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, and TOWN OF VINTON,

Respondents.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

42 U.S.C. § 1988 authorizes courts to award reasonable attorneys' fees to prevailing parties in civil rights litigation. This Court has held that when the defendant is the prevailing party, fees may not be awarded unless the plaintiff's action was vexatious, frivolous, or brought to harass or embarrass the defendant. Petitioner Ricky D. Fox filed a lawsuit alleging various state common law torts, as well as a federal civil rights claim arising from the same facts. He voluntarily dismissed his civil rights claim and continued to litigate his state tort claims. A magistrate ordered him to pay all attorneys' fees incurred by Defendants for the three-year life span of the case. The questions presented are:

1. May a court award attorneys' fees to a defendant under § 1988 based on a voluntary dismissal of one claim in an action where the defendants must still defend against non-frivolous claims that are factually intertwined?

2. May a court award defendants all of the attorneys' fees they incurred in an action under § 1988 without any effort to isolate the fees attributable to the single dismissed claim?

PARTIES TO THE PROCEEDINGS BELOW

Respondent Billy Ray Vice, who was sued in both his official and his individual capacities, passed away on August 26, 2010, during the pendency of this action. His name remains in the caption because no representative has come forward as yet to substitute as a party in either capacity. Whether or not a party enters the case to substitute, this case remains alive because Petitioner still owes fees to the Town of Vinton.

Troy Cary, a Defendant in the underlying case, was not granted fees because he failed to present any evidence of attorneys' fees incurred. He did not appear before the court of appeals. His name has therefore been removed from the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES, RULES & LEGISLATIVE MATERIALS

STATE & LOCAL STATUTES

MISCELLANEOUS

BRIEF FOR PETITIONER

OPINIONS BELOW[1]

The opinions of Magistrate Judges Alonzo P. Wilson and Kathleen Kay of the District Court for the Western District of Louisiana are reprinted at P.A. 35a-40a and 19a-34a, respectively. There is no district court opinion because the parties 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); Fed. R. Civ. Pro. 73(c). The opinion of the U.S. Court of Appeals for the Fifth Circuit is published and reported at 594 F.3d 423 (5th Cir. 2010), and reprinted at P.A. la-18a. The order of the court of appeals denying rehearing en banc is reprinted at P.A. 41a-42a.

JURISDICTION

The court of appeals entered judgment on September 21, 2008, and denied rehearing en banc on April 16, 2010. The district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1441. The jurisdiction of the court of appeals was based on 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] The Joint Appendix and Supplemental Joint Appendix are cited as "J.A." and "S.J.A.," respectively. The Cert. Petition and Petition Appendix are cited as "Pet'n" and "P.A.," and respectively. This is an R-rated story. Expletives and slurs throughout the record have been redacted in the interest of decorum.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b), 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. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. §2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 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

The plot of this case reads like something out of Grisham. But the twist is pure Kafka.

The plot: Retired State Trooper Fox runs to unseat the corrupt Chief of Police named Vice. The Chief unleashes a criminal plot to intimidate and humiliate Mr. Fox into abandoning the race. The Chief uses his office to get dirt from a sister law enforcement agency under the guise of "exchanging intel." J.A. 323. He sends an extortionate letter to Mr. Fox threatening to publish gross distortions of the "intel" he has collected if Mr. Fox does not abandon the race. When that does not work, he facilitates the release of a jailed crack dealer, and directs him to fake an angry public confrontation with Mr. Fox and file a criminal complaint falsely accusing Mr. Fox of despicable racial slurs. Just when things are looking bad for our hero, the FBI swarms in. Chief Vice is convicted of extortion, and Mr. Fox becomes the new Police Chief.

Now the twist: Mr. Fox decides to sue the Chief and the town. His lawyers tell him he has a claim for defamation, extortion, and intentional infliction of emotional distress. They are indisputably correct. They also tell him he has a civil rights claim based on the Chief's efforts to prevent him from exercising his First Amendment right to run for public office, and they raise that in the complaint as well. Defendants do not challenge Mr. Fox's complaint nor any of the claims raised in it. In fact, they invoke the

federal claim as the basis for removing the case from state court (where Mr. Fox chose to file it) to federal court.

After discovery, Mr. Fox's lawyers voluntarily drop just the civil rights claim. The state law claims all remain intact and are remanded to state court where the litigation began. A year later a new magistrate judge—who had had nothing to do with the case—finds that the federal claim included in Mr. Fox's complaint almost three years earlier is "without merit." P.A. 27a.

The magistrate does not sanction counsel. Instead, she orders Mr. Fox himself to pay attorneys' fees to the defendants. So now, the victim has to pay the convicted extortionist. Worse yet, Mr. Fox does not have to pay just *some* of his adversaries' fees. This lifelong public servant must pay every penny charged by his tormenters' lawyers—and the town's lawyers—for all their work while the rest of his claims are litigated in state court. Chief Vice's criminal plan was foiled, but he is on the verge of ruining Mr. Fox just the same.

This Court has held that courts may not award any fees to a defendant in a civil rights case unless the suit is frivolous or vexatious. The central question in this case is how this rule applies where the dismissed claim is factually interwoven with surviving claims. Here, the civil rights claim did not add any appreciable burden to the defense of the case; to the contrary, the original magistrate overseeing the action explicitly found that "[a]ny trial preparation, legal research, and discovery" involved to date "may

be used by the parties in the state court proceedings." P.A. 40a.

Under these circumstances, courts should not impose crushing penalties on the client. When a client conveys truthful factual allegations to his lawyers, and those allegations plainly support a claim for relief, the client should not be punished for lacking the sophistication, education, and confidence to direct his lawyers not to include a civil rights claim in the complaint.

STATEMENT OF FACTS

Police Chief Vice Launches a Criminal Plot to Interfere with Mr. Fox's Run for Public Office

Ricky Fox was a Marine Corps veteran who had served the State of Louisiana as a state trooper for 25 years when he retired in 2005. Where his fellow retirees might while away their twilight years watching reruns or poring over a stamp collection, Mr. Fox opted to rededicate himself to public service. In early 2005, he announced his plan to run for Police Chief of his hometown, the Town of Vinton, Louisiana. P.A. 2a.

Incumbent Police Chief Billy Ray Vice did not like that plan one bit. Chief Vice had been the owner of an auto parts store for nearly 25 years and had had no police experience when his buddy, the mayor, appointed him to complete the last six months of a term vacated by the previous chief. J.A. 394, 429-30. By his own admission, he "wasn't well informed in law enforcement." J.A. 432. Chief Vice had run for Police Chief once before and lost, J.A. 433, and he was not prepared to leave his fate in the hands of the

town's electorate again, especially against an opponent with Mr. Fox's record and experience, J.A. 324-26. So Chief Vice hatched a plot—using police personnel and police department resources—directed at intimidating and humiliating Mr. Fox into abandoning his campaign.

Chief Vice started with extortion and then continued by scheming with one of his officers to manufacture a highly explosive criminal complaint. Chief Vice could not have achieved either without abusing the power vested in him by the town. While some of the plot's details are disputed, there is no dispute that ample evidence supports the following narrative.

The Extortion Plot. The first step in the extortion plot was to dig up dirt on Mr. Fox. Chief Vice boasted to one of his officers that he "could have Ricky Fox crucified with one telephone call." J.A. 177. Chief Vice made that call (actually, he needed several) to State Police Commander Ken Delcambre, who had been Mr. Fox's supervisor when Mr. Fox was a state trooper. J.A. 318. Chief Vice was a complete stranger to the Commander. J.A. 319. He identified himself as the Chief of Police of Vinton, and asked the Commander for "any information about any of Ricky Fox's wrongdoing." J.A. 320. Playing on his official capacity, Chief Vice convinced the Commander to share information as though they were "exchanging intel." J.A. 323.

It never dawned on the Commander that Chief Vice planned to use that intel as the basis for a criminal extortion plot. *Id.* Accordingly, after several pestering calls from Chief Vice, the Commander re-

counted whatever he could recall that might conceivably be cast in a negative light. J.A. 321-23.

Chief Vice took that information and liberally embellished every tidbit into a grotesque distortion of the truth. He then incorporated the smear into a threatening letter that he sent Mr. Fox in January 2005. J.A. 349. The letter began:

> MR FOX
>
> WE ARE GLAD THAT YOU ARE FINALLY GIVING US THE OPORTUNITY [SIC] TO PAY YOU BACK FOR SOME OF THE THINGS THAT YOU HAVE DONE TO SOME OF YOUR FELLOW TROOPERS OVER THE PAST YEARS. EACH WEEK WE ARE GOING TO PUT AN[] ADD [SIC] IN YOUR VINTON NEWSPAPER ….

J.A. 33. The letter then threatened that the weekly ad would report to the public an outrageously defamatory statement along the lines of "CITIZENS OF VINTON DID YOU KNOW THAT RICKY FOX SHOT A BLACK MAN IN THE BACK WITH A SHOT GUN" even though he "[K]NEW THEY [sic] HAD NO GUN[?]" J.A. 34. The letter listed seven other accusations that voters would want to know: Grand theft. Perjury. Insurance fraud. Police intimidation. Racism. Sexual harassment. Adultery. The letter continued:

> WE JUST THOUGHT WE WOULD GIVE YOU A LITTLTASTE [SIC] OF WHAT WE GOT[.] WE WILL PROBABLY SEND A COPY OF THIS TO EVERYONE THAT SUPPORTS YOU[.] WE DON'T THINK IT WILL DO ANY GOOD TO SEND THIS LETTER OUT UNTILL [SIC] AFTER YOU START RUNNING. I KNOW ALL THE LOCAL CHURCHES AND WOMENS GROUP [SIC] AND OTHER POLITIANS [SIC] SUCH AS THE

> CHIEF, MAYOR, AND ALDERMAN WOULD LIKE A COPY.

J.A. 35-36.

Chief Vice did not sign the letter. He sent it anonymously—but obviously tried to create the impression that it came from Mr. Fox's former colleagues in state law enforcement.

Chief Vice immediately tried to leak the letter to the press in the hope of getting coverage that would leave Mr. Fox's reputation in tatters. J.A. 232-35, 288-89. The press would not go near the letter nor the incendiary charges it contained. J.A. 470.

The Trumped-Up Complaint. Mr. Fox took the letter seriously enough to hand it over to the Federal Bureau of Investigation, but gave no sign of giving in to its cowardly and anonymous threats. So Chief Vice moved on to Plan B: He conspired with one of his officers to manufacture an equally outrageous criminal charge designed to ruin Mr. Fox's reputation in the town he and his family had lived in for 25 years. The scheme was as simple as it was sinister: Recruit a vulnerable confederate to instigate a sham confrontation before a large crowd, coach him to feign outrage and indignation (as loudly as possible), and then manufacture a criminal complaint falsely accusing Mr. Fox of flinging around racially charged threats. Chief Vice expected that the ensuing rumors—however false—would destroy Mr. Fox's campaign and guarantee Chief Vice the office he was so desperate to keep. All he needed was a co-conspirator, a shill, a public setting, and an angry confrontation.

Chief Vice found a willing co-conspirator in one of his officers, Troy Cary, who had no interest in seeing the police department run more professionally under a new Chief Fox. J.A. 279. Officer Cary, who, like Chief Vice, had only a few months' experience with the Vinton Police Department, knew that he would have to reapply for his position—along with everyone else—if Mr. Fox were elected, and he knew he had little chance of keeping his job in a new administration. J.A. 390. Officer Cary was content with the lax administration of the inexperienced Chief Vice, whom he could control. J.A. 279. In fact, Chief Vice promoted Officer Cary to the rank of detective after demoting one of Mr. Fox's friends and supporters. J.A. 391-92, 451. So, Chief Vice had his motivated co-conspirator.

Next, the shill. Chief Vice had a jail full of compliant subjects at his disposal. He chose a 23-year-old crack dealer named Joe Budwine whom he and Vinton Police Officer Arthur Phillips had arrested less than a month earlier for dealing crack. J.A. 260. Chief Vice approached him with an offer he couldn't refuse. According to Officer Phillips, Chief Vice committed to "try to get charges dropped against Joe Budwine if Joe Budwine would make a [false] complaint against Ricky Fox." J.A. 274. Mr. Budwine confirmed that Chief Vice promised to "take care of" him and even to "help [him] in so many ways" in the future "if [he] [got] in trouble" J.A. 252; *see* J.A. 249, 256, 258-59. But there was a problem: Mr. Budwine was in jail. That is, until his bond was mysteriously reduced from $240,000 to less than 1% of that amount, $2,300. J.A. 227-30, 261, 275, 353-55. Problem solved, shill ready.

Finding a public setting and manufacturing a confrontation were easy by comparison. Mr. Fox regularly cheered on his son's former high school basketball team. So there was little doubt he would be at the last game of the season. Mr. Budwine showed up 15 minutes before the end of the game. J.A. 338, 370. Because the team was down by 40 points at the end of its disastrous 0-for-31 season, J.A. 338, 382-83, all but a handful of the fans had dispersed, J.A. 337. But Mr. Fox stayed to the bitter end. He was sitting in a sea of empty bleachers with his wife and two friends, a librarian and a minister, when Mr. Budwine appeared. J.A. 337-38. Of all the gym seats in all the bleachers to choose from, Mr. Budwine walked up to them. He sat in front of Mr. Fox and immediately began shouting profanities. J.A. 339. Mr. Fox chided, "don't talk so loud." *Id*. Mr. Budwine then jumped up from his seat, ranting and raving. J.A. 340. Mr. Budwine raised such a ruckus that the high school principal escorted him from the gym and banned him from returning. *Id*. Once outside, Mr. Budwine continued shouting, "[I'll] get you, Ricky Fox, and your son then too." J.A. 341. Things were going according to plan: It was a public spectacle. The set-up was a success.

Mr. Fox called the Vinton Police Department to log the incident. J.A. 343. But the police already knew about the episode firsthand. Officer Cary had appeared at the gym—on-duty and in uniform—shortly before Mr. Budwine showed up. J.A. 340, 342. He stood guard at the gym entrance with the only other Vinton Police Officer on duty that night. J.A. 400-03. This was the first time Officer Cary had ever been to a game. J.A. 399. He stood idly by

throughout Mr. Budwine's performance. J.A. 402-03. He left just after Mr. Budwine was ejected. J.A. 343.

Now, to complete the plan. A couple of days after the incident, Chief Vice directed Officer Phillips to haul Mr. Budwine into the Vinton Police Station. J.A. 282-83. Although Officer Phillips thought it odd, J.A. 282, he followed the order. Of course, Mr. Budwine knew what he was being taken in for: to file a complaint against Mr. Fox. J.A. 250-51, 284. Meanwhile, Chief Vice called Officer Cary back to the station so that he—and not Officer Phillips—would take Mr. Budwine's complaint. J.A. 404, 461-62. They were ready for Mr. Budwine when he arrived and declared their intention to do whatever it took to keep "this son-of-a-b**ch out of office." J.A. 285.

Mr. Budwine began as best he could to write out his complaint. But it was not good enough. So Officer Cary snatched it away and tore it up. J.A. 285-86, 294. He gave Mr. Budwine a clean sheet of paper and proceeded to dictate a better complaint. J.A. 294. Mr. Budwine dutifully transcribed the story as his own. J.A. 294-95. In it, he alleged that he had overheard Mr. Fox loudly "tell some other man" how the world would change "if [Mr. Fox] got in office." According to the complaint, Mr. Fox vowed that "([n]i***rs) thought it was bad back then[;] this time [they] will not be able to shop at the local food stores here in Vinton." S.J.A. 6. According to the fabricated account, an astonished Mr. Budwine interrupted Mr. Fox and "we got to arguing." *Id.* Mr. Fox threatened "he would Remove [sic] me from the premises." *Id.* Armed with Mr. Budwine's false

narrative, Officer Cary filled out an Incident Report accusing Mr. Fox of "Disturbing the Peace by Racist Language," Vinton, La., Ord. No. 402, § 1(120) (Dec. 20, 1994).

Of course, no one in Chief Vice's department ever spoke to Mr. Fox about the incident at the high school. J.A. 345-46. Nor, of course, did anyone investigate Mr. Budwine's allegations; no sense in investigating charges you know to be fabricated. J.A. 414-16, 487. At Chief Vice's direction, Officer Phillips simply delivered the report and Mr. Budwine's complaint to the District Attorney's office. J.A. 462. When the DA declined to take action, J.A. 377, Chief Vice set out to get press attention. He called a reporter at a local paper, J.A. 290-92, and directed Officer Phillips to work the press too—he specifically wanted Officer Phillips to persuade an African-American reporter to publish the story. *Id*. Meanwhile, Officer Cary leaned on Mr. Budwine to share the story with the press. J.A. 232-35. Chief Vice got an audience with at least two reporters. J.A. 290-92, 406-07. But ultimately, not a single paper found the story sufficiently credible to publish. Finally, Chief Vice shared copies of Mr. Budwine's complaint against Mr. Fox with the National Association for the Advancement of Colored People and instructed his officers to spread the word as well. J.A. 410-12, 414. The police got no traction with the NAACP, but the plan was not a total failure; the charges of racism were the talk of the town and were enough to distress Mr. Fox and generate hostility among his friends and voters. J.A. 381-82.

Mr. Budwine, for his part, received the reward Chief Vice had promised: All but one of the charges

originally filed against him were dropped. He pleaded guilty to that one charge. J.A. 231.

Mr. Fox Is Elected Police Chief, While Chief Vice Is Convicted

Call it karma or just desserts, but what happened next was the sort of reversal of fortune that is usually reserved for B-movies: Mr. Fox won the election and became Chief of Police. J.A. 324. Chief Vice became a convicted felon. *State v. Vice*, No. 08-255, 2008 WL 5169955 (La. Ct. App. Dec. 10, 2008). Officer Cary quit the force without notice and, when the criminal investigation was announced, skipped town to work on a cattle ranch. J.A. 387-88, 463-64.

Unbeknownst to Mr. Fox, the FBI and the Louisiana State Police opened an investigation against Chief Vice, replete with wiretaps and secret recordings. J.A. 199, 271-72, 309. Convinced that Chief Vice and Officer Cary were committing a crime, Officer Phillips served as an informant. J.A. 272. Once confronted with the evidence, Chief Vice confessed that he wrote the threatening letter—an admission he later recanted. J.A. 303; *see also Vice*, 2008 WL 5169955, at *3. He also admitted that he actively sought to have the letter published. J.A. 466; *see also Vice*, 2008 WL 5169955, at *4.

A state grand jury indicted Chief Vice for the anonymous letter, the fabricated complaint, and an unrelated matter in a three-count indictment alleging criminal malfeasance, filing false records, and criminal extortion. J.A. 85. Two years later, a jury found him guilty of extortion. *See* La. Rev. Ann. Stat. § 14:66. The court sentenced him to five years hard labor, suspended, and two years supervised

probation. Chief Vice's conviction and sentence were affirmed on appeal. *See Vice*, 2008 WL 5169955, at *7.

Mr. Fox Sues the Perpetrators and the Town in State Court

Neither karma nor his election compensated Mr. Fox for the harm Chief Vice inflicted on him. Mr. Fox consulted counsel, who concluded that he had a viable case against the police officials and the Town of Vinton.

Mr. Fox sued Chief Vice, Officers Cary and Phillips, and the town. He filed the suit in Louisiana state court—not federal court. As the court of appeals and both magistrates below acknowledged, Mr. Fox's "complaint ... allege[d] that these defendants conspired to violate Fox's constitutional rights and to commit criminal and tortious acts against Fox." P.A. 36a; *see* P.A. 21a (Fox sought damages "for a violation of his civil rights under 42 U.S.C. § 1983 and under state tort law"); P.A. 3a (Fox "claimed federal and state causes of action"). No one disputes that the complaint made out a case for three separate common law torts: defamation, extortion, and intentional infliction of emotional distress. P.A. 38a. "[I]n the alternative" to the state law claims, Mr. Fox's lawyers also asserted a federal civil rights claim under 42 U.S.C. § 1983. J.A. 40-41. They invoked "rights privileges and immunities afforded by our Constitution," specifically, "the right to seek public office" and "the right to Due Process." J.A. 41.

In both the federal and the state claims, Mr. Fox alleged that the town was liable for the conduct of its Police Chief and officers. J.A. 40-41.

Defendants Remove to Federal Court and Proceed with Discovery

Defendants did not move to dismiss Mr. Fox's federal claim (or any other claim) for failure to state a claim. They did the opposite: On the basis of the federal claim, they removed the case to federal court. P.A. 23a.

The civil case sat dormant for well over a year awaiting the outcome of the criminal prosecution. During that time, not one of the Defendants filed a motion to dismiss or even suggested a flaw in Mr. Fox's § 1983 theory. So far as appears from the record, the only exchange about the merits of the § 1983 claim was correspondence between Mr. Fox's lawyers and the town lawyers about whether the town could be held liable without evidence of a municipal policy that was the "moving force" behind any constitutional violation. J.A. 200-01.

Once Chief Vice was convicted, the parties conducted basic fact discovery for the civil case, gathering relevant information in connection with all Mr. Fox's claims. Mr. Fox's lawyers deposed all the participants in the scheme—Chief Vice, Officers Phillips and Cary, and Mr. Budwine. J.A. 199. Defendants deposed Mr. Fox about what he witnessed and the basis of his complaints. J.A. 324-86. Among the areas they covered were his tort law claims, allegations, and damages. J.A. 328-30, 332, 341, 349-50, 355, 359-62. The parties also pored over the record of the criminal investigation by the FBI and State Police; listened to FBI wire tape recordings; and scoured the testimony and full record of the state criminal trial. J.A. 199.

Discovery exposed yet another constitutional violation the police perpetrated under Chief Vice's oversight: With Chief Vice's approval, Officer Cary began to "[w]rite" a citation to "every son of a b***h that's behind … Ricky Fox." Deposition Testimony of Arthur Phillips at 153 (Feb. 28, 2007) (attached to Docket Doc. # 77); *see* J.A. 280-81, 286-87. Evidence even emerged that Chief Vice may have used his influence to help his supporters extinguish citations they had received. J.A. 286.

Counsel Withdraws Mr. Fox's Federal Claim, and the Magistrate Awards Full Attorneys' Fees

Following discovery, Defendants moved for summary judgment on Mr. Fox's federal claim. J.A. 128-67. The motion was never heard. With the benefit of the evidence gathered in the criminal case, discovery in the civil case, and briefing on the motion, Mr. Fox voluntarily moved to dismiss his federal claim and remand the case back to state court to try his state law claims. P.A. 37a-38a. In response, the magistrate dismissed Mr. Fox's federal claim "by agreement of all parties." P.A. 39a.

Hoping to remain in federal court rather than return to Mr. Fox's preferred forum, Defendants asked the magistrate to exercise supplemental jurisdiction over the surviving state law claims. P.A. 38a. The magistrate declined and remanded the state law claims. P.A. 40a. As he sent the state claims back, the magistrate went out of his way to emphasize that "[a]ny trial preparation, legal research, and discovery" involved to date "may be used by the parties in the state court proceedings." *Id.*

At that point, Defendants moved for attorneys' fees alleging that Mr. Fox's federal claim was—and had always been—frivolous. J.A. 199. They did not acknowledge even the existence of state law claims, much less their continuing viability. Nor, in their voluminous submission of billing records, did they point to a single minute they spent conducting discovery on the federal claim that would not have also been required to explore the state claims. Indeed, overall, the billing records reflect no more than a handful of hours dedicated to work on the federal claim alone, almost all of it in connection with the removal and remand. *See* S.J.A. 8-67.

None of that troubled a new magistrate who, with no prior involvement in the case, decided the attorneys' fees motion a year after it was filed. She did not find that Mr. Fox's federal claim was "frivolous or vexatious" as required for an award of attorneys' fees to a defendant; instead she believed that she could award fees against Mr. Fox if his position was "vexatious, frivolous, *or otherwise without merit*." P.A. 27a (emphasis added). She found this last condition met because "the plaintiff failed to make out a *prima facie* case." *Id*.

The magistrate then granted Defendants *all* the fees they had incurred over the course of the entire three-year litigation as though the federal claim was the only claim that had ever been in the case. P.A. 34a. She acknowledged that "[n]ormally, a party seeking attorneys' fees must segregate successful claims from unsuccessful claims." P.A. 28a. But she did not even acknowledge the original magistrate's view that "[a]ny trial preparation, legal research, and discovery may be used by the parties in the state

court proceedings," P.A. 40a, much less analyze what proportion of Defendants' attorneys' fees were attributable only to the dismissed federal claim. Instead, she concluded that there is an exception—and "no segregation is … required"—"where various claims 'arose out of the same transaction and were so interrelated that their prosecution or defense entailed proof or denial of essentially the same facts.'" P.A. 28a (citation omitted). This had serious consequences to Mr. Fox; the fees and costs came to $54,481. P.A. 34a. That was two years' salary—a crushing sum for a lifelong public servant in a small town in Louisiana. *See* Vinton, La. Council Minutes (Sep. 30, 2003), http://www.cityofvinton.com/guestbook/guestbook.html (setting chief's salary at $23,000 in 2003).

Mr. Fox appealed the decision directly to the Fifth Circuit. *See* 28 U.S.C. § 636(c)(3); Fed. R. Civ. Pro. 73(c).

A Split Panel of the Court of Appeals Affirms

A split panel of the Fifth Circuit affirmed. The majority held Mr. Fox's statement—that the civil rights claim could not be sustained—"represented recognition that Fox's federal claims should never have been brought." P.A. 6a. According to the majority, "Fox's claims are groundless because the offenses *alleged in his Complaint* have no redress in the Constitution or laws of the United States." P.A. 8a (emphasis in original).

The majority rejected Mr. Fox's argument that it was improper to award fees because the state law claims survived. P.A. 10a. Noting a split among the circuits, the court held "that a defendant does not

have to prevail over an entire suit in order to recover attorneys' fees for frivolous § 1983 claims." *Id*.

As to the amount of the fees, the majority correctly noted that "a defendant is only entitled to attorneys' fees for work which can be distinctly traced to a plaintiff's frivolous claims." P.A. 11a. Nonetheless, in deference to the magistrate's discretion, the court affirmed her award, including her failure to segregate fees related to the § 1983 claim. P.A. 12a. Relying exclusively on the magistrate's assertions that the parties' "focus" was on Mr. Fox's § 1983 claim, that Defendants' request for fees related only to the federal court proceedings, and that Defendants "d[id] not appear" to request fees "related to the defense of the state law claims," the court held that the magistrate had not abused her discretion in awarding Defendants all the fees they requested for the entire litigation. *Id*.

Judge Southwick dissented. P.A. 12a-18a. He opined that the magistrate applied the wrong standard when she refused to segregate the fees related to the § 1983 claim from the fees related to the state law claims. P.A. 14a. "[W]hen some claims are dismissed as frivolous and others are not, allowing a defendant full recovery of his fees because the services for the various claims are too interrelated gives too much." P.A. 16a. He further observed that "almost all the defendant's discovery and factual analysis would have been necessary even if no federal claims had been brought." *Id*. "Generally," he continued, "the same witnesses would be deposed, the same documents produced, and the same factual disputes resolved. Only the legal work allocable solely or dominantly to the dismissed federal claims

was unnecessary." *Id*. In the end, he insisted, "[t]he only fees Fox should be required to pay are those solely applicable to his federal claims"—specifically "for the legal services necessary to remove the action and now to address the remand, as well as any services uniquely arising from the legal work to have the Section 1983 claims dismissed." P.A. 17a.

SUMMARY OF ARGUMENT

Defendants were not entitled to any fees at all. But even if Defendants were entitled to some fees, it was error to award them *all* the fees they incurred.

I. The fee-shifting provision in statutes like § 1988 treat prevailing defendants differently from prevailing plaintiffs. Prevailing plaintiffs ordinarily recover their fees. But prevailing defendants cannot recover their fees, except in the rare circumstance where "the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983),.

This Court has explained that the reason for the asymmetry is that "[a] successful defendant seeking counsel fees … must rely on quite different equitable considerations" from a prevailing plaintiff. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978) (emphasis added). Although the plaintiff is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority,'" *Id*. at 418 (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)), the defendant—even if successful—is not. Whereas a losing defendant is, by definition, a law-breaker, the losing plaintiff is not.

This was a single, indivisible tort suit. Mr. Fox sought damages, under several legal theories, for a single scheme perpetrated by Chief Vice and his henchman. Only one claim was dismissed, leaving the defendants to defend all the others. Because all the legal claims were founded on the same facts, the defense counsel would have needed to perform the same work whether or not the federal claim had been in the case. Moreover, there was no wasted time or effort; every shred of evidence developed in discovery remains relevant after the dismissal. Under these circumstances, the "equitable considerations" that have guided this Court's past decisions prohibit an award of attorneys' fees. *Christiansburg*, 434 U.S. at 419.

First, the only legitimate basis to grant fees to a prevailing defendant under § 1988 is "to protect defendants *from burdensome litigation* having no legal or factual basis." *Id.* at 420 (emphasis added). Where the entire lawsuit is frivolous, or where the dismissed claim is factually distinct from meritorious claims that survive, the burden is manifest and fees are justified. But where the dismissed claim entailed little additional burden—as is almost always the case where the dismissed claim is factually intertwined with the surviving claims—no fees should be granted. The court of appeals erred in overlooking this distinction.

The court of appeals also erred in uncritically applying to partially prevailing defendants the same rule that applies to partially prevailing plaintiffs. A plaintiff who prevails on only one of several intertwined claims can recover some or all of the fees incurred, depending on the result achieved. But de-

fendants are not entitled to the benefit of the same rule precisely because they are situated differently with respect to the policies that § 1988 is designed to advance.

Second, a rule requiring a plaintiff to pay attorneys' fees in these circumstances could have devastating consequences to the enforcement of federal law and to the progress of the law. Advocates of all ideological stripes have advanced arguments that ultimately prevailed before this Court, even though they may have appeared meritless under existing doctrine—even frivolous—when first advanced. Any plaintiff who knows he could be punished with crushing fees for asserting a federal claim would think twice about including that claim.

Such a plaintiff will draw scant comfort from the assurance that he will have to pay his adversary's fees only if the court views his claim not just as meritless, but as frivolous. As this Court has observed, any lower court can fall prey to "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." *Christiansburg*, 434 U.S. at 421-22. This Court's admonition to "resist … the temptation" does not change the reality that judges are human beings who can sometimes have trouble distinguishing a claim they find meritless from one that is downright frivolous.

This case powerfully illustrates the point. Mr. Fox had a constitutional right at stake in this case—his First Amendment right to run for office and to advocate publicly about his qualifications—and am-

ple basis for alleging that Chief Vice, capitalizing on his official position, conspired to deprive him of that right. A lawyer would be justified in casting the case in § 1983 terms. Defendants certainly did not believe that the federal claim was frivolous from the start. They found the § 1983 claim sufficiently meritorious that they removed the case to federal court on that basis, and they never filed a motion to dismiss. The courts below indulged in classic *post hoc* reasoning in leaping from the counsel's willingness to withdraw the federal claim to the conclusion that it was therefore frivolous—a conclusion that was especially ironic because counsel may well have been wrong in conceding the federal claim had no merit.

Third, dangling the prospect of attorneys' fees before prevailing defendants will put all the incentives and burdens for all participants—the lawyers, the clients, and the defendants—in the wrong places. If a client can be punished because his lawyer decides to jettison a federal claim before trial, lawyers will stop making those judgments. The result will be needless litigation, more complicated cases, busier courts, and more confused juries.

Moreover, where the client presented his lawyers with a sound factual basis for judicial relief, it is unfair to punish the client for the lawyer's decision as to what legal claims match the fact pattern. It is the lawyer's job, not the client's, to map the facts onto the right legal theory. Insulating clients from paying attorneys' fees for a wrong legal theory will not lead to abuses. There are consequences for pressing frivolous claims—Rule 11 sanctions. Rule 11 is a much more suitable vehicle for protecting defendants where a frivolous federal claim is factually inter-

twined with other viable claims. Rule 11 places the onus where it belongs, enshrining the common-sense principle that clients cannot be held responsible for their counsel's legal judgments.

II. Even if Defendants were entitled to *some* fees, the courts below erred in awarding every penny they incurred in defending the entire two-year litigation.

The court of appeals stated the correct rule: The most a defendant should ever recover are the fees directly and exclusively attributable to a frivolous claim—fees that would not have been incurred but for the inclusion of the claim. The touchstone, again, is Congress's limited objective in allowing an award of fees to a prevailing defendant: "to protect defendants *from burdensome litigation* having no legal or factual basis." *Christiansburg*, 434 U.S. at 420 (emphasis added). This objective justifies nothing more than compensation for the incremental burden occasioned by the frivolous claim. Any work that defense counsel would have had to do anyway was not the result of the frivolous claim.

Here, Defendants have managed to defeat only one claim—on purely legal grounds—but still stand to be held fully liable on any of the several remaining viable common law theories. Even a plaintiff in this situation would not be awarded all attorneys' fees incurred. If this Court were to apply the allocation principle it applies to plaintiffs, Defendants here would collect nothing—at least not yet. Even with the voluntary dismissal of the federal claim, Defendants still had a lot to lose; they still faced the prospect of a hefty damages award on the state law torts.

Although the court of appeals announced the correct rule, it promptly eviscerated the rule with several improper leaps of logic. First, the court of appeals incorrectly concluded that the complaint was purely federal. To the contrary, it featured the state law claims prominently. Second, it is simply not true that, throughout the litigation, "'the focus of both plaintiff and defendants was plaintiff's § 1983 claim.'" P.A. 12a (quoting P.A. 33a). Defendants were always keenly aware of the independent force of all the state law claims. In any event, it does not matter what legal theories most occupied Defendants' minds as they were conducting discovery. What matters is that the federal claim did not impose any more of a litigation burden on Defendants than they would have had to endure if only state law claims had been pled.

Congress passed § 1988 and other similar statutes to encourage plaintiffs to enforce federal law and to ensure that Defendants get compensated fairly for litigation burdens to which they should never have been subjected. An affirmance of the fee award here will only encourage plaintiffs to drop federal claims from their suits, to the detriment of the public good, and bestow windfall recoveries on Defendants.

ARGUMENT

I. THE MAGISTRATE ERRED IN AWARDING ANY ATTORNEYS' FEES AGAINST MR. FOX FOR A DISMISSED FEDERAL CLAIM THAT WAS FACTUALLY INTERTWINED WITH SURVIVING NON-FRIVOLOUS CLAIMS.

When it comes to attorneys' fees in a federal civil rights case, defendants are very different from plaintiffs: While prevailing plaintiffs routinely collect their fees, a prevailing defendant is never entitled to fees unless the plaintiff's position was frivolous or vexatious. *See infra* Point I.A. Mr. Fox's federal claim was neither frivolous nor vexatious and the magistrate erred in awarding fees simply because she deemed the claim "otherwise without merit." P.A. 27a; *see* Pet'n 25-28. But this appeal is premised on the assumption that the § 1983 claim was frivolous.[2] Even with that assumption, Defendants were not entitled to any fees, because the dismissed federal claim was factually intertwined with surviving claims and imposed no appreciable burden on Defendants. *See infra* Point I.B.

A. A Prevailing Defendant May Not Collect Attorneys' Fees Under § 1988 Except in Unusual Circumstances.

Ordinarily, under the "American Rule," each party to a lawsuit bears its own attorneys' fees. *Alyeska*

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[2] The Cert. Petition argued that the claim was not frivolous, *see* Pet'n 25-28, but did not raise the fact-bound issue as a separate Question Presented. Nevertheless, the errors of the courts below provide cautionary tales that are instructive in crafting the correct legal rule. *See infra* at 38-42.

Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269-71 (1975). Congress has crafted an exception to this "bedrock principle" for certain litigation critical to advancing federal interests. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2157 (2010). Among these favored litigations are suits to protect civil rights, the environment, equal employment opportunity, equal educational opportunity, fair labor standards, and fairness in consumer credit and debt collection.[3]

Civil rights cases like this one are governed by the fee-shifting provision of § 1988, which provides: "In any action or proceeding to enforce a provision of [various civil rights statutes] ... 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." 42 U.S.C. § 1988. Most federal fee-shifting statutes employ similar "prevailing party" language, and courts generally interpret this language the same wherever it appears. *See Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

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[3] *See* 42 U.S.C § 1988 (Civil Rights Attorney's Fees Awards Act of 1976); 42 U.S.C. §§ 2000a-3(b), 2000b-1, 2000e-5(k) (Titles II, III and VII of Civil Rights Act of 1964); 42 U.S.C. § 7604(d) (Clean Air Act); 33 U.S.C. §§ 1365(d), 1369(b)(3) (Clean Water Act); 30 U.S.C. §§ 1270(d), 1275(e), 1293(c) (Surface Mining Control and Reclamation Act); 29 U.S.C. § 262(b) (Age Discrimination in Employment Act); 20 U.S.C. § 1415(i)(3)(B) (Individuals with Disabilities Education Act); 29 U.S.C. § 216(b) (Fair Labor Standards Act); 15 U.S.C. § 1640(a)(3) (Truth in Lending Act); 15 U.S.C. §§ 1618n(c), 1681o(b) (Fair Credit Reporting Act); 15 U.S.C. § 1692k(a)(3) (Fair Debt Collection Practices Act).

Whenever this Court has devised rules to effectuate this directive, its touchstone has been the congressional imperative to use attorneys' fees to encourage parties and their lawyers to bring the suits in question, and, correlatively, the imperative *not* to discourage them: "Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance." *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (quoting H.R. REP. NO. 94-1558, at 2 (1976) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968))) (some internal quotation marks omitted). "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." *Id*. (quoting 122 CONG. REC. 33,313 (1976) (remarks of Sen. Tunney)). To ensure that "private citizens are … able to assert their civil rights, and [that] those who violate the Nation's fundamental laws are not to proceed with impunity," Congress concluded that "citizens must have the opportunity to recover what it costs them to vindicate these rights in court." *Id*. at 578 (quoting S. REP. NO. 94-1011, at 2 *reprinted in* 1976 U.S.C.C.A.N. 5910).

The fee-shifting provision is not, however, reserved exclusively for plaintiffs. Section 1988 permits a "prevailing party" to seek fees without regard to which side of the "*v*." the party is on. But the rules are not the same for both sides. *See Christiansburg*, 434 U.S. at 416-21. On the one hand,

prevailing plaintiffs "'should ordinarily recover an attorney's fee'" under § 1988 because they enforce important federal rights. *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 (quoting *Newman*, 390 U.S. at 402)). On the other hand, defendants *never* get their fees, except in the rare circumstance where "the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley*, 461 U.S. at 429 n.2 (citing H.R. REP. NO. 94-1558, at 7 (1976)); *see Christiansburg*, 434 U.S. at 421.

The reason for this asymmetry is that "[a] successful *defendant* seeking counsel fees … must rely on quite different equitable considerations." *Christiansburg*, 434 U.S. at 419 (emphasis added). The considerations are different in multiple ways.

As an initial matter, prevailing plaintiffs and defendants occupy different positions with respect to the advancement of federal interests. The plaintiff is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg*, 434 U.S. at 418 (quoting *Newman*, 390 U.S. at 402). Awarding fees against plaintiffs simply because they lost 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. *Christiansburg*, 434 U.S. at 422. Congress cautioned that "'private attorneys general' should not be deterred from bringing good faith actions to vindicate … fundamental rights … 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.

In contrast, "defendants … do 'not appear before the court cloaked in a mantle of public interest,'" even when they prevail. H.R. Rep. No. 94-1558, at 6 (quoting *United States Steel Corp. v. United States*, 519 F.2d 359, 364 (3d Cir. 1975)). Because a defendant does not advance any federal policy by fending off a suit, requiring him to pay his own fees poses no threat to any national interest or congressional policy, much less one of the "highest priority."

Conversely, losing plaintiffs and defendants are also situated differently. A losing defendant is, by definition, a law-breaker. *See Indep. Fed. 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."). The losing plaintiff is not. When a plaintiff loses, that means only that he has failed to prove his case, not that he violated any law or compromised any important federal policy. *See Christiansburg*, 434 U.S. at 418-19.

Finally, plaintiffs and defendants confront different economic realities. While Congress concluded that the prospect of obtaining attorneys' fees is necessary to entice plaintiffs and their lawyers to bring suits to enforce the civil rights laws, "few defendants need any incentive to defend themselves when sued." *Young v. New Process Steel, LP*, 419 F.3d 1201, 1205 (11th Cir. 2005).

B. Because the Dismissed Federal Claim Was Factually Intertwined With Surviving Non-Frivolous Claims, Defendants Were Not Entitled to Any Attorneys' Fees.

The "equitable considerations" that underlie this Court's attorneys' fee decisions dictate the proper outcome here. *Christiansburg*, 434 U.S. at 418. Where claims are factually intertwined, seeking recovery for the same misdeed—albeit under different legal theories—the defendant is not entitled to fees when only one claim is dismissed and the others proceed. In those circumstances, an award of fees (1) would grant defendants a windfall they do not deserve; (2) would unduly chill plaintiffs; and (3) would yield perverse incentives and multiply litigation. We address each point in turn.

1. Defendants cannot recover fees when claims are factually intertwined because the dismissed claim imposes little incremental burden on the defendant.

If, as is demonstrated above, the only reason Congress permits defendants to seek fees is "to protect defendants *from burdensome litigation* having no legal or factual basis," *Christiansburg*, 434 U.S. at 420 (emphasis added), then defendants should not receive fees for a claim that yields little incremental burden. That is the situation in this case.

This was a single, indivisible tort suit. Mr. Fox sought damages, under several legal theories, for a single scheme perpetrated by Chief Vice and his henchman. Defendants faced considerable financial

exposure on any one of those theories, whether Mr. Fox proved that the Chief's scheme constituted extortion, defamation, intentional infliction of emotional distress, or a violation of his civil rights. The unitary nature of this action has several consequences for this case and for most any suit in which only one of several factually intertwined claims is dismissed.

First, as the dissent below observed, because the same facts were relevant to all claims, defense counsel would have needed to perform the same work whether or not the federal claim had been in the case. P.A. 16a. The parties would have been the same. They would have taken the same depositions from the same fact witnesses. They would have pored over the same record of the criminal trial. The interrogatories and document requests would have been essentially the same as well. Not surprisingly, defense counsels' time sheets reveal that very little of their work was specific to Mr. Fox's federal claim; it was limited to researching § 1983 and filing the removal petition. *See* S.J.A. 8-67.

Second, every shred of evidence developed in discovery remains relevant after the dismissal. As the magistrate who presided over the pretrial proceedings confirmed: "Any trial preparation, legal research, and discovery" that Defendants conducted to that point "may be used by the parties in the state court proceedings." P.A. 40a. There was no wasted time or effort.

Third, in light of the potential damages, Defendants had the same incentive to defend the case vigorously, with or without the federal claim.

Fourth, there is no evidence—and no reason to believe—that Mr. Fox's motivation in adding the § 1983 claim was vexatious, harassing, or oppressive or that Defendants felt more vexed, harassed, or oppressed by virtue of the claim's inclusion. Mr. Fox was the victim, not the perpetrator, and the § 1983 claim was merely one of several alternative routes to redress for Chief Vice's criminal activity.

Under these circumstances, requiring a plaintiff to pay attorneys' fees is not necessary "to protect defendants *from burdensome litigation* having no legal or factual basis" *Christiansburg*, 434 U.S. at 420 (emphasis added). Far from it. Defendants faced the same litigation burden with or without the federal claim.

The situation is different when the *entire lawsuit* is frivolous. This was what Congress had in mind when it authorized fees against plaintiffs and what this Court had in mind when it discerned that intent. That is why this Court routinely recites legislative references to the availability of fee awards "'to deter the bringing of *lawsuits* without foundation,'" *Christiansburg*, 434 U.S. at 420 (emphasis added) (quoting 110 CONG. REC. at 13,668 (1964) (remarks of Sen. Lausche)), "'to discourage frivolous *suits*," *id.* (emphasis added) (quoting 110 CONG. REC. at 14,214 (1964) (remarks of Sen. Pastore)), and "'to diminish the likelihood of unjustified *suits* being brought," *id.* (emphasis added) (quoting 110 CONG. REC. at 6534 (1964) (remarks of Sen. Humphrey)).

To be sure, a frivolous claim appended to an otherwise non-frivolous suit can sometimes lead to the

"burdensome litigation" that Congress wished to deter and compensate. *See, e.g.*, *id*. at 422 (noting the congressional purpose to "assure that this statutory provision will not in itself operate as an incentive to the bringing of *claims* that have little chance of success") (emphasis added). That could be the case, for example, where the frivolous claim is based on completely "different facts and legal theories"—so that it is essentially a "separate lawsuit[]" within a lawsuit. *Hensley*, 461 U.S. at 434-35 & n.10 (observing in dictum that if such an "unsuccessful claim" is frivolous, the defendant may recover attorneys' fees incurred in responding to it). When that occurs, the defendant may recover attorneys fees incurred in responding to the frivolous claim. But that is because, again, the separate and distinct claim imposes separate and distinct burdens. The same rationale has no bearing where, as here, the dismissed claim imposed little incremental burden.

This distinction between factually intertwined claims and factually distinct claims is not new. This Court draws the same distinction in determining how to compensate a *plaintiff* who prevails on some claims but not others. *See id* at 434-35. With plaintiffs, the issue arises in two different scenarios, and a different rule applies to each. Scenario 1 involves *discrete* claims: "In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories." *Id*. at 434. For that scenario, this Court has observed that "counsel's work on one claim will be unrelated to his work on another claim," and "work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result

achieved.'" *Id.* at 435 (citation omitted). As a result, "no fee may be awarded for services on the unsuccessful claim." *Id.*

Scenario 2 involves *interrelated* claims: "In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories.... Such a lawsuit cannot be viewed as a series of discrete claims." *Id.* A completely different rule applies here: "[T]he 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.* (emphasis added). The reason is that "[m]uch 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." *Id.*

The court of appeals missed this critical distinction when it reasoned "that a defendant need not prevail over an entire suit in order to recover attorneys' fees for frivolous § 1983 claims." P.A. 10a. As noted above, that is certainly correct: If frivolous claims revolve around entirely *different facts*, and the defendant incurred fees directed specifically and exclusively to defend those frivolous claims, the defendant can recover fees without "prevail[ing] over an entire suit." *Id.* But the court of appeals erred in applying this rule in the very different situation where the claims are factually intertwined. P.A. 11a n.25 (recounting dicta from *Hensley*, 461 U.S. at 435 & n.25, about the circumstances under which a *plaintiff* can recover for interrelated claims) (emphasis added).

The court of appeals also erred in uncritically applying to Defendants the same rule that applies to partially prevailing plaintiffs: A plaintiff who prevails on only one of several intertwined claims can recover some or all of the fees incurred, depending on the result achieved. *Hensley*, 461 U.S. at 436-37. But that does not mean that a defendant is entitled to recover some or all of his fees when he prevails on one of several factually intertwined claims. In assuming symmetry, the court of appeals overlooked the different equitable considerations that apply on different sides of the "*v*." Defendants are not entitled to the benefit of the same rule for all the reasons enumerated above: (1) the special status plaintiffs enjoy as proponents of congressional policy; (2) the difference in incentives between plaintiffs (who need financial incentives to challenge official misconduct) and defendants (who already have every incentive to defend themselves); and (3) the difference in status between a losing defendant, who is necessarily a violator of federal law, and an unsuccessful plaintiff, who is not. *See supra* at 29-30. In short, as this Court has determined, the asymmetric treatment of plaintiffs and defendants is appropriate because "[a] successful defendant seeking counsel fees … must rely on quite different equitable considerations." *Christiansburg*, 434 U.S. at 419.

2. Plaintiffs' enforcement of the civil rights laws will be chilled by the threat of fees where claims are factually intertwined.

On the flip side of the equation, a rule awarding attorneys' fees against a plaintiff in these circumstances could have devastating consequences to the

enforcement of federal law and to the progress of the law.

Creative efforts to extend the law are "the very lifeblood of the law." *LaSalle Nat. Bank v. First Connecticut Holding Group, LLC*, 287 F.3d 279, 289 (3d Cir. 2002) (internal quotation marks and citation omitted). Nowhere has history shown that axiom to be more true than in the area of civil rights. Advocates of all ideological stripes have advanced arguments that ultimately prevailed before this Court, even though they may have appeared meritless under existing doctrine—even frivolous—when first advanced. That creativity is fragile. Any plaintiff who knows he could be punished with crushing fees for asserting a federal claim would think twice about including that claim, particularly if he thinks there is a safer state law basis on which to proceed.

Such a plaintiff will draw scant comfort from the assurance that he will have to pay his adversary's fees only if the court views his claim not just as meritless, but as frivolous. As this Court has observed, any lower court can fall prey to "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." *Christiansburg*, 434 U.S. at 421-22; *see Hughes v. Rowe*, 449 U.S. 5, 14 (1980). Even the most objective "courts have had a fair amount of trouble developing standards for distinguishing frivolous cases from ordinary losers." Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 U.C.L.A L. REV. 65, 66 (1996). "[A] judge is more likely to find a violation of Rule 11 (which is, after

all, a finding that a case or claim had a very low probability of success) when that judge already knows that the claim has been dismissed on the merits." Charles Yablon, *Hindsight, Regret and Safe Harbors in Rule 11 Litigation*, 37 LOY. L.A. L. REV. 599, 604-05 (2004). This Court's admonition does not change the fact that judges are human beings and sometimes unable to "resist the understandable temptation."

This case powerfully illustrates the point. Mr. Fox had a constitutional right at stake—his First Amendment right to run for office and, at a minimum, his right to speak out in support of his own election. *See, e.g.*, *McKune v. Lile*, 536 U.S. 24, 50 (2002) (recognizing in dictum "the First Amendment right to run for office") (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977)); *Clements v. Fashing*, 457 U.S. 957, 984 n.4 (1982) (Brennan, J. dissenting) ("right to seek public office [is] a right protected by the First Amendment"); *Buckley v. Valeo*, 424 U.S. 1, 57 (1976). He had ample basis for alleging that Chief Vice conspired to deprive him of that right through extortion, defamation, and public humiliation. He also had a ground for alleging that Chief Vice used his position as a public official to advance his illegal scheme: exploiting his authority as Police Chief to extract unfavorable "intel" from Commander Delcambre; casting a prisoner as pawn in the ruse against Mr. Fox and arranging that convict's release on reduced bail; sending uniformed officers on official business to oversee the arranged confrontation, and then filing the false police report. *None* of this would have been possible but for the

government office and authority Chief Vice enjoyed and abused.

Hearing this story, a lawyer would be justified in casting the case in § 1983 terms. Defendants certainly did not act as if the federal claim was frivolous from the start. Nine attorneys in seven separate law offices represented the four Defendants. Not one of them saw fit to file a motion to dismiss when they first saw the complaint, or at any time in the ensuing two years. To the contrary, they found the § 1983 claim sufficiently meritorious that they removed the case to federal court on that basis. And when conversation turned to the merits of the claim, they challenged a different aspect—whether there was a "municipal policy" involved—an issue that could not be resolved on the face of the complaint before discovery and that would apply only to one of the Defendants. J.A. 200.

In concluding that Defendants were entitled to attorneys' fees, the court of appeals and the magistrate both cited counsel's "admi[ssion] that [they] had failed to properly present any federal cause of action." P.A. 3a; *see also* P.A. 24a. From this observation, the court of appeals concluded that "Fox's claims" were "groundless because the offenses *as alleged in his Complaint* have no redress in the Constitution or laws of the United States." P.A. 8a (emphasis in original); P.A. 27a (same conclusion). That is a classic case of *post hoc* reasoning: Because the magistrate thought the claim incorrect, she leapt to the conclusion that it was frivolous when filed. But even though Mr. Fox did not succeed, the federal claim was not so far beyond the realm of creative advocacy to be frivolous or vexatious. In fact, the

irony here is that plaintiffs' counsel may well have been wrong about conceding that the claims lacked merit.

First, counsel conceded that "'Vice did not act under "color of state law"concerning the extortion letter,'" because the letter "was sent anonymously." P.A. 3a (quoting counsel's concession at J.A. 169). That concession is at least debatable—and almost certainly wrong. State officials are frequently found liable under § 1983 for constitutional violations they commit secretly. *See, e.g., Zilich v. Longo*, 34 F.3d 359, 365 (6th Cir. 1994) (rejecting defendants' argument that acts that are "anonymous" "cannot provide the basis for a suit under 42 U.S.C. § 1983"). For § 1983 purposes, what matters is that Chief Vice "us[ed] his official power as a means to achieve his private aim" of gathering the dirt he included in his letter. *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 464-65 (5th Cir. 2010). And beyond his abuse of authority to draft that letter, Chief Vice certainly used his official power as Chief of Police when he Shanghaied a prisoner and used police personnel and police resources to execute his plot.

Second, counsel conceded that Mr. Fox had no § 1983 claim because "'Fox was not prevented from running for election.'" P.A. 3a (quoting counsel's concession at J.A. 170). That does not necessarily mean that Chief Vice was not violating any constitutional right. Surely, there is an argument that the state may not constitutionally use its ample resources and authority to try to skew an election in favor of an incumbent or to skew the candidate's "speech of [his] qualifications … for public office." *Republican Party of Minnesota v. White*, 536 U.S.

765, 774 (2002). There is an argument that the state violates the First Amendment when it tries to interfere with a candidate's right to run for office by distracting the candidate with false criminal complaints and forcing him to fend off false allegations. *Cf. Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir. 1977) ("[P]laintiff's interest in running for [office] and thereby expressing his political views without interference from state officials who wished to discourage the expression of those views lies at the core of the values protected by the First Amendment."). Just as a speaker does not have to be completely silenced in order to sue for state interference with his right to speak, a candidate does not have to withdraw from the race or stop speaking about his candidacy to sue for state interference with his right to run for office and advocate his qualifications. *Cf. White*, 536 U.S. at 774 (regulation of candidate speech is unconstitutional even though candidate is not silenced); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 195 (1999) (regulation of petition circulators "imposes a burden on political expression that the State has failed to justify," even though petitioning is not prohibited outright).

These legal theories may foster scholarly debate. This Court might ultimately deem these arguments wrong or "without merit," P.A. 27a—which is all the courts below actually found.[4] But that does not

[4] Both the magistrate and the court of appeals awarded fees under the Fifth Circuit's rule, which deems a claim "frivolous" based upon three factors: "(1) whether the plaintiff established a prima facie case, (2) whether the defendant offered to settle, and (3) whether the court held a full trial." P.A. 7a (citing *Myers v. City of West Monroe*, 211 F.3d 289, 292 (5th Cir.

make them frivolous. As this Court has held "[a]llegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone," vexatious or frivolous. *Hughes*, 449 U.S. at 15-16 (summarily reversing fee award where the prisoner's complaint was dismissed for failure to state a claim, which means it would not, under any circumstance, make out a constitutional violation).

Maybe some courts would not commit the same errors as the courts below. Maybe most would be able to "resist the understandable temptation to engage in *post hoc* reasoning." *Christiansburg*, 434 U.S. at 421-22. Even so, no plaintiff can ever know in advance whether he will be the victim of that temptation. When put to the choice between financial ruin and advancing the public interest with a creative federal theory, most plaintiffs would think twice before proceeding with the claim. This uncertainty 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.* at 422.

2000)). The magistrate set an even lower standard, awarding fees after finding that Mr. Fox's federal claim was "vexatious, frivolous, or *otherwise without merit*," P.A. 27a (emphasis added). To conclude that the claim was "frivolous" because counsel's theory was legally incorrect—that "Fox failed to establish any prima facie federal claim," P.A. 8a—is a far cry from determining the claim to be outside the realm of permissible advocacy and frivolous on its face.

3. The court of appeals' rule will yield perverse incentives and multiply litigation.

Dangling the prospect of attorneys' fees before prevailing defendants will put all the incentives and burdens for all participants—the lawyers, the clients, and the defendants—in the wrong place and multiply litigation.

Lawyers. What counsel did here is common, desirable, and commendable. They pled the claims they thought they might plausibly be able to prove. Counsel necessarily have to be expansive, because they often do not know what they will be able to prove or how the law will evolve as their case wends its way through the courts. Then, once discovery was complete, they culled their claims. A lawyer might decide to abandon a federal claim for any number of reasons. She might wish to return to state court (where this case was first filed). She might conclude that state law could provide all the appropriate relief without the distraction and expense of litigating a federal claim. She might want to gain credibility with the judge. She might have determined through discovery that the allegations—however legitimate—could not be proven. She might wish simply to streamline the case so as to avoid confusing the jury.

Such judgments are obviously valid and desirable. They conserve judicial resources, focus the parties' attention, and simplify the jury's job.

If a client can be punished because his lawyer decides to jettison a federal claim before trial, lawyers will stop making those judgments. The result will be

needless litigation, more complicated cases, busier courts, and more confused juries.

Clients. Just as there is something deeply troubling about punishing a client for his lawyer's candor, there is also something deeply troubling about punishing the client for his lawyer's choice of legal theory.

A client should be liable for fees where a particular claim in a complaint is founded on "extravagant charges … that *lack[] a substantial basis in fact.*" *Hanrahan v. Hampton*, 446 U.S. 754, 765 (1980) (Powell, J. concurring in part and dissenting in part). It is sensible to hold the client accountable for the facts asserted in his pleadings. After all, those facts often come from the client himself, and his lawyers will not have independent knowledge of their truth or falsity at the outset.

The situation is different—and the court's response should be as well—if the facts are true and the defendant contests the *legal theory* applied to those facts. It is the lawyer's job, not the client's, to map the facts onto the right legal theory, and it would be unfair to punish clients for the choices made by their lawyer.

This case illustrates the point vividly. Mr. Fox did his job: He recounted the facts he witnessed, turned over the documents he had, and relied on the outcome of an FBI investigation. No one disputes that he had a substantial basis for believing Chief Vice wronged him; a jury found as much beyond a reasonable doubt based on these same facts. When his lawyers heard the story and declared, "That's defamation, and it's unconstitutional to boot," he had

no basis on which to second-guess their judgment. Nothing in the law or common sense required him to say, "No, we cannot file a claim under 42 U.S.C. § 1983 because there is no deprivation of a constitutional right if a state official tries to block me from running for office, but fails." Only the rarest of plaintiffs would have the sophistication, education, or confidence to cross-examine his lawyers: "How can you say that Chief Vice was acting under color of state law when he wrote an anonymous letter? I think it's frivolous to say that he acted under color of state law when he identified himself as a police chief and directed a conspiracy involving his police officers and a prisoner in his custody." Just as "[a]n unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims," *Hughes*, 449 U.S. at 15, a represented litigant should not be punished for failure to override counsel's legal or tactical judgments.

The court of appeals worried that "it would undermine the intent of Congress to allow plaintiffs to prosecute frivolous claims without consequences merely because those claims were joined with additional non-frivolous claims." P.A. 10a. But there *are* "consequences" for pressing frivolous claims—Rule 11 sanctions. And for at least two reasons, Rule 11 is a much more suitable vehicle for addressing these concerns when a frivolous federal claim is factually intertwined with other viable claims.

First, Rule 11 places the onus where it belongs, enshrining the common-sense principle suggested above that clients are not held responsible for their counsel's legal judgments. Rule 11 sanctions are assessed against the client, rather than counsel, only

in limited circumstances: when filings are "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation," Fed. R. Civ. P. 11(b)(1), or when they present "factual contentions" lacking in "evidentiary support," *id.* 11(b)(3), or false "denials of factual contentions," *id.* 11(b)(4). But "[t]he court must not impose a monetary sanction … against a represented party for violating Rule 11(b)(2)," *id.* 11(c)(5)(A), which prohibits a lawyer from "presenting to the court a pleading" where "the claims, defenses, and other legal contentions" are not "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." *Id.* 11(b)(2); *see id.* 11(c)(5).

Second, Rule 11 prohibits sanctions "if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service" of the sanctions motion. *Id.* 11(c)(2). This safe harbor gives the plaintiff an opportunity to evaluate the financial risk of proceeding with a claim without the chilling effect of a potential attorneys' fee motion being made after a claim is dismissed.

Defendants. The court of appeals' approach also gives perverse incentives to defendants in at least two ways.

First, under a rational regime, defendants should be encouraged to eliminate frivolous federal claims early. But the court of appeals' rule rewards defendants for holding back dispositive motions and keeping the meter running in hopes of recovering fees for work that would have to be done anyway.

Again, this case illustrates the danger. If Defendants wasted any effort in connection with the federal claim, they have only themselves to blame. If, as they contend, the claim was frivolous from the start, then they should have moved to dismiss it from the start—not after they had amassed fees of over $50,000 in discovery.

Second, if fees are available whenever a defendant succeeds in getting a claim dismissed, defendants will seek fees every time. Where the dismissed claims are factually intertwined with the surviving claims, the fee litigation will be especially time-consuming. Parties and courts will spend countless hours parsing time entries and bickering over how much of each entry is properly allocable to the federal claims. And the task will be doubly difficult if this Court were to adopt a rule for defendants that parallels the rule for plaintiffs, in which compensation depends on "degree of success obtained" by the defendant, *Hensley*, 461 U.S. at 436, "in comparison to the scope of the litigation as a whole," *id*. at 440. It is hard enough to make that determination when a litigation is over; it is downright impossible to assess the defendant's success where, as here, the case is still proceeding and the defendant still stands to lose everything under state law that he could have lost under the federal law.

Already, litigation over fee awards "must be one of the least socially productive types of litigation imaginable." *Id*. at 442 (Brennan, J., concurring in part and dissenting in part). It is even less productive to figure out how much money a convicted felon should receive, in the middle of active litigation

against him, when only one of several intertwined claims against him was dismissed.

II. THE MAGISTRATE ERRED IN AWARDING DEFENDANTS ALL THEIR FEES WITHOUT SEGREGATING THE FEES THAT WERE ATTRIBUTABLE EXCLUSIVELY TO THE DISMISSED CLAIM.

Even if Defendants were entitled to some fees, the courts below erred in awarding every penny they incurred in defending the entire two-year litigation.

The court of appeals and the magistrate judge articulated two diametrically opposite legal rules on apportioning fees where a purportedly frivolous claim is factually interwoven with other, surviving claims. The magistrate held that: "Normally, a party seeking attorney's fees must segregate successful claims from unsuccessful claims; however, where various claims 'arose out of the same transaction and were so interrelated that their prosecution or defense entailed proof or denial of essentially the same facts,' no segregation is necessarily required." P.A. 28a (quoting *United States for Varco Pruden Bldgs. v. Reid & Gary Strickland Co.*, 161 F.3d 915, 919 (5th Cir. 1998)). In contrast, the court of appeals held that the most a defendant should ever be allowed to recover is the amount of "attorneys' fees for work which can be distinctly traced to a plaintiff's frivolous claims." P.A. 11a.

The court of appeals stated the correct rule: A defendant should recover, at most, fees directly and exclusively attributable to a frivolous claim—fees

that would not have been incurred but for the inclusion of the claim. *See infra* Point II.A. But the court of appeals misapplied the rule, essentially transforming it into the magistrate's incorrect one. *See infra* Point II.B.

A. The Most That Defendants Could Collect Are Fees Directly Attributable to the Dismissed Claim.

The touchstone, as before, is Congress's limited objective in allowing an award of fees to a prevailing defendant: "to protect defendants from burdensome litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420 (emphasis added); *see supra* at 28-30. This objective justifies nothing more than compensation for the incremental burden occasioned by the frivolous claim. Any work that defense counsel would have had to do anyway cannot be the result of the frivolous claim. As the panel dissent recognized, *see* P.A. 15a-16a, anything more would grant Defendants an unfair windfall far out of proportion to any harm they suffered—a result that this Court has held is antithetical to § 1988. *See Blum v. Stenson*, 465 U.S. 886, 893-95 (1984) (holding that Congress "expressly intended to prohibit" "windfall profits") (internal quotation marks omitted). "The only fees Fox should be required to pay"—if he is required to pay any at all—"are those solely applicable to his federal claims." P.A. 17a.

The magistrate got it exactly backwards when she declared that "'no segregation is necessarily required'" when "various claims 'arose out of the same transaction.'" P.A. 28a (citation omitted). She started with the right premise: When claims are as

"interrelated" as these claims were, "'their prosecution or defense entail[s] proof or denial of essentially the same facts.'" *Id*. (citation omitted). But the factual interrelatedness is an argument for *declining* to award fees that would have been incurred anyway, not an argument for *awarding* them.

In holding otherwise, the district court cited just one case—involving a Texas debt collection statute. *See Varco*, 161 F.3d at 919 (interpreting Tex. Civ. Prac. & Rem. Code Ann. § 38.001). But the standards for awarding attorneys' fees under a federal statute are a matter of federal, not state, law. *See, e.g., Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 198 (1988); 28 U.S.C. § 1652. It was especially inappropriate to import the standards from a state law directed at awarding fees to *plaintiffs*. As this Court has recognized, even the *federal* law governing when a prevailing plaintiff can collect attorneys' fees cannot be uncritically applied to prevailing defendants. *See supra* at 28-30 (discussing the asymmetry this Court has implemented); P.A. 15a (panel dissent makes this distinction).

Here, Defendants have managed to defeat only one claim—on purely legal grounds—but still stand to be held fully liable on any of the several remaining viable common law theories. Even a plaintiff in this situation would not be awarded all attorneys' fees incurred. As this Court has recognized, compensating a plaintiff for every hour expended on the entire litigation when he or she prevails on only one of several intertwined claims would often yield "an excessive amount." *Hensley*, 461 U.S. at 436. When it comes to fees for a plaintiff's partial success, "the most critical factor is the degree of success obtained,"

id. at 436; "[t]he result is what matters," *id*. at 435. For plaintiffs, "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*.

If this Court were to apply the allocation principle it applies to plaintiffs, Defendants here would collect nothing—at least not yet. Even with the voluntary dismissal of the federal claim, Defendants still had a lot to lose; they still faced the prospect of a hefty damages award on the extortion claim, the defamation claim, and the claim for intentional infliction of emotional distress. If they do eventually lose any of those claims, their "success" on the federal claim will be of only trivial historic interest. In fact, under the *Hensley* test, a court could not even assess Defendants' success on the federal claim until the end of the litigation, for only then could the court determine how Defendants fared "overall." *Id*.

All that said, the central point remains: Just as it is senseless to apply the rules for awarding attorneys' fees to a plaintiff when considering an award to a defendant, it is equally senseless to import the allocation rules from one context to the other. In each context, "[a] successful defendant seeking counsel fees … must rely on quite different equitable considerations." *Christiansburg*, 434 U.S. at 419. For plaintiffs, the equities are all about encouraging lawsuits and righting constitutional wrongs; for defendants, the equities are all about avoiding the additional incremental burden imposed by frivolous litigation.

B. The Court of Appeals Erred in Applying the Standard.

Although the court of appeals announced the correct rule, it promptly eviscerated the rule by adopting most of the magistrate's flawed rationale for awarding every penny of fees to Defendants. P.A. 12a (summarizing P.A. 32a-33a).

The magistrate began by mischaracterizing the complaint as purely federal: "The court finds that plaintiff failed to allege state 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." P.A. 32a. To the contrary, the state law claims were featured prominently in the complaint. The complaint alleged certain facts that could only be viewed as supporting state law causes of action. It alleged, for example, that the "offense report that was prepared against petitioner was totally false in its allegations and was made with malice on the part of Billy Ray Vice, Arthur Phillips, and Troy Cary," J.A. 42—the classic formulation of a defamation claim. It listed numerous "rights, privileges and Immunities afforded" to Mr. Fox, not just by "our Constitution" but also by various other "laws that were violated." Among them were: (1) "the right to not be slandered/defamed"; and (2) "the right to be free from extortion." J.A. 41. It further invoked principles of "vicarious liability on the part of the Town of Vinton," which could only apply to the state law claims, since that is not a viable theory under § 1983. J.A. 38, 40. *See Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978) ("[A] municipality cannot be held liable under § 1983 on a

respondeat superior theory."); *Lamkin v. Brooks*, 498 So. 2d 1068, 1071-72 (La. 1986) (applying Louisiana law and finding town vicariously liable for the tort of its police officer).

True, the complaint did not set forth independent counts for each claim as federal judges are accustomed to seeing. But that is because this complaint was prepared for state court, not federal court, and that form of pleading is not required under Louisiana law. In Louisiana, plaintiffs do not allege the "'theory of the case' … as a pleading requirement or restriction." *Cox v. W.M. Heroman & Co.*, 298 So. 2d 848, 855 (La. 1974) (overruled on other grounds, *A. Copeland Enters., Inc. v. Slidell Mem. Hosp.*, 657 So. 2d 1292 (La. 1995)). "So long as the [f]acts constituting the claim or defense are alleged or proved, the party may be granted any relief to which he is entitled under the fact-pleadings and evidence." *Id*. There is no dispute that the "fact-pleadings" supported claims for various state law torts, including extortion, intentional infliction of emotional distress, and defamation.

The court of appeals evidently did not embrace the magistrate's view of the complaint. The panel majority acknowledged that the complaint, from the start, "claim[ed] federal and state causes of action." P.A. 3a. However, the majority appears to have adopted the magistrate's next observation, "that, throughout the litigation, the focus of both plaintiff and defendants was plaintiff's § 1983 claim." P.A. 33a (quoted at P.A. 12a) (emphasis added).

Neither the panel majority nor the magistrate explained how they reached that conclusion. The

single sentence falls far short of satisfying this Court's direction that the district court must "provide a concise but clear explanation of the reasons for the fee award." *Hensley*, 461 U.S. at 437; *see id*. at 438-39 (vacating judgment because district court failed to provide sufficient explanation). The magistrate did not cite a single document to support her conclusion. That may be because she had not presided over any of the prior proceedings. The truth is that Defendants were always keenly aware of the independent force of all the state law claims: The answers filed by each of the three individuals vouched compliance with state law and interposed several defenses to state law claims. J.A. 50, 66, 75. Moreover, Mr. Fox filed a motion for partial summary judgment on his state law extortion claim, and defendants responded to it as a matter of state law. J.A. 122-23.

In any event, as the dissent by Judge Southwick noted, the decision cannot turn upon what legal theories most occupied Defendants' minds as they were conducting discovery. P.A. 17a (dissent notes that "[t]hat finding does not affect my view that any fee for services by Vice's counsel that was also necessary for the state claims is not recoverable, no matter what the focus of counsel might have been"). What matters is that the federal claim did not impose any more of a litigation burden on Defendants than they would have had to endure if only state law claims had been pled. *See supra* at 31-33 (explaining litigation burden). What matters is the finding of the original magistrate—who did preside over the previous proceedings—that "[a]ny trial preparation, legal research, and discovery" that Defendants con-

ducted to that point "may be used by the parties in the state court proceedings." P.A. 40a; *see also* P.A. 16a.

Beyond that, the only other justification the magistrate offered was the non sequitur (also echoed by the court of appeals) that "defendants' request for attorney's fees relates only to proceedings before this court," and "Defendants do not appear to request attorney's fees related to the defense of the state law claims [that were] remanded." P.A. 33a (quoted at P.A. 12a). The premise was correct—at the time of the fee request, the case had been pending exclusively in federal court—but irrelevant. An award of attorneys' fees depends on what transpired in the litigation, not which court was presiding. Whatever the courthouse, Defendants are not entitled to attorneys' fees without demonstrating that those fees were directly and exclusively attributable to the dismissed federal claim. Defendants have fallen far short of satisfying that burden.

All of the arguments presented above about the dangers of allowing a defendant to recover *some* fees for prevailing on a factually intertwined claim are magnified many times over if courts are authorized to grant *all* the fees, even those that the defendant would have incurred anyway. *See supra* at 31-47. Congress passed § 1988 and other similar statutes to encourage plaintiffs to enforce federal law and to ensure that defendants get compensated fairly for litigation burdens to which they should never have been subjected. An affirmance of the fee award here will only encourage plaintiffs to drop federal claims from their suits, to the detriment of the public good, and bestow windfall recoveries on wicked and ma-

leficent defendants just because they were able to show that their deeds, however wrongful and illegal, did not violate *federal* law.

CONCLUSION

The judgment of the court of appeals should be reversed and the fee award should be vacated.

Respectfully submitted,

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