaintiffs' attorney, who must consider the likely return on their law firm's investment of labor and other resources when making case-selection decisions.[261] The attorney will usually have little ability to predict which judge will be assigned to the case,[262] let alone what that judge's views about the public interest value of the litigation might be. If those views represent a potential source of non-payment, the additional risk will make representation of fee-shifting clients less economically attractive.[263]

Even if an attorney could predict a district judge's views about the public interest value of a prospective client's victory, appellate judges would introduce another layer of uncertainty. Consider two cases decided six years apart by the Fourth Circuit, *Kane v. Lewis* and *Project Vote/Voting for America, Inc. v. Dickerson*. In *Kane v. Lewis*,[264] the plaintiff obtained nominal damages based on the jury's finding that the defendant officers failed to properly knock and announce when executing a search warrant.[265] While executing the warrant, the officers fatally shot the plaintiff's son.[266] The district court awarded fees, but the

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> reexamination of the merits of a case to determine the significance and scope of the rights that have been protected.

New Mexico Right to Choose/NARAL v. Johnson, 986 P.2d 450, 459 (N.M. 1999).

[261] *See generally* HERBERT M KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004) (detailing different aspects of contingency fee legal practice, including the factors that affect case-selection decisions).

[262] There are exceptions. *See, e.g.*, Alex Botoman, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 298 (2018) (explaining how, as a plaintiff in two cases, the state of Texas "was able to choose its judge with almost complete certainty" under divisional judge-assignment rules); Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 202–03 (2014) (explaining how a related case rule allowed one judge to preside over nearly all constitutional challenges to the New York Police Department's stop-and-frisk policies over a fourteen-year period).

[263] This uncertainty compounds the risk associated with other potential causes of non-payment in fee-shifting cases. For example, case selection decisions must account for the possibility that the defendant will render the plaintiff ineligible for fees by unilaterally changing its conduct at a late stage in the litigation. *See* Carroll, *supra* note 10, at 1028–33 (discussing the circumstances that can result in non-payment in fee-shifting cases).

[264] Kane v. Lewis 675 F. App'x 254 (4th Cir. 2017).

[265] *Id.* at 256.

[266] *Id.*

Fourth Circuit reversed.[267] With respect to the public interest inquiry, the appellate court noted that "[o]ne way for the victory to advance the public interest is deterring similar misconduct in the future."[268] In the court's view, the plaintiff's victory fell short; it "serves the salutary goal of holding police accountable, but [the plaintiff] identifies no change in police practice or policy that would support the notion that this lawsuit benefitted the public more broadly."[269]

The opposite type of reversal occurred in *Project Vote/Voting for America, Inc. v. Dickerson*,[270] in which the plaintiffs obtained nominal damages based on the district court's ruling that a transit regulation violated their First Amendment rights.[271] The regulation had prevented the plaintiffs from registering voters at the defendant's bus and train stations.[272] The district court denied fees, but the Fourth Circuit reversed.[273] In the appellate court's view, "[w]hile the settlement and receipt of nominal damages did little for Plaintiffs personally, their victory undoubtedly signaled to the MTA the importance of ensuring that its regulations do not intrude upon our most basic constitutional and democratic rights."[274]

As the Supreme Court's nominal damages case law demonstrates,[275] the impact of a nominal damages award is easy to minimize when a court is so inclined. In light of the sharp ideological divisions among current members of the federal judiciary, it is not difficult to think of situations in which some judges might be so inclined. Consider a case brought to challenge pandemic-related restrictions on houses of worship. If the plaintiffs prevailed, some judges would believe that the litigation vindicated important interests in religious freedom, without any

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[267] *Id.*

[268] *Id.* at 259–260.

[269] *Id.* at 260. The court added that the jury's verdict was too "opaque" to deter future violations, because it did not specify *how* the officers failed to properly knock-and-announce. *Id.*

[270] Project Vote/Voting for America, Inc. v. Dickerson, 444 F. App'x 660 (4th Cir. 2011).

[271] *Id.* at 661.

[272] *Id.*

[273] *Id.*

[274] *Id.* at 664.

[275] *See supra* Part I.

significant harm to public health;[276] but other judges would believe that the litigation imperiled public health, without any significant benefit to religious freedom.[277]

As discussed previously,[278] some cases result in nominal damages because the Supreme Court has held that "the abstract value of a constitutional right" is not a permissible basis for awarding substantial monetary relief.[279] Because of the potential for arbitrary results, the Supreme Court viewed that method of determining monetary relief as "an unwieldy tool for ensuring compliance with the Constitution[ ]" and "too uncertain to be of any great value to plaintiffs."[280] As the foregoing analysis demonstrates, the same considerations weigh against tying fee-shifting awards to judicial views of the public interest.

IV. LEGISLATIVE AND JUDICIAL TASKS

When a plaintiff becomes a prevailing party by obtaining nominal damages, some courts deny or dramatically reduce the plaintiff's fee-shifting award because of the "technical" nature of the victory,[281] and some decide whether to award fees by looking to their own views of the public interest value of the litigation.[282] Many of these denials and reductions have resulted from the Supreme Court's decision in *Farrar v. Hobby*,[283] which coheres poorly with multiple strands of doctrine and undermines access to counsel for civil rights claimants. Congress, the Supreme Court, and the lower federal courts have all contributed to the current state of affairs, and as explained below, each can play a role in bringing about improvements.

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[276] *Cf.* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 72 (2020) (Gorsuch, J., concurring) ("Nor may we discount the burden on the faithful who have lived for months under New York's unconstitutional regime unable to attend religious services.").

[277] *Cf. id.* at 78 (2020) (Sotomayor, J., dissenting) ("Amidst a pandemic that has already claimed over a quarter million American lives, the Court today enjoins one of New York's public health measures aimed at containing the spread of COVID–19 in areas facing the most severe outbreaks.").

[278] *See supra* Section I.A.

[279] *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309 (1986).

[280] *Id.* at 310.

[281] *See supra* Section II.B.

[282] *See supra* Section III.B.

[283] Farrar v. Hobby, 506 U.S. 103, 106 (1992).

A. *Congress*

Statutory fee shifting is long overdue for a legislative overhaul. Decisions like *Farrar* have subverted the promise of fee shifting: to create an economic incentive for attorneys to represent civil rights claimants, even when those claimants do not seek large amounts of monetary relief.[284] Congress could dramatically improve matters by clarifying the standards for prevailing-party status and fee amounts, and by modifying those standards so as to ensure that fee awards will create appropriate incentives for the representation of civil rights plaintiffs with valid claims.

Most relevant here, Congress should adopt clear, objective, and administrable standards for awarding fees to plaintiffs who obtain nominal damages or relatively low amounts of compensatory damages. Among other things, those standards should make clear that judges may not rely on their own views of the public interest value of the litigation when resolving fee-shifting disputes.[285]

It might seem unlikely that the project of reforming fee-shifting statutes, so as to better facilitate private lawsuits that enforce civil rights protections,[286] could garner enough support to succeed. That may seem especially so in an era of hyper-partisanship, when support for private enforcement of public laws is largely associated with the political left.[287]

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[284] *See supra* notes 13–21 and accompanying text.

[285] If Congress were to authorize judges to consider the public interest value of the litigation, it should at least identify specific criteria that judges should use in that evaluation, so as to reduce the potential for arbitrary and unpredictable results.

[286] I leave to the side the question of private lawsuits designed to curtail or discourage the exercise of constitutional rights, which are another matter entirely. *See, e.g.*, Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Breyer, J., dissenting) (discussing a state law that "delegates to private individuals the power to prevent a woman from obtaining an abortion during the first stage of pregnancy" at a time when such a woman had "a federal constitutional right to obtain an abortion during that first stage").

[287] Stephen Yeazell has pointed out the oddity of this political alignment:

> In the litigation wars, the Democratic and Republican parties take stances that conflict with their core views of government. The same political party that in other contexts deplores governmental meddling and recommends privatization as a remedy recoils in horror from this instance of privatization. Conversely, the political party that, in general, cheers on new regulatory regimes and distrusts markets, here celebrates private entrepreneurship in the form of the plaintiffs' bar.

But it was not always thus: "Although it has been largely forgotten, for most of our history, conservatives preferred legal enforcement by private lawyers because they thought private enforcers of the law were better than public enforcers."[288]

There is some reason to believe that the pendulum may be swinging back enough that successful fee-shifting reforms might not be too far out of reach. In particular, an empirical analysis of congressional activity between 1989 and 2018 has shown "escalating Republican Party support for private lawsuits to implement rights" in recent years.[289] By the end of the study period, "Republicans were as likely as Democrats to sponsor or cosponsor statutory provisions intended to stimulate private lawsuits."[290] The two parties are not usually interested in stimulating the same *types* of litigation.[291] But those divisions could actually create bipartisan support for limits on judges' ability to award fees based on their own views of the public interest value of particular lawsuits.

Notwithstanding that there is room for hope, no one should hold their breath waiting for legislative reform. Even if the two parties could find middle ground on the substance of fee-shifting reforms worth implementing, the current level of congressional dysfunction provides reason to doubt that such reforms would pass any time soon. In the meantime, the federal judiciary has a role to play as well.

B. *The Supreme Court*

In its 2021 decision in *Uzuegbunam v. Preczewski*,[292] the Supreme Court characterized nominal damages as a far more meaningful remedy than it did in its 1992 decision in *Farrar v. Hobby*,[293] suggesting that

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Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1754 (2013).

[288] Brian T. Fitzpatrick, *Deregulation and Private Enforcement*, 24 LEWIS & CLARK L. REV. 685, 690 (2020).

[289] Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 UC IRVINE L. REV. 657, 660 (2021).

[290] *Id.*

[291] *See id.* ("We also show that this surge in Republican support for private lawsuits to implement rights was led by the conservative wing of the Republican Party, fueled in part by an apparent belief during the Obama years that the President could not be relied upon to implement their anti-abortion, immigrant, and taxes, and pro-gun and religion agenda.").

[292] Uzuegbunam v. Preczewski, 141 S. Ct. 792, 802 (2021).

[293] *See supra* Section II.B.

Farrar may be out of step with an understanding shared by seven of the current justices.[294] Moreover, lower courts' practice of looking to the public-interest value of the litigation conflicts with the Supreme Court's decisions constraining the judicial role in fee shifting,[295] creating additional incentive for the Court to weigh in. By granting certiorari in an appropriate case, the Court could bring these strands of doctrine into alignment.

One might doubt whether the conservative members of the Court would have any appetite for clarifying the doctrine in a way that would increase the frequency or amounts of fee-shifting awards. Consider Justice Thomas, who wrote the majority opinion in *Farrar*. He joined a 2001 concurrence, written by Justice Scalia, that referred to fee-shifting awards as an "extraordinary boon" and characterized some who seek such awards as "extortionist[s]."[296] He also joined a 2011 dissent, written by Justice Kennedy, that characterized *Farrar* as making attorney's fees "unavailab[le]" to a plaintiff who obtained only nominal damages.[297]

In 2020, however, Justice Thomas joined a dissent that cited *Farrar* for the proposition that the plaintiffs "would be eligible" for fees if they obtained only nominal damages.[298] Justice Alito wrote that dissent, in *NYSRPA v. City of New York*, and Justice Gorsuch signed on as well. In addition to characterizing *Farrar* as support for fee-shifting awards in nominal-damages cases, the dissent emphasized that "attorney's fees are an important component of civil rights enforcement" because "[t]he prospect of an award of attorney's fees ensures that 'private attorneys

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[294] *See supra* Part I. The majority in *Uzuegbunam* included Justices Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Barrett (as well as Justice Breyer, who has since retired.)

[295] *See supra* Part III.

[296] Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res., 532 U.S. 598, 618 (2001) (Scalia, J., concurring).

[297] Camreta v. Greene, 563 U.S. 692, 728 (2011) (Kennedy, J., dissenting, joined by Thomas, J.) (citing Farrar v. Hobby, 506 U.S. 103, 112–15 (1992)). For context, a fuller quote follows: "[T]he objectives of qualified immunity might be satisfied if there were no bar to reaching the merits and issuing judgment when requested damages are nominal and substantial attorney's fees are waived or not allowed. *Cf. Farrar v. Hobby*, 506 U.S. [103], 112–115, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (discussing unavailability of attorney's fees where nominal damages are only relief) . . . ."

[298] N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y., 140 S. Ct. 1525, 1538 (2020) (Alito, J., dissenting, joined by Gorsuch, J., and joined in relevant part by Thomas, J.) (citing *Farrar*, 506 U.S. at 109).

general' can enforce the civil rights laws through civil litigation, even if they 'cannot afford legal counsel.'"[299] The dissent also bemoaned the effect on the plaintiffs of a restriction on fee-shifting awards that the Court had imposed almost two decades earlier.[300] That three of the conservative justices endorsed these views provides additional reason to believe that the Supreme Court might be open to clarifying its doctrine in a way that establishes a firmer foundation for fee-shifting awards in nominal-damages cases.

If the Court does grant certiorari in a fee-shifting case involving nominal damages, it should limit *Farrar* to its facts, recognizing the decision's status as an outlier among both its nominal-damages and its fee-shifting cases. It should make clear that the lower courts may not rely on their own views of the public interest value of the litigation when resolving fee-shifting disputes, regardless of whether the case involves nominal damages or a relatively low amount of monetary relief. And it should direct lower courts to engage in the same fee-shifting analysis when the plaintiff obtains nominal damages as they would if the plaintiff had obtained any other form of relief.

As the Supreme Court has made clear,[301] it will often be reasonable for district courts to exclude or limit compensation for time the plaintiff's attorneys spent on unsuccessful efforts. For example, if the plaintiff obtains only nominal damages, time spent proving up entitlement to compensatory damages may be subject to exclusion or reduction.[302] But such an exclusion or reduction would represent an application of a general principle about compensable activity, rather than singling out nominal damages as such.

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[299] *Id.* at 1538–39.

[300] *Id.* at 1538 ("[D]ismissing the case as moot means that petitioners are stuck with the attorney's fees they incurred in challenging a rule that the City ultimately abandoned—and which it now admits was not needed for public safety. That is so because '[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change.'" (quoting *Buckhannon Bd.*, 532 U.S. at 605)).

[301] *See, e.g.*, Hensley v. Eckerhart, 461 U.S. 424 (1983).

[302] *See, e.g.*, Nitkin v. Main Line Health, No. 20-CV-4825, 2022 WL 2651968, at *16 (E.D. Pa. July 8, 2022) (reducing a fee award by 10%, in part because the plaintiff "spent a substantial amount of time at trial devoted to developing her alleged compensatory damages" but "the jury found that she was only entitled to a nominal award of $1").

C. *Lower Courts*

So long as the majority opinion in *Farrar* remains good law, the lower federal courts are not free to ignore it. But neither are they bound by Justice O'Connor's concurring opinion; because there was a majority opinion, which Justice O'Connor joined without reservation, her concurrence does not implicate the *Marks* rule.[303] Moreover, lower courts are bound by the majority opinion in *Alyeska*, which directs them not to displace congressional judgments about fee shifting and the public interest.[304] They are also bound by the majority opinion in *Perdue*, which instructs them not to base fee awards on such "impressionistic" determinations as their "subjective opinion[s] regarding . . . the importance of the case."[305]

Lower courts should apply *Farrar* in a way that recognizes the constraints that other precedents impose, and that further recognizes that the majority opinion in *Farrar* "dealt with a distinctive set of facts and justified its ruling by reasons that focused solely on those facts."[306] Specifically, *Farrar* involved plaintiffs who failed on almost all of their claims; sued multiple defendants, but obtained a liability finding against only one of them; obtained a verdict that did not specify which of the defendant's acts were unlawful or which of the plaintiff's civil rights were violated; and sought $17 million, but obtained only nominal damages.[307] Lower courts must deny fees if faced with similar facts, but it seems unlikely that many cases will present similar facts. Nothing about *Farrar* obligates lower courts to try to put square pegs in round holes.

When deciding a nominal-damages case with less extreme facts than those present in *Farrar*, courts should award fees in the same way they would if the case involved any other form of relief. If the plaintiff succeeded on all claims, the fee-shifting award should normally reflect compensation for "all hours reasonably expended on the litigation."[308] If the plaintiff succeeded only in part, the analysis should turn on relatively objective determinations about the extent of their success, such

[303] Marks v. United States, 430 U.S. 188, 193 (1977).
[304] *See supra* Section III.A.1.
[305] Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 558 (2010); *see also supra* Section III.A.4.
[306] Eaton & Wells, *supra* note 144, at 847.
[307] Farrar v. Hobby, 506 U.S. 103, 106 (1992).
[308] Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

as the degree of interrelationship between the successful and unsuccessful claims.[309] It should not include any inquiry into the public interest value of the litigation.

Relying on more objective indicia of success would better promote administrability and reviewability, and it would contribute to greater predictability in fee-shifting awards. That predictability matters for defendants facing potential liability, as well as for plaintiffs' attorneys making decisions about which clients their firm will represent. Most importantly, it matters for civil rights claimants who depend on fee-shifting statutes in order to secure representation.

CONCLUSION

The Supreme Court's opinion in *Farrar v. Hobby* is an outlier among both the Court's nominal-damages cases[310] and its fee-shifting cases,[311] and it has led to significant confusion in the lower courts. In one manifestation of that confusion, some courts have resolved fee disputes by looking to their own views of the public interest value of the litigation, but that approach is both unwise and contrary to constraints the Supreme Court has imposed.[312] The Court or Congress should step in to clarify matters.[313]

In the meantime, lower courts should immediately abandon the public-interest inquiry that many of them have adopted.[314] Instead, when a plaintiff who prevailed by obtaining nominal damages seeks a fee-shifting award, the majority opinion in *Farrar* supports an approach that looks to relatively objective indicia of the "degree of success obtained."[315] Some relevant questions include whether the plaintiff lost almost all claims against almost all defendants (in *Farrar*, five of the six defendants escaped liability);[316] whether the plaintiff sought an extremely high amount of compensatory damages (in *Farrar*, the

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[309] *See id.* at 435–47 (discussing fee reductions based on the "degree of success obtained").
[310] *See supra* Part I.
[311] *See supra* Part II.
[312] *See supra* Part III.
[313] *See supra* Sections IV.A–B.
[314] *See supra* Section IV.C.
[315] *See* Farrar v. Hobby, 506 U.S. 103, 114–16 (1992) (quoting Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)); *see also supra* Section II.B.
[316] *Id.* at 106.

plaintiffs sought $17 million);[317] and whether the verdict made the nature of the defendant's violation clear (in *Farrar*, the verdict provided no specifics about the acts that were unlawful or the legal provision that was violated).[318] But courts should not deny or reduce fee-shifting awards because of a judge's subjective view of the public interest value of the litigation. That is so regardless of whether the plaintiff has obtained nominal damages, a relatively low amount of compensatory damages, or some other form of relief.

[317] *Id.* at 114.
[318] *Id.* at 106, 114.