No. 97-2073

# In the Supreme Court of the United States

OCTOBER TERM, 1997

DARNELLA BARJON AND LEE DURAN, PETITIONERS

*v.*

JOHN H. DALTON, SECRETARY OF THE NAVY

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

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the district court abused its discretion in the calculation of attorney's fees under 42 U.S.C. 1988(b) by basing the hourly rate for counsel on the prevailing market rate in the Eastern District of California, the forum in which petitioners' claim arose and in which their complaint was filed, rather than on the market rate in the San Francisco area, where petitioners' counsel was located.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A18) is reported at 132 F.3d 496. The opinion of the district court (Pet. App. B20-B23) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on December 22, 1997. A petition for rehearing was denied on March 3, 1998. Pet. App. A1. The petition for a writ of certiorari was filed on June 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioners were federal, civilian employees at the Mare Island Naval Shipyard (MINS) in Vallejo, California. In 1993, they filed administrative complaints

against the Secretary of the Navy, alleging wrongful discrimination in the employment context. Pet. App. A4-A6.

All employment actions relating to petitioners' discrimination claims occurred at MINS, which is in the Eastern District of California; the administrative complaint also was filed in the Eastern District; and a significant portion of the administrative proceedings took place in the Eastern District as well. Petitioners, however, retained an Oakland attorney, Elaine Wallace, to represent them, and many administrative proceedings were conducted in Oakland and San Francisco, which are in the Northern District of California. In 1994, after achieving favorable administrative outcomes, petitioners became entitled to reasonable attorney's fees. Pet. App. A4-A6.

The Navy did not challenge the number of hours claimed in petitioners' request for attorney's fees. The Navy determined, however, that the $250 hourly rate requested by petitioners based on their attorney's place of practice—the San Francisco area—was out of line with prevailing rates in the Eastern District of California and in Sacramento, the district where petitioners' causes of action arose and where qualified attorneys were available to represent petitioners. The Navy determined that $200 per hour was a reasonable hourly rate for a Sacramento attorney similarly situated to petitioners' counsel. Pet. App. A6-A7.

2. Petitioners filed a consolidated complaint against the Navy in the Eastern District of California in Sacramento, arguing that their attorney's hourly rate should be calculated according to the San Francisco market rate of $250 per hour, not the Sacramento rate of $200 per hour. Pet. App. A6-A7, B20. Petitioners argued that where, as here, the community in which the

cause of action arose and the majority of the administrative action occurred (*i.e.*, Vallejo) is on the edge of a judicial district, and where that community has closer geo-political contacts with an out-of-district attorney's place of practice (*i.e.*, San Francisco) than the judicial district (*i.e.*, Sacramento), the relevant community should not be limited to the district court's venue. *Id.* at A9.

The district court disagreed. It observed that, consistent with Ninth Circuit precedent, it generally awards fees based on the rate prevailing in the forum judicial district. Pet. App. B21 (citing *Davis* v. *Mason County*, 927 F.2d 1473, 1488 (9th Cir.), cert. denied, 502 U.S. 899 (1991)). However, it retains discretion to award fees based on the rates prevailing in an out-of-district attorney's place of practice if local counsel are unavailable either because "attorneys are unwilling to take the cases or because they 'lack the degree of experience, expertise, or specialization required to handle properly the case.'" Pet. App. B21 (quoting *Gates* v. *Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992)).

The burden is on the fee applicant to prove that out-of-district rates should apply, and the court found that petitioners failed to carry that burden. Pet. App. B21. The evidence submitted by petitioners pointed in the opposite direction, because several declarations offered by petitioners to show the unavailability of Sacramento counsel revealed that the declarants themselves had previously represented plaintiffs who were similarly situated to petitioners. *Ibid.* The court therefore granted the Navy's motion for summary judgment. *Id.* at B23.

3. The court of appeals affirmed in relevant part, holding that the district court did not abuse its

discretion in calculating the fee award. As relevant here, the court held that neither precedent nor policy compelled grafting a "geo-political" contacts component onto the local forum rule. Pet. App. A8-A10. Petitioners "offered no evidence that San Francisco rates are necessary to the enforcement of civil rights cases in Sacramento. Without evidence that Sacramento rates preclude the attraction of competent counsel, their argument remains too theoretical to warrant departure from the local forum rule." *Id.* at A11. Moreover, record evidence showed that qualified Sacramento counsel were available to represent petitioners. *Id.* at A13.

The court of appeals denied petitioners' request for rehearing and suggestion of rehearing en banc. Pet. App. A1.

**ARGUMENT**

The decision of the court of appeals is correct and does not conflict with any decision of this Court or with any decision of the courts of appeals. This Court's review is therefore not warranted.

1. Under this Court's precedents, federal courts calculating attorney's fees pursuant to 42 U.S.C. 1988 should use the "prevailing market rates in the relevant community." *Blum* v. *Stenson*, 465 U.S. 886, 895 (1984). In all but exceptional cases, identifying the "relevant community" is not problematic. The attorney representing the prevailing plaintiff usually practices in the community in which the suit is brought. In such a case, there is only one obvious choice for the "relevant community"—the community in which the suit is filed and from which counsel hails.

The "relevant community" becomes a litigable issue only where, as here, an out-of-district attorney handles a lawsuit. In such cases, courts follow what is known as the "local forum" rule. Under that rule, the district court presumes that the forum in which it sits is the relevant community. The justification for this presumption is that, if counsel are available in the local forum, "the fee opponent should not be required to pay the higher rates of * * * counsel from out-of-town." 2 M. Derfner & A. Wolf, *Court Awarded Attorney Fees*, ¶ 16.03[8] at 16-103 (1997). Nonetheless, where the justification underlying the local forum rule is absent—that is, in circumstances where local counsel are not available, or local counsel lack the special skills required to litigate a particular case—the court retains discretion to apply the prevailing market rate of a different community. Thus, a district court may look to market rates outside its jurisdiction "where the plaintiffs [prove] that local counsel * * * [were] unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." *Schwarz* v. *Secretary of HHS*, 73 F.3d 895, 907 (9th Cir. 1995) (internal quotation marks omitted).

The local forum rule is uniformly followed by courts of appeals,[1] and with good reason. It is easily adminis-

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[1] Derfner & Wolf, *supra*, ¶ 16.03[8], at 16-101; see, *e.g.*, *Schwarz*, 73 F.3d at 906-907; *Public Interest Research Group* v. *Windall*, 51 F.3d 1179, 1186-1187 (3rd Cir. 1995); *TCBY Sys., Inc.* v. *RSP Co.*, 33 F.3d 925, 931 (8th Cir. 1994); *Brooks* v. *Georgia State Bd. of Elections*, 997 F.2d 857, 868 (11th Cir. 1993); *National Wildlife Fed'n* v. *Hanson*, 859 F.2d 313, 317 (4th Cir. 1988); *Polk* v. *New York State Dep't of Correctional Servs.*, 722 F.2d 23, 25 (2d Cir. 1983); *Louisville Black Police Officers Org.* v. *City of Louisville*, 700 F.2d 268, 277-278 (6th Cir. 1983); *Maceira* v. *Pagan*,

tered and predictable, which eases the burden on district courts and prevents the "request for attorney's fees [from becoming] a second major litigation," *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).[2] It is neutral, favoring neither plaintiffs nor defendants.[3] And it is sufficiently flexible to ensure fairness, because the district court always retains discretion to consider the specific litigation needs of plaintiffs—such as the absence of qualified local counsel, or other factors making it necessary to obtain out-of-district counsel—

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698 F.2d 38, 40 (1st Cir. 1983); *Donnell* v. *United States*, 682 F.2d 240, 251-252 (D.C. Cir. 1982), cert. denied, 459 U.S. 1204 (1983); *Chrapliwy* v. *Uniroyal, Inc.*, 670 F.2d 760, 768 (7th Cir. 1982), cert. denied, 461 U.S. 956 (1983).

[2] The district court simply applies the prevailing market rates within its jurisdiction—a matter about which it generally has developed some expertise. *Donnell*, 682 F.2d at 251.

[3] "High-priced attorneys coming into a jurisdiction in which market rates are lower will have to accept those lower rates for litigation performed there. Similarly, some attorneys may receive fees based on rates higher than they normally command if those higher rates are the norm for the jurisdiction in which the suit was litigated." *Donnell*, 682 F.2d at 251-252; see also Derfner & Wolf, *supra*, ¶ 16.03[8], at 16-103 (pursuant to local forum rule, where out-of-town counsel's customary rates are lower than prevailing market rate in local jurisdiction, "out-of-town counsel can recover the higher forum rate"); *Public Interest Research Group*, 51 F.3d at 1186, 1187 ("Plaintiffs should not be penalized for retaining counsel of their choice, but neither should they be permitted to impose additional costs on defendants for plaintiffs' decision to go outside the district when ample competent local counsel were available." As a result, "an out-of-town lawyer would receive not the hourly rate prescribed by his district but rather the hourly rate prevailing in the forum in which the litigation is lodged. Deviation from this rule should be permitted only when the need for 'the special expertise of counsel from a distant district' is shown or when local counsel are unwilling to handle the case.").

on a case by case basis. *Schwarz*, 73 F.3d at 907; *Donnell* v. *United States*, 682 F.2d 240, 252 (D.C. Cir. 1982), cert. denied, 459 U.S. 1204 (1983); Derfner & Wolf, *supra*, ¶ 1603[8], at 16-103 to 16-104. Accordingly, at least one judicial task force has concluded that the local forum rule not only is the uniform choice of appellate courts, but also is the "best rule." *Public Interest Research Group* v. *Windall*, 51 F.3d 1179, 1186 (3rd Cir. 1995).

2. Petitioners do not appear to challenge the local forum rule directly, but rather seem to request its revision with respect to cases where, as here, the cause of action arises near the border of a judicial district. In such cases, they argue, the "relevant * * * community" should be the neighboring community in which out-of-district counsel practices, so long as there is a sufficiently close "geo-political" connection between the community where the cause of action arose and the community from which out-of-district counsel hails. See Pet. 10-11.

a. Petitioners, however, "have no legal precedent to support" revising the local forum rule in the manner they request. Pet. App. A9. Indeed, contrary to petitioners' contentions, no other circuit has adopted the "geo-political realities" test they propose.

The decision in *Rum Creek Coal Sales, Inc.* v. *Caperton*, 31 F.3d 169 (4th Cir. 1994) (cited Pet. 15), for example, "actually confirmed [the local forum rule] in stating 'that the community in which the court sits is the first place to look to in evaluating the prevailing market rate.'" Pet. App. A10 (quoting *Rum Creek*, 31 F.3d at 179). And, although the court in *Rum Creek* approved the use of out-of-district rates in part, it carefully justified that result by reference to one of the exceptions to the local forum rule—the unavailability of

willing local counsel. As the court explained, the plaintiff there made "a persuasive argument that it was necessary to use [out-of-district counsel] since taking on the governor and the police of the state where the trial is located, in the middle of a well-publicized coal miners' strike, could be a politically sensitive activity for a local * * * firm." 31 F.3d at 179. Petitioners have made no showing that political sensitivities made it "necessary" to use out-of-district counsel here.[4]

Petitioners' reliance (Pet. 11-12) on *Casey* v. *City of Cabool, Missouri*, 12 F.3d 799 (8th Cir. 1993), is similarly misplaced. *Casey* acknowledges that it may be appropriate at times to use out-of-district rates, 12 F.3d at 805, but that acknowledgment is not inconsistent with the local forum rule; the local forum rule merely presumes that local rates are adequate and permits use of out-of-district rates where, among other things, local counsel are unavailable or there is a compelling reason for retaining out-of-district counsel. See p. 5, *supra*. Moreover, in *Casey* itself, the Eighth Circuit did not purport to apply an out-of-district rate. Instead, it "upheld the district court's award of $150 per hour to plaintiff's attorney rather than his customary rate of $185 per hour." Pet. App. A11. It thus "allow[ed] the same result reached by the district court in [this] case." *Ibid.*

Nor is *Planned Parenthood, Sioux Falls Clinic* v. *Miller*, 70 F.3d 517 (8th Cir. 1995) (Pet. 15-17), inconsistent with the decision below. The court there exercised its discretion to award out-of-district rates

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[4] In addition, the court of appeals in that case relied on the complexity of the work and the fact that most of it was appellate in nature. *Rum Creek*, 31 F.3d at 179. Petitioners identify no similar factors in this case.

after conducting a fact-intensive inquiry and concluding that plaintiffs' counsel—who were "leaders in the field of reproductive-rights law [and who had] extensive experience"—were "able to handle the case in a shorter length of time than a local lawyer, without comparable experience." 70 F.3d at 519. Petitioners have made no similar showing here.

b. Petitioners not only fail to identify circuit authority adopting the rule they propose, but also fail to identify a compelling reason why it should be adopted, even in the circumstances of this case. As the Ninth Circuit explained, petitioners "offer[] no evidence that San Francisco rates are necessary to the enforcement of civil rights cases in Sacramento." Pet. App. A11. To the contrary, the record supports the conclusion that qualified Sacramento attorneys were, in fact, available to represent petitioners. *Id.* at A13. Petitioners, of course, were free to select counsel of their choice from San Francisco. But, under these circumstances, there is no reason to permit them to "impose additional costs on defendants for [their] decision to go outside the district" for counsel. *Public Interest Group*, 51 F.3d at 1187.

Moreover, engrafting a "geo-political realities" component onto the local forum, as respondents request, would introduce imprecision and unpredictability into fee calculations, threatening to transform attorney's fees cases into "second major litigation[s]." *Hensley*, 461 U.S. at 437. For example, petitioners nowhere explain how close to the border of a judicial district the injury must arise before their proposed rule would apply; what constitutes "geo-political" differences and connections, and how they may be proved; or how the proposed rule would apply if the market rate in the out-of-district community is lower than the rate within the

judicial district. The cost of the uncertainty that the proposed rule would thus inject into fee calculations outweighs any conceivable benefits the rule might promise.

3. Finally, petitioners argue (Pet. 14-17) that this Court should grant certiorari because the lower courts erred in concluding that qualified counsel were available in Sacramento. This fact-bound contention, which was rejected by both the district court, Pet. App. B21, and the Ninth Circuit, *id.* at A13, does not warrant this Court's review. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980). The claim lacks merit in any event. As the Ninth Circuit stated: "The same declarations [from Sacramento counsel] offered by [petitioners] to show the unavailability of Sacramento counsel also reveal [that the] declarants themselves * * * have represented plaintiffs like [petitioners] previously." Pet. App. A13.[5]

[5] Petitioners' passing assertion (Pet. 14 n.7) that certiorari is warranted to correct the district court's alleged error in determining Sacramento's prevailing market rate is similarly a fact-specific claim that does not warrant this Court's attention, *Branti*, 445 U.S. at 512 n.6, and that lacks merit in any event, Pet. App. A14-A15, B22.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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