No. _____

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 A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

J. STEVEN BROUSSARD
RANDALL E. HART
BROUSSARD & HART, LLC
1301 Common Street
Lake Charles, Louisiana 70601
(337) 439-2450

E. JOSHUA ROSENKRANZ
Counsel of Record
LISA T. SIMPSON
SIDDHARTHA M. VENKATESAN
REBECCA L. MROZ
ORRICK, HERRINGTON
& SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner Ricky D. Fox

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QUESTION PRESENTED

42 U.S.C. § 1988 authorizes courts to award reasonable attorney's fees to prevailing parties in civil rights litigation. This Court has recognized that the purpose of this statute is to ensure effective access to the judicial process for civil rights plaintiffs, and that fees may not be awarded to a prevailing defendant except where the plaintiff's action was frivolous, unreasonable, or without foundation. Petitioner Ricky D. Fox filed a lawsuit alleging various common law torts, as well as a civil rights claim arising from the same facts. He voluntarily withdrew his civil rights claim, leaving his state tort claims in place. The District Court ordered him to pay attorney's fees to defendants under 42 U.S.C. § 1988.

1. Can defendants be awarded attorneys' fees under Section 1988 in an action based on a dismissal of a claim, where the plaintiff has asserted other interrelated and non-frivolous claims?

2. Is it improper to award defendants all of the attorney's fees they incurred in an action under Section 1988, where the fees were spent defending non-frivolous claims that were intertwined with the frivolous claim?

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The opinion of the Court of Appeals in Mr. Fox's petition for review is published and reported at 594 F.3d 423 (5th Cir. 2010), and reprinted at App. 1a. The opinions of Magistrate Judges Kathleen Kay and Alonzo P. Wilson of the United States District Court for the Western District of Louisiana are reprinted at App. 19a and 35a, respectively. The order of the Court of Appeals denying rehearing en banc is reprinted at App. 41a.[1]

JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals on January 19, 2010. The decision of the Court of Appeals denying rehearing en banc was entered on April 16, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42

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[1] The parties below consented to a trial by magistrate judge for all purposes. Therefore, appeal was taken directly to the Court of Appeals from Magistrate Judge Kay's decision. *See* 28 U.S.C. § 636(c)(3).

> U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

INTRODUCTION

In 2004, Petitioner Ricky D. Fox announced his candidacy for police chief of the Town of Vinton, Louisiana. Shortly thereafter, he became the target of an extortion plot engineered by the incumbent candidate, Defendant Billy Ray Vice, which was intended to intimidate Mr. Fox and prevent him from pursuing the position. Based on these events, Mr. Fox brought suit in Louisiana state court, alleging common law claims as well as a federal claim arising under 42 U.S.C. § 1983 against Mr. Vice and the other Defendants. Defendants removed this case to federal court.

During the pendency of Mr. Fox's lawsuit against Defendants, Mr. Vice was charged and convicted for criminal extortion for the same plot that formed the basis of Mr. Fox's civil suit. Despite the fact that

Mr. Fox's lawsuit asserted claims against proven criminal conduct, however, he now finds himself forced to pay three years worth of Defendants' attorney's fees because his action was deemed "frivolous" by the Court of Appeals below.

The Court of Appeals reached this conclusion despite finding that only Mr. Fox's federal claim was "frivolous," and affirming the remand of his state law claims rather than assessing their obvious merit. Moreover, the court made no analysis as to what portion of the fees incurred by Defendants were in defense of Mr. Fox's federal claim as opposed to his viable non-federal claims, and gave no credence to the magistrate judge's finding that any discovery resulting from Mr. Fox's federal claim would be relevant to the state court proceedings. Rather, the court awarded Defendants a windfall of more than $50,000 in attorney's fees and costs, consisting of all of Defendants' fees incurred in the action to date. As a consequence of this decision, Mr. Fox, an individual with limited resources, faces overwhelming attorney's fees while continuing to litigate state law claims based on the same set of operative facts.

The Court of Appeals misapplied this Court's precedent and erred in finding that Mr. Fox's federal claim was "frivolous." It compounded that error by awarding Defendants all of their fees and costs without segregating fees for the supposedly frivolous and non-frivolous claims. This ruling gave the Defendants too much too easily, contrary to this Court's precedent under 42 U.S.C. § 1988 and

congressional intent. Although it has been established that attorney's fees are only payable to defendants under Section 1988 in defense of exceptional, "frivolous" claims, confusion has arisen among the circuits as to when attorney's fees can be awarded to partially prevailing defendants. With the majority of regional circuits weighing in, the courts have broken into four disparate camps that differ irreconcilably as to whether and under what circumstances a plaintiff may be ordered to pay attorney's fees to a defendant under Section 1988. Accordingly, the award of fees against a civil rights plaintiff is now almost entirely a function of where he happens to reside, contrary to Congress' plan for uniform civil rights enforcement under the statutes that are subject to Section 1988. This confusion has resulted in the erroneous windfall tolerated by the Court of Appeals under the auspices of Section 1988.

The circuits have had ample opportunity to examine this question and have reached disparate, irreconcilable positions. Only this Court can settle the confusion.

STATEMENT OF THE CASE

Statutory Background

In *Alyeska Pipeline Service Company v. Wilderness Society*, this Court reaffirmed the "American Rule" that each party in a lawsuit ordinarily should bear its own attorney's fees unless there is express statutory authorization to the contrary. 421 U.S. 240, 269-71 (1975). In response to the "anomalous gaps in our civil rights laws"

resulting from this decision, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizing courts to award reasonable attorney's fees to prevailing parties in civil rights litigation. S. REP. NO. 94-1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5911-12; *see also* H.R. REP. NO. 94-1558, at 1-2 (1976)).

"Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process." *City of Riverside v. Riviera*, 477 U.S. 561, 576 (1986) (plurality opinion). As explained in the Senate Report approving the proposed Section 1988,

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. REP. NO. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910. The purpose of Section 1988 was thus "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. REP. NO. 94-1558, at 1 (1976)). The legislation reflected Congress's recognition that "[a]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an

essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. REP. NO. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

While Congress intended that "a prevailing plaintiff 'should ordinarily recover an attorney's fee [under § 1988] unless special circumstances would render such an award unjust,'" *Hensley*, 461 U.S. at 429 (quoting S. REP. NO. 94-1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912), the same is not true for prevailing defendants. Congress cautioned that "'private attorneys general' should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose." S. REP. NO. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912. Congress noted with approval that "courts have developed a different standard for awarding fees to prevailing defendants because they do 'not appear before the court cloaked in a mantle of public interest.'" H.R. REP. NO. 94-1558, at 6 (1976) (quoting *United States Steel Corp. v. United States*, 519 F.2d 359, 364 (3rd Cir. 1975)). That standard prevents attorney's fees awards to prevailing defendants unless an action was "brought in bad faith." Congress reasoned that such a standard would "not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes." *Id.* at 7.

Precedential Backdrop

In *Christiansburg Garment Company v. EEOC*, this Court first considered the circumstances under which attorney's fees should be awarded to prevailing defendants in civil rights actions. The Court identified two equitable considerations that support a differing standard for prevailing defendants as compared to prevailing plaintiffs:

> First, as emphasized so forcefully in *Piggie Park*, the plaintiff is the chosen instrument of Congress to vindicate "a policy that Congress considered of the highest priority." Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.

434 U.S. 412, 418 (1978) (quoting *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)). In light of these considerations, the Court held that a district court may only award attorney's fees to a prevailing defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421.

This Court cautioned in *Christiansburg* that in applying these criteria, courts should resist the temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. *Id.* at 421-22. To this end, the Court noted that "the course of litigation is rarely predictable," and "[d]ecisive facts

may not emerge until discovery or trial." *Id.* at 422. Thus, "[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Id.* To assess attorney's fees against plaintiffs simply because they did not prevail would "substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement" of the civil rights laws. *Id.*

While *Christiansburg* addressed a fee-shifting provision specific to Title VII, this Court later held in *Hughes v. Rowe* that the same demanding standard applies under Section 1988. Reviewing its holding in *Christiansburg*, the Court reasoned,

> Although arguably a different standard might be applied in a civil rights action under 42 U.S.C. § 1983, we can perceive no reason for applying a less stringent standard. The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees.

Hughes, 449 U.S. 5, 14 (1980).

The Court in *Hughes* affirmed all but one of the dismissals of the claims subject to Section 1988 on the pleadings, but vacated the lower court's award of attorney's fees against the plaintiff, concluding that the plaintiff's allegations were "not meritless in the

Christiansburg sense." *Id.* at 10, 15. Emphasizing the rigor of the *Christiansburg* standard, the Court noted that "[a]llegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or 'without foundation' as required by *Christiansburg*." *Id.* at 15-16.

Finally, in *Hensley v. Eckerhart*, this Court commented on whether a partially prevailing *plaintiff* may recover all of its attorney's fees under Section 1988 for an action involving successful and unsuccessful claims. After reiterating the purpose of Section 1988 in providing judicial recourse for aggrieved plaintiffs, the Court concluded that in actions in which claims for relief are based on different and unrelated facts and legal theories, "no fee may be awarded for services on the unsuccessful claim." *Hensley*, 461 U.S. at 434-35. Conversely, where the prevailing plaintiff's claims "involve a common core of facts or will be based on related legal theories, . . . the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* However, the Court cautioned,

> 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. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees

> whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill.

Id. at 436. In these cases, "the most critical factor is the degree of success obtained. . . . A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.* at 436, 440.

To assist with separating work on successful and unsuccessful claims, the Court in *Hensley* urged fee applicants to "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Id.* at 437. Furthermore, it emphasized the importance of the district court "provid[ing] a concise but clear explanation of its reasons for the fee award." *Id.*

Statement of Facts

Mr. Fox announced his intention to challenge Defendant Billy Ray Vice in the election for police chief of the Town of Vinton, Louisiana in 2005. App. at 2a. Shortly after this announcement, Mr. Vice embarked on a campaign of intimidation against Mr. Fox designed to dissuade him from running for the position. The first of two notable incidents took place in January 2005, when Mr. Vice sent Mr. Fox an "anonymous" letter, threatening to take certain actions against Mr. Fox if he continued his candidacy. App. at 20a. The second incident occurred at a local high school basketball game in February 2005, when Mr. Vice and Defendant Troy Cary orchestrated a confrontation in which a third

party falsely accused Mr. Fox of uttering a racial slur. At the instigation of Defendants Vice and Cary, the third party filed a false police report regarding Mr. Fox's alleged utterance. App. at 20a-21a.

In December 2005, Mr. Fox brought a suit in Louisiana state court against Mr. Vice and Defendant Town of Vinton, alleging the above-stated facts and claiming state law causes of action for extortion, intentional infliction of emotional distress, and defamation. App. at 3a, 38a. Mr. Fox also asserted a federal cause of action, alleging that the actions of Defendants Vice and Cary as police officers of the Town of Vinton constituted a gross abuse of power made possible by the titles conferred on them by the Town. App. at 21a. Defendants proceeded to file a Notice of Removal, and in February 2006, the case was removed to federal court. App. at 23a.

In April 2007, Mr. Vice was tried and found guilty of extortion in state criminal court on the same set of facts alleged in Mr. Fox's civil case. App. at 3a. Discovery in the civil case during this time also produced evidence of Mr. Vice's participation in the filing of the false police report. *Id.* However, after discovery and in response to Defendants' motion for judgment on the pleadings and for summary judgment, Mr. Fox voluntarily conceded his federal claim, acknowledging that he was unable after completion of discovery to establish that Mr. Vice acted with state authority in support of that claim. He maintained valid state law claims, however. App. at 37a-38a. The magistrate judge

proceeded to dismiss Mr. Fox's federal claims and remand the remaining state law claims to state court, finding that "[a]ny trial preparation, legal research, and discovery may be used by the parties in the state court proceedings." App. at 40a.

In September 2008, a second magistrate judge granted defendants' motion for attorney's fees and costs. App. at 34a. The court held that Mr. Fox's federal claim was "frivolous," despite its nexus to his pending and valid state law claims. App. at 27a. In addition, the court failed to analyze the degree to which Defendants' attorney's fees were incurred in defense of Mr. Fox's remaining claims as opposed to his dismissed federal claim, despite the finding by the first magistrate judge that the record developed before dismissal of the federal claim would be applicable to the remaining state law claims. App. at 28a-30a, 32a-33a.

On appeal, Mr. Fox asserted that his federal claim did not rise to the level of frivolous, even though he had conceded it, and furthermore, that Defendants were not entitled to attorney's fees and costs, and particularly not all of their fees and costs, because his dismissed federal claim was so closely intertwined with his remaining state law claims. App. at 7a, 9a. The Court of Appeals rejected those arguments, affirming the district court's determination and non-segregated award of fees to Defendants. App. at 7a-12a. Judge Southwick dissented from the majority's decision, finding that almost all of Defendants' discovery and factual analysis would have been necessary for the state law claims, and reasoning that the only fees Mr. Fox

should have been required to pay were those incurred solely in defense of his federal claims. App. at 16a-18a.

REASONS FOR GRANTING THE PETITION

This Court should review this case for at least three reasons. First, and most significantly, eight of the twelve regional circuits have weighed in on the issue at hand and have reached disparate and confusing results. Second, resolution of this case will address a significant and ongoing national problem. Third, the Court of Appeals, and many of the other circuits, have decided this important federal question in a manner that conflicts with this Court's guiding precedent on the issue of fee-shifting to defendants under Section 1988.

I. A Significant And Entrenched Split Among Eight Circuits Is Creating Confusion And Leading To Irreconcilable Results.

The majority of regional circuits have grappled with the issue of fee-shifting to partially prevailing defendants under Section 1988. They have reached varying results, so that now whether a plaintiff in Mr. Fox's position is threatened with the prospect of paying his adversary's attorney's fees depends almost entirely on where he happens to reside.

The eight regional circuits to consider this issue have divided into four disparate camps:

- Two circuits adopt the rule that attorney's

fees may be awarded to partially prevailing defendants under Section 1988 for *any* frivolous claims, even where these claims are intertwined with the plaintiff's non-frivolous claims.

- Three circuits follow the rule that attorney's fees may be awarded to partially prevailing defendants under Section 1988 *only* where the plaintiff's frivolous and non-frivolous claims are distinct.

- Two circuits adopt a rule that attorney's fees may be awarded to partially prevailing defendants under Section 1988 *only* where the plaintiff's frivolous claim is a "significant" issue.

- One circuit follows a rule that attorney's fees may *never* be awarded to partially prevailing defendants under Section 1988 where the plaintiff has asserted at least one non-frivolous claim.

The first camp, consisting of the First Circuit and now, in this case, the Fifth Circuit, holds that attorney's fees may be awarded to partially prevailing defendants under Section 1988 for *any* frivolous claims, even where these claims are intertwined with the plaintiff's non-frivolous claims. *See* App. at 9a-12a; *Ward v. Hickey*, 996 F.2d 448, 455-56 (1st Cir. 1993). In *Ward*, the First Circuit found that the lower court erred in denying the defendant's request for attorney's fees due to the interrelatedness of the plaintiff's frivolous and non-

frivolous claims. 996 F.2d at 455. While recognizing that "[t]he standard for a civil rights defendant to receive fees is high to encourage legitimate civil rights claims," the court nonetheless reasoned that "a district court should not deny fees for defending frivolous claims merely because calculation would be difficult." *Id.* at 455-56. The Fifth Circuit cited this reasoning with approval in this case, noting that "'we are confident that the district court will be able properly to weigh and assess the amount of attorney's fees attributable exclusively to [a plaintiff's] frivolous . . . claim[s].'" App. at 11a-12a (citing *Quintana v. Jenne*, 414 F.3d 1306, 1312 (11th Cir. 2005)). However, as noted by dissenting Judge Southwick, the *Fox* majority approved the lower court's decision not to segregate fees between Mr. Fox's frivolous and non-frivolous claims because the claims were too interrelated. App. at 13a.

In contrast, the second camp—including the Second, Ninth, and Eleventh Circuits—holds that attorney's fees may be awarded to partially prevailing defendants *only* where the plaintiff's frivolous and non-frivolous claims are distinct. *See Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1062-64 (9th Cir. 2006); *Quintana*, 414 F.3d at 1311-12; *Colombrito v. Kelly*, 764 F.2d 122, 132 (2d Cir. 1985). In support of this determination, these courts have relied on this Court's decision in *Hensley*, "which instructs that claims involving a common core of facts, or related legal theories, should not be viewed as a series of discrete claims for purposes of awarding a prevailing plaintiff attorney's fees." *Tutor-Saliba*, 452 F.3d at 1063 (citing *Hensley*, 461 U.S. at 435); *see also Quintana*, 414 F.3d at 1311;

Colombrito, 764 F.2d at 132. The Ninth Circuit further reasoned that "the legislative history behind § 1988 demonstrates Congress' intent to promote vigorous private enforcement of civil rights, and permitting district courts to parse out frivolous claims from a set of interrelated claims may chill such enforcement." *Tutor-Saliba*, 452 F.3d at 1063 (citing S. REP. NO. 94-1011 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908); *see also Quintana*, 414 F.3d at 1312 (noting that allowing "a civil rights defendant [to] receive attorney's fees for an unsuccessful claim that is not frivolous . . . would frustrate the goal of Congress that the provisions of Title VII be enforced vigorously."). The Second Circuit has adopted a more pragmatic stance, reasoning that where the plaintiff's frivolous and non-frivolous claims were closely intertwined, evidence adduced by the plaintiff on its frivolous claim would be relevant to its non-frivolous claim, and thus attorney's fees should not be awarded. *Colombrito*, 764 F.2d at 132.

The third camp—consisting of the Fourth and Seventh Circuits—departs from the interrelatedness inquiry entirely, holding instead that partially prevailing defendants may only recover attorney's fees under Section 1988 where plaintiff's frivolous claim is a "significant" issue. *See Curry v. A.H. Robins Co.*, 775 F.2d 212, 219-21 (7th Cir. 1985); *Lotz Realty Co. v. United States Dep't of Hous. & Urban Dev.*, 717 F.2d 929, 931-32 (4th Cir. 1983). This language derives from this Court's decision in *Hensley*, which states that "'[p]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the

parties sought in bringing suit.'" *Curry*, 775 F.2d at 219 (quoting *Hensley*, 461 U.S. at 433). The Fourth and Seventh Circuits have adopted this language despite recognizing that different standards apply to defendants seeking fees under Section 1988. *See id.*; *Lotz*, 717 F.2d at 931. In addition, the Fourth Circuit has suggested that other considerations, such as "the deterrent effect of such an award against [plaintiff] and other future claimants," should impact a court's decision to award attorney's fees to partially prevailing defendants under Section 1988. *Lotz*, 717 F.2d at 932.

Standing alone from these courts is the fourth camp, consisting of the Sixth Circuit, which has firmly held that attorney's fees may *never* be awarded to defendants where the plaintiff has asserted at least one non-frivolous claim. *See Balmer v. HCA, Inc.*, 423 F.3d 606, 616-17 (6th Cir. 2005). In *Balmer*, the Sixth Circuit affirmed its holdings in two prior cases, both of which found "that it is an abuse of discretion to award attorneys' fees to a prevailing defendant where any part of the plaintiff's cause of action was not frivolous." *Id.* at 616-17 (citing *Haynie v. Ross Gear Div. of TRW, Inc.*, 799 F.2d 237, 242 (6th Cir. 1986); *Tarter v. Raybuck*, 742 F.2d 977, 987-88 (6th Cir. 1984)). The court so held despite finding that one of the plaintiff's claims was "completely without merit and 'frivolous, unreasonable, or without foundation.'" *Id.* at 617.[2]

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[2] Although *Balmer* addressed 42 U.S.C. § 2000e-5(k), a fee-shifting provision specific to Title VII, this Court has held that the same demanding standard applies under Section 1988, the

Given these disparate results, the time is ripe to grant *certiorari*. The split on this issue is well-developed, and the contours of the disagreement among the circuits will not appreciably change with future decisions, given that almost every circuit has considered this issue, and many have weighed the reasoning of other circuits prior to publishing their decisions.[3] The disarray among the circuits is particularly harmful given that Section 1988 governs fee-shifting in many of Congress's most important civil rights laws, including Sections 1981, 1982, 1983, 1985, and 1986. There is no reason the calculus undertaken by a civil rights plaintiff in Louisiana prior to bringing suit should differ from a similarly situated plaintiff in Ohio.

II. The Majority Rule Imposes Substantial Burdens On Civil Rights Plaintiffs, Undermining Important Federal Policies.

The issue decided by the Court of Appeals in this case is critical to the appropriate application of Section 1988 which, as this Court has found, is fundamental "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley*, 461 U.S. at 429 (quoting H.R. REP. NO. 94-1558, at 1 (1976)). The attorney's fees language at issue is essential to promoting Congress's plan for the protection of civil rights,

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fee-shifting statute governing civil rights actions. *See Hughes*, 449 U.S. at 14.

[3] *See* App. at 10a-12a; *Tutor-Saliba*, 452 F.3d at 1063-64; *Quintana*, 414 F.3d at 1312; *Curry*, 775 F.2d at 220.

workplace and gender nondiscrimination, and religious freedoms. *See* 42 U.S.C. § 1988(b).

Uniform rules governing attorney's fees, which impact the incentives and likelihood that plaintiffs will bring suit, are of critical national importance given that these plaintiffs are Congress's chosen enforcers of civil rights and nondiscrimination laws. As this Court has noted, "Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process." *City of Riverside*, 477 U.S. at 576. Many civil rights statutes were designed with the understanding "that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." *Newman*, 390 U.S. at 401. Fee awards aid this goal by facilitating the filing of civil rights lawsuits. *See City of Riverside*, 477 U.S. at 574-75.

The rule adopted by the Court of Appeals lowers the bar for Section 1988 defendants to recover fees in a number of ways. First, it provides that defendants may collect attorney's fees for defense of particular claims subject to Section 1988, despite the fact that the overall action may include related claims that are meritorious. Second, it provides that defendants may collect their full measure of attorney's fees for an action even if their defense effort is intertwined with other claims that have not been defeated. Third, it provides that defendants may collect their attorney's fees prior to the ultimate resolution of all claims in the underlying action, which means that a

Section 1988 defendant could disrupt a plaintiff's meritorious action with an attorney's fee request by virtue of premature resolution of a Section 1988 fee request (precisely the situation faced by Mr. Fox below). Finally, it improperly taxes voluntarily dismissed claims under Section 1983, effectively punishing a plaintiff for exercising good judgment.

As a consequence, the Court of Appeals' ruling creates burdens on prospective plaintiffs considering claims subject to Section 1988 through the increased chance that plaintiffs will be held liable for a defendant's attorney's fees. Indeed, under the rule adopted by the Court of Appeals, Mr. Fox would be better off not asserting a Section 1983 claim, despite the obvious merit in his overall lawsuit, due to the increased chance that he would be held liable for a defendant's attorney's fees as compared to the unlikelihood that he would be held liable for attorney's fees under his common law claims. Put differently, under the rule set forth by the Court of Appeals, Mr. Fox faces *greater* burdens to asserting his federal constitutional claims than the common law and other claims in his action, and consequently greater disincentive to bring these claims.

Such a result is contrary to congressional design. As this Court has recognized, lawsuits under Section 1983 and the other federal statutes governed by Section 1988 are crucial not only to redress individual civil rights violations, but, in the aggregate, "to advance the public interest by invoking the injunctive powers of the federal courts." *Newman*, 390 U.S. at 402. Civil rights cases afford courts an opportunity to take affirmative steps to

prevent continuing or future illegality, as well as to elaborate upon the substance of constitutional rights. A civil rights plaintiff serves "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.*

Though deterrence of frivolous lawsuits is a legitimate concern, this concern does not militate in favor of an expansive view of defendants' right to recover attorney's fees under Section 1988. Rather, creating disincentives for plaintiffs to sue under Section 1988-eligible statutes reduces the effectiveness of the carefully designed enforcement scheme established by Congress to remedy civil rights and other federal violations. Moreover, reducing the likelihood that a Section 1988-eligible claim will be brought may reduce the likelihood that meritorious actions in general may be brought, as resource-constrained plaintiffs may be unable to retain competent counsel without at least the possibility for a Section 1988 recovery at the end of a lawsuit. *See* S. REP. NO. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913.[4]

The Court of Appeals' rule also limits the flexibility of a civil rights plaintiff by applying

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[4] Many nonprofit and other legal service organizations rely on Section 1988 to fund their ongoing litigation and operational expenses. Burdening plaintiffs under Section 1988 could therefore have a deleterious impact on the market for public interest civil rights legal services overall. *See* Brief for the American Civil Liberties Union in *Watchtower Bible & Tract Soc'y of New York, Inc. v. De Jesus*, *available at* http://www.aclu.org/files/assets/2010-1-20-WatchtowervDeJesus.pdf, at 30 (last visited July 6, 2010).

Section 1988 to a voluntarily withdrawn claim, a finding that works at cross-purposes with a desire to limit frivolous litigation. No further purpose is served by assessing attorney's fees against the plaintiff because Congress did not intend Section 1988 to be used as a deterrent against plaintiffs in the first instance. Voluntary withdrawal of a claim subject to Section 1988 provides adequate protections for a defendant in and of itself. For example, in the context of Federal Rule of Civil Procedure 11 sanctions, a party need simply withdraw a claim—formally or informally—during the safe harbor period of Rule 11(c)(2) to avoid monetary or other sanctions under the Rule.[5] Similarly, a plaintiff should not be penalized for exercising the judgment to voluntarily dismiss or withdraw a Section 1983 claim from a meritorious action, particularly since penalizing such actions creates incentives for plaintiffs to keep claims they would otherwise retract in order to avoid premature imposition of attorney's fees under the Court of Appeals' rule.

Certiorari should be granted to ensure that Section 1988 is applied consistent with congressional design. Congress intended that Section 1988 be applied as a narrow exception to the "American rule" where each party bears its own costs, as a consequence of the high social utility served by lawsuits alleging claims under Section 1988-eligible

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[5] In a similar vein, a voluntarily dismissed claim does not "count" for "prevailing party" purposes under the California statutory attorney's fees provision governing awards for claims arising under a contract. *See* Cal. Civil Code 1717(b)(2).

statutes. The Court of Appeals' rule, which burdens rather than facilitates a plaintiff's Section 1988-eligible claims, is contrary to this congressional design and should therefore be closely scrutinized by this Court, and ultimately rejected.

III. The Court of Appeals And Other Circuits To Reach Similar Conclusions Have Misapplied This Court's Precedent On Fee-Shifting Under Section 1988.

The Court of Appeals awarded attorney's fees to the Defendants in the instant matter too easily and without regard to the overall merit of Mr. Fox's action. In doing so, it misapplied this Court's precedent as set forth in both *Hensley* and *Christiansburg*.

First, the Court of Appeals misapplied this Court's precedent in *Hensley* when it failed to consider Defendants' overall success in Mr. Fox's suit prior to awarding attorney's fees. *Hensley* involved a class action lawsuit alleging constitutional and federal statutory claims on behalf of a class of institutionalized persons in Missouri. *Hensley*, 461 U.S. at 426-27. The *Hensley* plaintiffs were found to be the prevailing party under Section 1988 based on their success in obtaining some measure of their claimed relief. *Id.* at 428. However, the district court did not analyze their success against the reasonableness of the attorney's fees they requested. *Id.*

This Court remanded the case for further

analysis of the attorney's fee question. *Id.* at 440. In so doing, the Court found that when a plaintiff has only achieved success on some of the claims in a civil rights lawsuit, and these claims are related to other, unsuccessful claims, courts should focus on "the degree of success obtained" by the plaintiff in awarding attorney's fees. *Id.* at 436. As the Court observed,

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. *Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.*

Id. at 435 (emphasis added).

Because the Court of Appeals here did not analyze defendants' overall success in the suit—and could not have, given that Mr. Fox's remaining claims against Defendants are still pending—the Court of Appeals misapplied *Hensley*. Mr. Fox's remaining claims arise from the same nucleus of operative facts as his dismissed Section 1983 claim, and are therefore intertwined with this claim. In fact, the district court acknowledged as much, but still awarded the Defendants attorney's fees for

substantially all of their efforts in the litigation below and did not undertake any effort to segregate litigation expenses associated with Mr. Fox's non-Section 1983 claims. App. at 28a-30a, 32a-33a. The fact that Defendants still face significant liabilities under these related claims should have weighed into the attorney's fees calculus undertaken by the district court and the Court of Appeals.[6]

Second, the Court of Appeals misapplied this Court's precedent in *Christiansburg* in finding that Mr. Fox's claims were frivolous. In *Christiansburg*, this Court considered a lawsuit brought by the Equal Employment Opportunity Commission (EEOC) on behalf of a claimant under the auspices of a then-recently amended Section 14 of Title VII, which permitted it to prosecute "charges pending with the Commission" despite the fact that the claimant's charge was not pending at the time of the amendment authorizing the EEOC's suit. *Christiansburg*, 434 U.S. at 414. This claim was defeated on summary judgment on the undisputed basis that the claimant's charge was no longer "pending" at the time suit was brought. *Id.*

In rejecting the defendant's claim for attorney's fees, this Court emphasized that the attorney's fees language in Section 706(k) of Title VII applied asymmetrically to plaintiffs and defendants, and that defendants should only recover attorney's fees

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[6] *Hensley*'s requirement that overall success be considered militates in favor of only making attorney's fees determinations after resolution of all claims in an action involving Section 1988-eligible claims.

in the most exceptional cases, where "plaintiff's action was frivolous, unreasonable, or without foundation." *Id.* at 421. The Court justified this strict standard by noting that when a civil rights plaintiff prevails, the defendant has been adjudged "a violator of federal law." *Id.* at 418-19. By contrast, when a defendant prevails, the unsuccessful plaintiff ordinarily has not committed any legal wrong. *Id.*

The Court went on to caution against the application of "hindsight logic" in determining frivolousness:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Id. at 422-23. Thus, even in a case where the statutory language enabling the Title VII lawsuit at issue expressly applied only to then-pending claims, which undisputedly did not apply to the claim at issue, this Court found that the EEOC's claims were not frivolous. *Id.* at 423-24. This is an illustration of the high bar that the Court of Appeals in this case failed to abide by in finding Mr. Fox's Section 1983 claims frivolous.

A similar illustration was provided by the Court in the Section 1983 context in *Hughes v. Rowe*. There, the *pro se* petitioner alleged constitutional violations based on his alleged placement in a segregation cell without a hearing. *Hughes*, 449 U.S. at 8. The petitioner's claim was dismissed on the pleadings. *Id.* This Court reversed some aspects of the district court's dismissal and rejected defendant's request for attorney's fees against the petitioner, despite the fact that the defendant had prevailed on the pleadings and only sought $400 in fees. *Id.* at 6, 12-14. The Court held that the petitioner's claim was not frivolous given that his constitutional claim had arguable merit, some aspects of it survived a motion on the pleadings, and dismissal was obtained only after a detailed scrutiny by opposing counsel and the district court. *Id.* at 15-16 ("Allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or 'without foundation' as required by *Christiansburg*.").

The Court of Appeals' decision violated these precepts. Unlike *Christiansburg* and *Hughes*, Mr. Fox's claim proceeded well beyond the pleadings

stage and into discovery. App. at 3a. Only after this discovery revealed the deficiencies in Mr. Fox's federal claims did Defendants challenge these assertions, at which time Mr. Fox voluntarily withdrew the claims. App. at 3a-4a. Even setting aside the fact that Mr. Fox also alleged undoubtedly meritorious claims in addition to his Section 1983 claim, this record is sufficient to avoid a showing of frivolousness.

CONCLUSION

Certiorari should be granted to resolve the deep and entrenched conflict that has arisen among the circuit courts regarding the ability of a partially prevailing defendant to recoup attorney's fees under Section 1988. Review is also warranted to address the misapplication of this Court's precedent on the issue. As this is a significant national issue that will not resolve itself without this Court's intervention, the petition for writ of certiorari should be granted.

Respectfully submitted,

E. Joshua Rosenkranz
Counsel of Record
Lisa T. Simpson
Siddhartha M. Venkatesan
Rebecca L. Mroz
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

J. Steven Broussard
Randall E. Hart
Broussard & Hart, LLC
1301 Common Street
Lake Charles, LA 70601
(337) 439-2450

Counsel for Petitioner Ricky D. Fox

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