No. 12-168

IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN LEFEMINE
D/B/A COLUMBIA CHRISTIANS FOR LIFE,

Petitioner,

v.

DAN WIDEMAN, MIKE FREDERICK, LONNIE SMITH,
BRANDON STRICKLAND AND TONY DAVIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATED COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Petitioner Steven C. Lefemine brought this action pursuant to 42 U.S.C. § 1983 alleging that various employees of the Greenwood County Sheriff's Office violated his First Amendment rights during an anti-abortion protest occurring on a busy public roadway in Greenwood County, South Carolina on November 3, 2005. The Petitioner was asked by sheriff's deputies to remove large, graphic signs depicting aborted fetuses.

Following the completion of discovery, the parties filed cross-motions for summary judgment. By order filed July 8, 2010, United States District Judge Henry M. Herlong, Jr. granted in part and denied in part those cross-motions. In denying the Petitioner's claim for nominal damages, the district court ruled that the individual officers were each entitled to qualified immunity. Judge Herlong determined that "[i]n November 2005, there was no clearly established law provided by the United States Court of Appeals for the Fourth Circuit regarding the extent to which government officials may proscribe the use of photographs of aborted fetuses in a traditional public forum." (App. 46-47). The district court ruled that "under the specific facts of this case, it was not unreasonable for Defendants to believe that their prohibition was lawful." (App. 47).

The district court did, however, grant limited injunctive relief to the Petitioner. Specifically, he enjoined the Respondents "from engaging in content-based restrictions on Plaintiff's display of graphic signs without narrowly tailoring its restriction to serve a compelling state interest." (App. 50). In effect, the district court ordered the Respondents to comply with the law in the future. Finally, the district court denied the Petitioner's prayer for attorney's fees under 42 U.S.C. § 1988.

The Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. A three-judge panel of that court affirmed on all issues, including the ruling that the Respondents are entitled to qualified immunity.

In addition to the ruling on the merits, the Petitioner also appealed the denial of attorney's fees under § 1988. The Fourth Circuit determined that the district court did not abuse its discretion in denying an award of attorney's fees. The circuit court noted that the injunction was limited to an order that the Respondents comply with the law in the future -- law which the court had concluded was not clearly established in 2005. The Fourth Circuit ultimately concluded that the Petitioner did not qualify as a "prevailing party" because "the outcome of this litigation has not altered the relative positions of the parties." (App. 23).

The Petitioner thereafter filed a petition for rehearing and rehearing *en banc*. That petition was denied. No judge requested a poll on the petition for rehearing *en banc*. (App. 8).

REASONS FOR DENYING THE PETITION

I. Clear precedent from the United State Supreme Court provides that a civil rights plaintiff for whom relief was denied on an immunity defense is not entitled to recover attorney's fees under 42 U.S.C. § 1988.

As his first reason for granting a writ of certiorari, the Petitioner argues that the Fourth Circuit's decision will deny "untold numbers of civil rights plaintiffs of attorney's fees that Congress intended them to have." In analyzing the Petitioner's argument, which is not an argument made in the circuit court below, it appears that the Petitioner is arguing that plaintiffs whose § 1983 claims are denied on the basis of qualified immunity should still be deemed a "prevailing party" entitled to an award of attorney's fees under 42 U.S.C. § 1988.

The Petitioner insists that the Fourth Circuit has promulgated a "new rule" denying attorney's fees to plaintiffs who lose their civil rights claim on a qualified immunity defense. However, the Petitioner not surprisingly fails to cite a single decision from a district court, circuit court or this Court that actually awarded attorney's fees under § 1988 to a plaintiff that lost on a qualified immunity defense.

More importantly, the Petitioner has disregarded key precedent from this Court on this very question. In particular, in *Kentucky v. Graham*, 473 U.S. 159 (1985), this Court held that "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either *because of legal immunity* or on the merits, § 1988 does not authorize a fee award against that defendant." 473 U.S. at 165. (Emphasis added). Similarly, in *Supreme Court of Virginia v. Consumers Union of United*

States, Inc., 446 U.S. 719 (1980), this Court vacated an award of attorney's fees under § 1988 after ruling that the defendants were entitled to absolute legislative immunity. The Court found nothing "in the legislative history of the [Civil Rights Attorney's Fees Awards Act of 1976] to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity." 446 U.S. at 738. *See*, *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 762 (1989) ("Our cases have emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes"). *See also, Farrar v. Hobby*, 506 U.S. 103, 109 (1992).

Therefore, because the Respondents were found not liable to Petitioner on the basis of qualified immunity, that provided no basis for an award of attorney's fees under § 1988. The Petitioner's suggestion that the Fourth Circuit adopted a "new rule" to that effect is clearly incorrect and does not warrant the issuance of a writ of certiorari.

II. The Fourth Circuit applied the correct standard in concluding that the Petitioner does not qualify as a "prevailing party."

The Petitioner contends that the Fourth Circuit applied an incorrect standard for determining a "prevailing party" and specifically erred in relying on its earlier decision in *People Helpers Foundation, Inc. v. City of Richmond*, 12 F.3d 1321 (4th Cir. 1993). The Petitioner contends that the Fourth Circuit failed to apply the standard enunciated in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001).

The Petitioner's position is incorrect for several reasons. First, the Fourth Circuit applied the correct standard in concluding that the Petitioner does not qualify as a "prevailing

party." Second, the Fourth Circuit's reliance on *People Helpers Foundation* was not in error. Third, the Fourth Circuit did not adopt a new "prevailing party" test inconsistent with this Court's precedent.

This Court has addressed the meaning of the term "prevailing party" in a series of cases. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), this Court held that "plaintiffs 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." 461 U.S. at 433. Later, in *Hewitt v. Helms*, 482 U.S. 755 (1987), the Court required the plaintiff to prove "the settling of some dispute which affects the behavior of the defendant towards the plaintiff" in order to recover attorney's fees. 482 U.S. at 761. Then, in *Rhodes v. Stewart*, 488 U.S. 1 (1988), the Court explained that "[a] declaratory judgment ... is no different from any other judgment. It will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff." 488 U.S. at 4.

Next, in *Texas State Teachers Association v. Garland Industrial School District*, 489 U.S. 782 (1989), the Court "synthesized the teachings of *Hewitt* and *Rhodes*." *See*, *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). The Court held that "to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." 489 U.S. at 792. "The touchstone of the prevailing party inquiry must be the *material* alteration of the legal relationship of the parties." 489 U.S. at 792-93. (Emphasis added). The Court explained that "a technical victory may be so insignificant ... as to be insufficient to support prevailing party status." 489 U.S. at 792.

Later, in *Farrar, supra*, this Court reaffirmed the necessity for the plaintiff to demonstrate a material alteration

of the legal relationship of the parties. The *Farrar* Court explained that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. at 111-12.

The Petitioner suggests that *Buckhannon*, *supra*, made an additional revision or modification to the "prevailing party" standard – which is a misreading of that case. In *Buckhannon*, this Court addressed whether the so-called "catalyst theory" supports "prevailing party" status. In rejecting the "catalyst theory," the Court held that a "prevailing party" does not include "a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." 532 U.S. at 600. The Court did not explicitly or implicitly make any substantive change to the "prevailing party" standard with its decision in *Buckhannon*, other than to reject the "catalyst theory" and require the prevailing party to have obtained a judgment on the merits or a court-ordered consent decree. Certainly, the Court did not alter, revise or modify its prior holdings including the "material alteration" requirement as set forth in *Texas State Teachers Association v. Garland Industrial School District*, *supra*.

Nonetheless, the Petitioner contends that this Court in *Buckhannon* did alter the "prevailing party" test and ruled that the "material alteration" requirement is satisfied in all instances by mere proof that the plaintiff obtained a judgment on the merits or a court-ordered consent decree. The Petitioner points to the following language from *Buckhannon*: "These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." 532 U.S. at 604. However, the Petitioner misreads the import of this language.

The Court does not suggest – let alone hold – that in every instance where there is a judgment or court-ordered consent decree then there automatically *must be* a "material alteration" per *Texas State Teachers Association*. In other words, the Court does not limit any inquiry as to the existence of a "material alteration." Instead, it is quite evident that the Court held in *Buckhannon* only that the "material alteration" – if any – must result from a judgment on the merits or a court-ordered consent decree and may not arise from a voluntary, non-court-sanctioned change in conduct by the defendant. For that was the issue that this Court was specifically addressing in *Buckhannon* and *not* any modification of the "prevailing party" test set forth in *Texas State Teachers Association*.

In sum, contrary to the Petitioner's suggestion, *Buckhannon* does not prevent a court from evaluating whether a court order effects a "*material* alteration" of the legal relationship of the parties. In fact, in *Sole v. Wyner*, 551 U.S. 74 (2007), decided post-*Buckhannon*, this Court continued to cite to *Texas State Teachers Association* and its "material alteration" requirement as the "touchstone of the prevailing party inquiry." 551 U.S. at 82. Thus, it was appropriate for the Fourth Circuit in the case at bar to evaluate whether the district court order effected a "material alteration" of the legal relationship of the parties. Likewise, it was appropriate for the Fourth Circuit to cite to the *People Helpers Foundation* case which in turn applied the test articulated in *Texas State Teachers Association*, *supra*. Contrary to the Petitioner's argument, the Fourth Circuit did not adopt a new prevailing party test inconsistent with this Court's precedent. Instead, the Fourth Circuit applied the appropriate standard and concluded that the district court had simply "ordered Defendants to comply with the law and safeguard Plaintiff's constitutional rights in the future" which in the court's judgment was not a material alteration of the legal relationship of the parties. (App. 22-23). Thus, the issuance of a writ of certiorari is not warranted on this issue.

III. The Fourth Circuit's decision does not create an intra-circuit split or a circuit split on the "prevailing party" test or the applicable standard of review.

As a corollary to its previous argument, the Petitioner insists that Fourth Circuit's decision on the "prevailing party" test creates a circuit split and an intra-circuit split, both of which arguments lack merit.

As for an intra-circuit split, the Petitioner cites to five Fourth Circuit decisions in which he claims that Fourth Circuit applied a different "prevailing party" test than in the present case. That is incorrect. In not one of those cases did the Fourth Circuit abandon the "material alteration" test articulated in *Texas State Teachers Association*, *supra,* or conclude that that test is satisfied by showing only that the plaintiff obtained a judgment on the merits or a court-ordered consent decree in his favor. The necessity of a "material alteration" is described in each of those cases, and three of the cases specifically cite to *Texas State Teachers Association*, *supra*, by name.

The same is true for the alleged circuit split. The Petitioner has not shown that the Fourth Circuit applied some "new" test. Instead, the Fourth Circuit has applied the "material alteration" test from *Texas State Teachers Association*, *supra*, which continues to be the applicable test even post-*Buckhannon*. That test allows the court to determine whether the court order or consent decree effects a "material alteration" of the legal relationship of the parties. As mentioned above, this Court as well has found that the "material alteration" test is alive and well post-*Buckhannon*. *See*, *Sole v. Wyner*, 551 U.S. 74 (2007).

In addition to the "prevailing party" test, the Petitioner also claims an intra-circuit and circuit split with regard to the applicable standard of review. The Petitioner's position on this issue also lacks merit.

The Fourth Circuit has previously held that "[t]he determination of a party as a prevailing party ... is a legal determination which we review de novo." *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 274 (4th Cir. 2002). *See also*, *Grissom v. The Mills Corp.*, 549 F.3d 313 (4th Cir. 2008); *Goldstein v. Moatz*, 445 F.3d 747 (4th Cir. 2006). In the present case, the Fourth Circuit did not overturn or reverse that authority. In effect, the circuit court did not change the standard of review.

Instead, it is evident that the Fourth Circuit applied the standard of review urged by the Petitioner. In his brief in the circuit court, the Petitioner articulated his first issue on appeal as follows: "Under controlling Supreme Court precedent, did the court below abuse its discretion when it failed to award Mr. Lefemine attorney's fees after it awarded him permanent injunctive relief against the Sheriff?" In that same brief, the Petitioner explained the applicable standard of review as follows: "this Court reviews a district court's failure to award attorney's fees for abuse of discretion." The Petitioner never argued that a *de novo* standard applied to any attorney's fees issue. The Petitioner's position was then re-stated by the Fourth Circuit in its decision, where the court explained the issue on appeal as follows: "Plaintiff argues that the district court *abused its discretion* by failing to award it attorney's fees." (App. 21). (Emphasis added). It is disingenuous for the Petitioner to now claim reversible error where the court below applied the standard of review actually urged by the Petitioner. The Petitioner should be judicially estopped from asserting a contrary position on appeal. *See*, *Pegram v. Herdrich*, 530 U.S. 211, 227, n.8 (2000) (judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase").

In fact, it is likely that the Fourth Circuit applied an abuse of discretion standard only because it was urged by the Petitioner. Certainly, the Fourth Circuit decision cannot be read as reversing prior authority in the circuit or authority from other circuits where the circuit court does not specifically state its intent to change or modify existing precedent. Moreover, it is well settled that a three-judge panel has no authority to overturn the precedent of the circuit. *See*, *United States v. Guglielmi*, 819 F.2d 451, 457 (4th Cir. 1987) (only an *en banc* court, not a subsequent panel, has authority to overturn a previous panel's published decision).

Finally, the Petitioner cannot show anything more than harmless error. The Fourth Circuit's decision in this case reflects that the panel would have found that the Petitioner failed to satisfy the "material alteration" test even under a *de novo* standard. Significantly, the circuit court has already stated that the district court's decision was not based on "mistaken legal principles." (App. 23). That is another way of saying that the law was correctly applied – and that satisfies a *de novo* standard of review.

In short, the Fourth Circuit's decision in this case may not be read as adopting a new standard of review for a "prevailing party" inquiry. Existing Fourth Circuit precedent applying a *de novo* standard remains unchanged by this decision. No circuit split has been created. Consequently, there is no basis for the issuance of a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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