Supreme Court, U.S.
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No. 10-114

In the Supreme Court of the United States

RICKY D. FOX,

Petitioner,

v.

BILLY RAY VICE, Chief of Police for the Town of Vinton; TROY CARY, Policeman for the Town of Vinton; TOWN OF VINTON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A district court, in its discretion, may allow a prevailing party a reasonable attorney's fee as part of its costs. 42 U.S.C. § 1988. A defendant may be considered a prevailing party entitled to attorney fees from a plaintiff if a district court finds that the plaintiff's claim was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. Petitioner, Ricky D. Fox, filed a lawsuit asserting various federal claims under 42 U.S.C. § 1983. Subsequent to Respondents' filing of dispositive motions, Petitioner raised "last minute" state law claims. The district court dismissed all of the federal civil rights claims and remanded the state tort law claims to state court. A motion for attorney fees was filed by Respondents. In response to the motion, the district court performed the Lodestar analysis and further performed an assessment of the twelve factors enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974) and awarded respondents' attorney's fees under 42 U.S.C. § 1988.

1. Whether the Fifth Circuit Court of Appeal properly determined that the district court was correct in using the Lodestar analysis and the *Johnson* factors to award attorney's fees to Respondents?

2. More particularly, whether the Fifth Circuit Court of Appeal properly determined that the district court correctly assessed the *Johnson* factors and concluded that *Johnson* factor number Eight ("the amount involved and results obtained") did not require a downward

adjustment to the Lodestar amount regarding state law claims which were raised "at the last minute" and then remanded to state court.

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INTRODUCTION

Petitioner, Ricky D. Fox, filed an original Complaint asserting civil rights claims against Respondents pursuant to 42 U.S.C. § 1983 alleging that Petitioner was the target of an "anonymous" letter as well as a "staged incident" with a third party whereby Petitioner was accused of making racial comments. Throughout the course of the proceedings, Respondents recognized Petitioner's suit as only setting forth federal claims. Respondents filed dispositive motions seeking dismissal of all federal claims asserted against them. Respondents did not make any arguments regarding state law claims within their dispositive motions because Respondents were not aware that the Petitioner was asserting any state law claims in his Complaint. In response, Petitioner filed an Opposition Memorandum to the dispositive motions acknowledging and admitting that Petitioner had no valid federal claims pursuant to 42 U.S.C. § 1983; however, Petitioner set forth in his Opposition Memorandum that he was now expressly setting forth state tort law claims for intentional infliction of emotional distress, defamation and extortion. Further, Petitioner asked the district court to remand the state law claims to state court. Respondents were surprised by Petitioner's revelation that he was now asserting state law claims. In response, Respondents requested that the district court ignore the state law claims pursuant to Rule 8 of the Federal Rules of Civil Procedure since the Petitioner's complaint did not place Respondents on notice of said state law claims. Ultimately, the district court issued a judgment dismissing all federal claims but declined to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(c).

In declining to exercise jurisdiction over the pendent state law claims, the district court observed that "the court has had minimal involvement with the state law claims at this stage." Pet. App. 40a.

Respondents filed a Motion for Attorneys' Fees and Costs pursuant to 42 U.S.C. § 1988 and Fed. R. Civ. P. 54. In response, the district court determined that under the standard set forth in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978), the Petitioner's federal claims were frivolous, unreasonable, or without foundation. The district court further performed a Lodestar analysis as well as an evaluation of the twelve *Johnson* factors to determine whether to adjust the Lodestar amount upward or downward. The district court specifically addressed *Johnson* factor number Eight regarding "the amount involved and the results obtained" and addressed it with the recognition that the state law tort claims were remanded to state court without consideration by the district court. The district court evaluated the facts and circumstances with this peculiar sequence of events in which the state law tort claims were not raised until the eve of the federal claims being dismissed. The district court ultimately concluded that the Lodestar amount should not be reduced based upon the following findings of fact:

> The Court finds that plaintiff failed to allege state tort law violations in the Complaint such that defendants were adequately noticed that a separate defense as to these claims would need to be prepared at the beginning of the litigation. Furthermore, the Record reflects that, throughout the litigation, the focus of both

> plaintiff and defendants was plaintiff's § 1983 claim. Finally, the Court notes defendants' request for attorney's fees relates only to the proceedings before this Court. Defendants do not appear to request attorney's fees related to the defense of the state law claims remanded for a decision to Louisiana state court. In consideration of these points and the *Johnson* factors generally, the Court does not adjust the determined Lodestar amount. Pet. App. 32a-33a.

On appeal, the Fifth Circuit Court of Appeal affirmed the district court's finding that Respondents were "prevailing parties" for purposes of 42 U.S.C. § 1988 and Fed. R. of Civ. P. 54, and that Petitioner's federal claims were frivolous, unreasonable or without foundation. The Fifth Circuit also affirmed the district court's equitable determination of attorney fees pursuant to the Lodestar analysis and application of the *Johnson* factors. In fact, the Fifth Circuit cited to this Court stating "there is no precise rule or formula for making these determinations," and much should be left to the district court's equitable discretion. *Hensley v. Eckerhart*, 461 U.S. 424, 436-37, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). The Fifth Circuit recognized that the district court specifically assessed that the state law tort claims were not raised or addressed while the suit was pending within the district court's jurisdiction. Ultimately, the Fifth Circuit determined that it was not an abuse of discretion for the district court to decline to make a downward adjustment of the Lodestar amount under the facts and circumstances of this particular case. Pet. App. 11a-12a.

A Petition for Rehearing *En Banc* was filed by Petitioner. In response, no member of the panel nor judge in regular active service with the Court requested that the court be polled and thus the Petition was denied. Pet. App. 42a.

STATEMENT OF THE CASE

This is a civil rights action brought by Petitioner, Ricky D. Fox, pursuant to 42 U.S.C. § 1983. Fox set forth in his original petition claims against the prior chief of police, Billy Ray Vice ("Vice"), and two police officers employed with the Town of Vinton ("Vinton"), namely Arthur Phillips ("Phillips") and Troy Cary ("Cary"), as well as claims against Vinton.[1] Subsequently, Petitioner voluntarily dismissed his claims against defendant, Phillips, early in the proceedings.

Petitioner alleged in his Complaint that Vice sent an anonymous letter to Petitioner setting forth disclosure of certain information about Fox if Fox ran for the position of chief of police for the Town of Vinton. Further, the complaint alleged that Vice, Cary and Phillips conspired, directed and orchestrated a confrontation between the Petitioner and a private citizen at a high school basketball game whereby the private citizen accused Petitioner of making racial slurs. Petitioner further alleged that an offense report was prepared at the direction of Vice regarding the complaint made by the private citizen about the

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[1] Petitioner, Ricky D. Fox, won the election for Chief of Police against the incumbent, Billy Ray Vice, and thus Mr. Vice was no longer Chief of Police at the time this suit was filed.

confrontation and that the offense report was shown to third persons.

Petitioner set forth only federal civil rights claims pursuant to 42 U.S.C. § 1983. Petitioner alleged that Vice, Phillips, and Cary violated Petitioner's constitutional rights by the power conferred upon them as policemen of the Town of Vinton. Ultimately, plaintiff alleged that his rights, privileges and immunities afforded by the Constitution were violated as follows:

A. The right to seek public office;
B. The right to be free from extortion;
C. The right to be protected by unlawful interference by police;
D. The right to be protected by malicious abuse of process;
E. The right to not be slandered/defamed;
F. The right to due process;
G. The right to not be subject to abuse of power;
H. Other violations to be proven at the trial of this matter.

App. 1a.

Petitioner alleged that Vinton was vicariously liable for the acts of its employees, Vice, Phillips and Cary. Petitioner sought general damages, punitive damages as well as attorney fees in regard to his civil rights claims brought pursuant to 42 U.S.C. § 1983.

This matter proceeded in the federal court and throughout the course of the proceedings, Respondents recognized the suit as setting forth federal claims only, and thus defended the case accordingly. The Record

confirms that Respondents only recognized Petitioner as asserting federal civil rights claims by the mere fact that Respondents' dispositive motions sought dismissal of this case by challenging the federal civil rights claims. Respondents' dispositive motions did not challenge any state tort law claims because Respondents were not placed on notice that Petitioner was asserting state tort law claims. It was not until Petitioner was challenged through the dispositive motions that Petitioner conveniently raised that he was pursuing state tort law claims for intentional infliction of emotional distress, defamation and extortion.

Thus, it is under these particular facts and circumstances set forth above that the district court determined that Respondents were prevailing parties; that Petitioner's federal civil rights claims were frivolous, unreasonable or without foundation; and that pursuant to the *Johnson* factors, the amount determined under the Lodestar analysis did not require a downward adjustment regarding the state tort law claims which were remanded to state court.

MISSTATEMENT OF FACTS

Pursuant to Supreme Court Rule 15.2, the Respondents should address any perceived misstatement of fact or law found in the Petition. Thus, Respondents submit the following misstatements of fact contained in the Petition.

Throughout the Petition, Fox describes his suit as alleging state law claims (plural) as well as a federal claim (singular) in an attempt to sidestep one of the critical factors that was considered by the district

court in determining an award of attorney fees. As set forth above, Petitioner's original complaint set forth and gave notice of only multiple federal civil rights claims. The state tort law claims were only expressly raised in Petitioner's Opposition to Respondent's dispositive motions.

Petitioner makes issue that Vice was found guilty of extortion in the state criminal court proceedings. However, the conviction was subject to appeal at the time of this civil proceeding. Further, Petitioner's civil case set forth additional allegations against Vice and other defendants that they pursued these alleged actions while acting under color of law which would not have been addressed at the criminal proceedings. For example, Petitioner alleged that Vice prepared the anonymous letter at the police station using police equipment. However, Respondents learned through discovery that Petitioner had no information or evidence whatsoever that the alleged anonymous letter was prepared through use of police equipment at the police station.

Petitioner states that he only conceded having no federal claims after completion of discovery. However, Petitioner's concession only occurred in response to the filing of Respondents' dispositive motions which occurred within two months of trial. Further, much of the facts learned through discovery revealed that Petitioner's allegations attempting to show defendants as acting under color of law, were not supported by any evidence that Petitioner alleged he possessed.

Petitioner has described throughout his petition the remanded state tort law claims as "non-frivolous" as well as "valid." However, there has been no judicial

determination regarding the state tort law claims as being valid or non-frivolous. At the request of Petitioner, those state tort law claims were remanded to state court shortly after they were raised.

Petitioner states that the Fifth Circuit Court of Appeal affirmed the district court's award of attorney fees "finding that only Mr. Fox's federal claims were frivolous and affirming the remand of the state law claims rather than assessing their obvious merit." Pet. Brief, p. 3. However, the district court's decision to remand the state law claims was not taken up on appeal and thus, there was no judicial determination by the Court of Appeal regarding the remand of the state law claims nor the validity of the state law claims.

Petitioner places emphasis regarding the Ruling by the district court on the dispositive motions whereby the district court stated that any trial preparation, legal research or discovery could be used by the parties in a state court proceeding. However, this was not a judicial finding by the district court, but was merely a comment that any work, although performed while the proceedings were in federal jurisdiction, would not be prevented from being used in any state court proceeding. Additionally, the district court specifically recognized that it had minimal involvement with the state law claims at the time of remand to state court. Pet. App. 40a.

Petitioner states that he voluntarily withdrew his federal civil rights claims. However, the Record revealed that Petitioner only conceded the lack of legal merit in his federal civil rights claims in response to dispositive motions filed by Respondents. The Fifth

Circuit Court of Appeal determined that based upon a review of the Record, Petitioner allowed the case to proceed for more than eighteen months in federal court and through discovery. It was only at the point that he was challenged on those federal claims that Petitioner conceded they were without merit. Further, the Fifth Circuit Court of Appeal recognized that without decisive action by Respondents, Petitioner's baseless federal claims would have proceeded to trial. Pet. App. 6a-7a.

Petitioner represents that the district court made no analysis as to what portion of the attorney fees incurred by Respondents were in defense of Petitioner's federal claims as opposed to the remanded state tort law claims. Pet. Brief, p. 3. However, the district court specifically addressed this circumstance whereby at the time all federal civil rights claims were dismissed, the state tort law claims were not adjudicated but remanded to state court. The district court specifically assessed this factor in awarding attorney fees by performing the Lodestar analysis including an assessment of the twelve *Johnson* factors and specifically *Johnson* factor number Eight regarding "the amount involved and the results obtained." As set forth above by citation from the district court's Memorandum Ruling, the district court determined that Petitioner failed to allege state tort law claims in the complaint in such a manner that Respondents were adequately noticed and that a review of the Record reflected that throughout the litigation, the focus of all parties was Petitioner's federal civil rights claims.

REASONS FOR DENYING THE PETITION

This case involves a request to review a district court's award of attorney fees pursuant to § 1988. This Court has specifically cloaked the district court as the proper adjudicator to make equitable adjustments to an award of attorney fees. This Court has held that the district court necessarily has the discretion in making this equitable judgment. *Hensley, supra.* In this instance, the district court properly performed the analysis determining the Lodestar amount and considered the twelve *Johnson* factors and determined within this district court's discretion that a downward adjustment was not required under these particular facts and circumstances. Thus, the Petition asks this Court to review the factual findings by the district court in declining to make a downward adjustment of the Lodestar amount and find it in error. Such a request to review perceived erroneous factual findings is not a compelling reason for this Court's consideration.

In an attempt to have this Petition granted, Petitioner seeks to create a conflict between the circuit courts of appeal and this Court. However, these circuit courts have simply applied the precedent set forth by this Court in *Christiansburg, Hughes v. Rowe,* 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) and *Hensley* to the facts presented before them. Any differing results regarding the amount of the attorney fee and whether there should be an upward or downward adjustment to the attorney fee will certainly occur merely as a result of the particular set of facts and circumstances presented to the district court.

The Petitioner also seeks to create the illusion of a split among the circuit courts of appeal. In reality, the cases cited by Petitioner merely arrive at differing outcomes based upon the particular set of facts and circumstances of that case. Respondents submit that the standards set forth by this Court in awarding attorney fees to a prevailing party under § 1988 have been properly applied by each of the circuits in determining whether the district court has abused its discretion in awarding attorney fees. The outcome of each case will certainly differ based upon the district court's duty to be the proper adjudicator regarding equitable adjustments to attorney fees. This is particularly true given there is no precise rule or formula for making these determinations. *Hensley*, 461 U.S. at 436-37.

I. The Fifth Circuit Properly Applied Precedent In Affirming The District Court's Award Of Attorney Fees.

The Fifth Circuit properly applied established law in finding that the district court did not abuse its discretion in finding Petitioner's federal claims frivolous and in awarding attorney fees to Respondents. The Fifth Circuit analyzed the § 1988 attorney fee award under the precedent set forth by this Court in *Christiansburg, Hughes,* and *Hensley*.

In *Christiansburg*, this Court determined that a prevailing defendant is entitled to attorney fees in a Title VII case. This Court held that a district court may in its discretion award attorney's fees to a prevailing defendant upon a finding that the plaintiff's claims were frivolous, unreasonable, or without foundation, even though not brought in subjective bad

faith[2] *Christiansburg,* 434 U.S. at 421. In holding this standard, this Court reviewed the policy considerations in permitting district courts to award attorney fees to prevailing defendants. "A fair adversary process presupposes both a vigorous prosecution and a vigorous defense. It cannot be lightly assumed that in enacting § 706(k), Congress intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith." *Id.* at 419. This Court also relied upon the legislative history of the Senate Floor Discussion of the attorney's fee provision of Title II. Several senators explained that an allowance of attorney fee awards to defendants would serve "to deter the bringing of lawsuits without foundation," "to discourage frivolous suits," and "to diminish the likelihood of unjustified suits being brought." *Id.* at 420. This Court provided its overall observations from the legislative history as follows:

> If anything can be gleaned from these fragments of legislative history, it is that while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis. The Court of Appeals for the District of Columbia Circuit seems to have drawn the maximum significance from the Senate debates when it concluded: "[From these

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[2] The same standard is applicable to Section 1988 claims for attorney fees. *Hughes v. Rowe*, 449 U.S. 5, 14 (1980).

> debates] two purposes for § 706(k) emerge. First, Congress desired to 'make it easier for a plaintiff of limited means to bring a meritorious suit'...But second, and equally important, Congress intended to 'deter the bringing of lawsuits without foundation' by providing that the 'prevailing party' - be it plaintiff or defendant - could obtain legal fees." *Grubbs v. Butz*, 179 U.S. App. D.C. 18, 20; 548 F. 2d 973, 975.

Additional precedent is provided by this Court in *Hensley v. Eckerhart*. This Court determined that district courts could award attorney fees to partially prevailing parties and held that the amount of the fee to be awarded to the partially prevailing party would be left to the discretion of the district court to make an equitable judgment. 461 U.S. at 436-37. This Court recognized that the amount of any fee awarded, "of course, must be determined on the facts of each case." *Id.* at 429. This Court further provided guidance to the district courts to apply the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), relying upon the Senate report citing to the *Johnson* factors. *Hensley*, 461 U.S. at 429-30. Additionally, this Court placed particular importance on *Johnson* factor number Eight, "the amount involved and the results obtained." *Hensley,* 461 U.S. at 430. The "product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Id.* at 434. This Court rejected an abstract "mathematical approach comparing the total number of issues in the case with those actually prevailed

upon. Such a ratio provides little aid in determining what is a reasonable fee in light of all of the relevant factors." *Id.* at 435 n.11. This Court determined that it would not provide a precise, bright line rule for awarding fees to partially prevailing parties, but emphasized that the district court, through its discretion, could consider all factors in determining an equitable amount:

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.....
>
> We re-emphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award... *Hensley,* 461 U.S. at 436-37.

In determining whether Respondents were entitled to attorney fees under § 1988, the Fifth Circuit properly applied this Court's precedent as set forth in *Christiansburg* and determined that Petitioner's federal civil rights claims were frivolous, unreasonable or without foundation. The Fifth Circuit

acknowledged that courts must resist the understandable temptation to engage in *post hac* reasoning, but must instead ask whether the case is so lacking in arguable merit as to be groundless or without foundation. Pet. App. 7a-8a.

In the present matter, the Fifth Circuit determined that Petitioner failed to establish any prima facie case on its federal claims finding that the dismissal of Petitioner's federal constitutional claims was not based on evidentiary hurdles faced at the end of discovery but rather Petitioner's claims were groundless because "the offenses as alleged in his complaint have no redress in the Constitution or laws of the United States." Pet. App. 8a. The Fifth Circuit determined that the anonymous nature of the letter received by Fox and the lack of constitutionally-protected harm stemming from the alleged false police report were circumstances of which Petitioner was aware of from the outset of litigation and thus no evidence produced in the discovery process could change the underlying deficiencies in Petitioner's Complaint. Pet. App. 8a. The Fifth Circuit further confirmed that any settlement talk was one sided as only being asserted by Petitioner and further found that Petitioner's federal claims were all dismissed without trial. Thus, the Fifth Circuit properly applied precedent and determined that Respondents were entitled to attorney fees as prevailing defendants based upon Petitioner's claims being frivolous, unreasonable or without foundation.

The Fifth Circuit also correctly applied the precedent of this Court as set forth in *Hensley* by determining that a partially prevailing defendant is entitled to attorney fees which can be traced to a

plaintiff's frivolous claims. The Fifth Circuit recognized this Court's statement that "there is no precise rule or formula for making these determinations and much should be left to the district court's equitable discretion." In applying this Court's precedent in *Hensley,* the Fifth Circuit observed that the district court performed the necessary analysis required by *Hensley:*

> In its Order awarding Appellee's attorney's fees, the district court noted that "the focus of both plaintiff and defendants was plaintiff's § 1983 claim." The Court also noted in the second Order that "defendant's [sic] request for attorney's fees relate only to proceedings before this Court." Finally, the Court noted that "defendant's [sic] did not appear to request attorney's fees related to the defense of the state law claims remanded for decision to the Louisiana state court." Pet. App. 8a.

Ultimately, the Fifth Circuit determined that since the district court specifically restricted its award of attorney fees to the proceedings before it and because the Court found that Respondents did not seek attorney's fees for the defense of the state law claims, the district court's award of attorney fees was not an abuse of discretion. Pet. App. 12a.

The Fifth Circuit clearly applied the precedent of this Court as set forth in *Christiansburg* and *Hensley* in affirming the district court's award of attorney fees to Respondents and thus Petitioner's representation of a conflict with this Court's precedent is without merit.

II. There Exists No Circuit Split Regarding Attorney Fee Awards To Prevailing Defendants.

Petitioner attempts to create a circuit split where none exists in order to comply with Supreme Court Rule 10(a). Petitioner cites to cases from various circuit courts and mischaracterizes their decisions as being conflicted in law. In truth, the differing outcomes by the circuits is, not surprisingly, a result of the particular and distinct set of facts posed to that circuit court. In fact, some of the decisions cited by Petitioner as "adopting differing rules" did not even address a determination of whether an amount of attorney fees was properly awarded to a partially prevailing defendant.

The two cases cited by Petitioner that do not even address a determination of the amount of attorney fees, much less adopt new rules for determining attorney fees, are *Colombrito v. Kelly*, 764 F.2d 122 (2d Cir. 1985) and *Lotz Realty Company, Inc. v. U.S. Department of Housing and Urban Development*, 717 F.2d 929 (4th Cir. 1983).

In *Colombrito*, the Second Circuit addressed the question of whether the district judge erred in finding plaintiff's claims to be frivolous. Upon review, the Second Circuit determined that the plaintiff's § 1985 claims could not be judged groundless and the plaintiff's § 1983 claims had at least a colorable basis for an inference of collusion. The Second Circuit concluded the case by determining that "on the whole, *Colombrito's* suit cannot be considered groundless, frivolous or meritless" relying upon the assessment that the case involved complex issues and involved

"new and changing principles of constitutional law." *Colombrito*, 764 F.2d at 132. Thus, the Second Circuit never addressed the issue of a partially prevailing party.

The same situation occurred with the Fourth Circuit in *Lotz Realty Company, Inc.* The district court had denied the defendant's motion for attorney fees under § 1988. On appeal, the Fourth Circuit determined that the defendant was a prevailing party in all aspects of the case. Based on that determination, the Fourth Circuit simply remanded the case to the district court to determine whether plaintiff's claims were frivolous, unreasonable or without foundation under *Christiansburg*. Thus, the Fourth Circuit did not make any determinations beyond finding the defendant as a prevailing party and properly remanding the matter to the district court.

Upon review of the remaining circuit cases cited by Petitioner as allegedly adopting differing rules for awarding fees to partially prevailing parties, such "rule making" does not exist. These cases simply examine the distinct set of facts before them and upon application of the precedent provided by this Court in *Christiansburg, Hughes* and *Hensley*, they reach differing results based on the facts and not on an alleged creation of "new rules."

In *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), the First Circuit merely addressed the error by the district court who simply denied the motion for attorney fees without making any determinations of whether plaintiff's claims were frivolous or not. The district court observed that plaintiff's claims were interrelated and simply shut down its analysis at that point and

failed to determine if any of the claims were frivolous under *Christiansburg* and *Hughes*. The First Circuit determined that the district court could not deny the motion for attorney fees prematurely on that basis and subtly chastised the district court that it "should not deny fees for defending frivolous claims merely because calculation would be difficult." *Ward*, 996 F.2d at 455-56. The First Circuit remanded the matter to the district court for further determinations since the district court never addressed whether plaintiff's claims were frivolous.

Petitioner also misinterprets the cases of *Tutor-Saliba Corp. v. City of Hailey*, 542 F.3d 1055 (9th Cir. 2006) and *Quintana v. Jenne*, 414 F.3d 1306 (11th Cir. 2005) as setting forth a "new rule" that attorney fees are only awarded when plaintiff's claims are distinct. In reality, both cases addressed facts in which the plaintiff's claims happened to be distinct.

In *Tutor-Saliba Corp.*, the Ninth Circuit affirmed the district court's finding that the plaintiff's constitutional claims were frivolous but that the federal statutory claims under the Airport and Airway Improvement Act and Airport Noise and Capacity Act were issues of first impression and therefore not frivolous. The Ninth Circuit further observed that the district court had evaluated the defense to the frivolous federal constitutional claims and the defense to the federal statutory claims and the district court subsequently performed a computation of attorney fees based on those circumstances. The Ninth Circuit determined that the district court had properly performed the analysis and justified its computation by its concise and clear explanation for awarding fees in this manner under these distinct facts. At no time

did the Ninth Circuit declare any "new rule" that attorney fees can only be awarded if the claims are distinct.

In *Quintana*, the Eleventh Circuit reversed the district court's finding regarding the issue of frivolousness. The district court had determined both federal claims to be frivolous. On appeal, the Eleventh Circuit reversed the finding of frivolousness as to one of the claims. Thus, the Eleventh Circuit remanded the case to the district court to recompute attorney fees. The Eleventh Circuit simply observed that the case involved a common set of facts with distinguished claims and was "confident that the district court will be able properly to weigh and assess the amount of attorney's fees" attributable to defending the frivolous retaliation claim. *Quintana*, 414 F.3d at 1312. Again, there exists no creation of new law or rules in this case and certainly there is no holding by this Court that partially prevailing parties are only entitled to attorney fees for cases involving distinct claims. This is just another example of a circuit court reviewing a case on its distinct set of facts and circumstances.

The case of *Curry v. A.H. Robins Co.*, 775 F.2d 212 (7th Cir. 1985), is yet another case involving distinct facts and an appellate court's review of whether the district court abused its discretion in awarding attorney fees under § 1988. This case involved peculiar facts. The plaintiff set forth three counts involving the product, the Dalcon Shield, which included a class action on behalf of users in the United States and in certain third world countries. Ultimately, Counts One and Two were dismissed by the district court as being barred by the relevant statute of limitations. Count Three was later

dismissed and found to be frivolous and the district court awarded attorney fees. The Seventh Circuit began its review by observing that "we further note that attorney's fee awards under 42 U.S.C. § 1988 *rests within the sound discretion of the trial court.* And this court will not disturb an award of attorney's fees under § 1988 unless the district court abused its discretion." *Curry*, 775 F.2d at 219. (Citations omitted). The Seventh Circuit determined that the district court did not abuse its discretion in awarding attorney fees. This case reviewed the precedent requiring a district court to consider certain factors in awarding attorney fees including whether a significant issue has been resolved in a party's favor, but the Seventh Circuit certainly does not set forth any holding that a prevailing party is entitled to attorney fees *only* where the frivolous claim is a significant issue. Respondents once again show that this case simply followed precedent and affirmed the attorney fee award based on the distinct facts and circumstances before it and found no abuse of discretion.

The review of the present case by the Fifth Circuit is just another example of an outcome based upon a distinct set of facts and circumstances. The Fifth Circuit properly applied this Court's precedent as well as this Court's instruction that determinations of attorney fees "should be left to the district court's equitable discretion" and ultimately determined that under the facts and circumstances before the district court, the district court did not abuse its discretion in awarding attorney fees. In this instance, the Fifth Circuit observed that the district court assessed that the plaintiff pursued only federal claims with the district court and that state law claims were not raised

until the eve of the federal claims being dismissed and the district court appropriately restricted its award of attorney fees to the proceeding before it. Pet. App. 12a. The district court provided a concise and clear explanation of its reasons for declining to make a downward adjustment to the Lodestar amount for which no abuse of discretion existed.

As shown above, the cases among the various circuits involved review of distinct sets of facts and circumstances and all circuit courts properly applied this Court's precedent in reviewing whether the district court abused its discretion in awarding attorney fees. Despite Petitioner's attempts to create conflicts of "rules" allegedly created by the circuits, there exists no such creation of "rules" nor conflict between the circuits.

III. Denying Attorney Fees To Respondents Would Lead To Absurd Results.

Respondents submit that a reversal of the district court's discretionary equitable decision to decline to make a downward adjustment of the attorney fee award under these particular circumstances would lead to absurd results. Petitioner filed this suit asserting civil rights claims under 42 U.S.C. § 1983. "In any action or proceeding to enforce" such a provision, "a Court in its discretion may allow the prevailing party...a reasonable attorney's fee." 42 U.S.C. § 1988. All of Petitioner's federal civil rights claims were determined frivolous. Only last minute state tort law claims raised on the eve of Petitioner's federal claims being dismissed remained, which were then remanded to state court. It is admitted that an award of attorney's fees to defendants requires a

higher standard showing that the civil rights claims were frivolous:

> On the other hand, frivolous civil rights claims waste judicial resources that would otherwise be used for legitimate claims. Accordingly, a district court should not deny fees for defending frivolous claims merely because calculation would be difficult...it would undermine the intent of Congress to allow plaintiff to prosecute frivolous claims without consequences merely because those claims were joined with unsuccessful claims that were not frivolous. *Quintana*, 414 F.3d at 1312.

In such instances involving petitioners bringing frivolous federal civil rights claims with claims that may be considered non-frivolous or claims which may not be addressed by the court (such as remanded state law claims), protection is provided through the district court's discretion to review the record and award attorney fees through the Lodestar analysis and an upward or downward adjustment following a *Johnson* factor assessment, particularly *Johnson* factor number Eight.[3]

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[3] "The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment... We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and a desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 436-37.

In this matter, the district court performed such an analysis and specifically addressed the fact that the state law claims were not raised until the eve of the dismissal of the federal claims. In the district court's discretion, it was determined that no downward adjustment was needed under the *Johnson* factors. Respondents submit that a decision to the contrary would only serve to open up the litigious gates and permit plaintiffs to pursue frivolous civil rights claims and avoid an assessment of attorney fees by simply bootstrapping a state tort law claim to its suit. Allowing such a rule "would depend not upon the district court's review of the merits of a plaintiff's § 1983 claims, but upon how a plaintiff chose to draft his complaint." *Tutor-Saliba Corp.*, 542 F.3d at 1064. An even more absurd result would occur if a plaintiff is permitted to pursue his suit in the same manner as Petitioner whereby state tort law claims were bootstrapped to a suit on the eve of his frivolous federal claims being dismissed.

In summary, the discretion taken by this district court in awarding attorney fees to Respondents under these circumstances was according to precedent and in alignment with the policy considerations expressed by this Court. This was a civil rights suit in which all civil rights claims were found frivolous. Last minute, non-civil rights, state tort law claims did not change that result. A ruling which would permit the Petitioner to avoid the attorney fees awarded to Respondents under these circumstances would only lead to absurd results.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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