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 OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, IMPACT FUND, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE LEGAL AID SOCIETY OF NEW YORK CITY, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NEW YORK, NATIONAL FAIR HOUSING ALLIANCE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND PUBLIC JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Amici are civil rights and public interest organizations that enforce civil rights laws both on their own behalf and/or on behalf of their clients, private plaintiffs. *Amici* bring litigation which seeks fees pursuant to 42 U.S.C. § 1988 ("§ 1988"), as well as fee-shifting provisions of other statutes whose jurisprudence tracks § 1988.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of that mission, the ACLU frequently litigates cases that are subject to federal fee-shifting statutes. The proper interpretation of those statutes—and, in particular, the circumstances under which defendants are entitled to recover fees—is therefore a matter of significant concern to the ACLU.

Americans United for Separation of Church and State ("Americans United") is a national, nonsectarian public-interest organization based in Washington, D.C. Its mission is twofold: (1) to advance the free-exercise right of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Since its

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the undersigned counsel contributed financially to its preparation or submission. The parties have consented to the filing of this brief.

founding in 1947, Americans United has participated as a party, counsel, or amicus curiae in many of the Court's leading church-state cases. The cases brought by Americans United typically deal with unsettled and controversial areas of law, and the results of the cases often are difficult to predict *ex ante*. Americans United rarely seeks damages in its cases, and the plaintiffs in such cases could be deterred from suing at all if they face an increased risk of liability for the defendant's attorneys' fees.

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country. In its funding role, the Impact Fund reviews requests for grants to cover expenses of civil rights litigation and is frequently called upon to assist firms in finding financing, co-counsel, or other resources necessary to bring significant litigation. It also represents non-profit organizations in their fee litigation. The Impact Fund's experience attests to the fact that the growing expenses of impact litigation have made it much more difficult to attract counsel to public interest cases in many parts of the country.

The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the effort to assure civil rights for all Americans. On behalf of its clients, the Lawyers' Committee litigates federal cases involving voting rights, employment discrimination, housing discrimination, education discrimination, and environmental justice. The Lawyers' Committee does not charge its clients a fee and instead depends on the attorneys' fees provisions of § 1988 and other federal

statutory provisions to support its litigation activities. Most, if not all, of the Lawyers' Committee's clients have limited resources and an adverse decision in this action may have a detrimental effect on future civil rights enforcement.

The Legal Aid Society of New York City ("Society") is a private, nonprofit law office dedicated since 1876 to providing legal representation to persons who cannot afford a lawyer. In *Blum v. Stenson*, 465 U.S. 886, 890 n.3 (1984), this Court noted that the Society "enjoys a wide reputation for the devotion of its staff and the quality of its service." In addition to providing direct legal services to individual clients in over 300,000 cases annually, the Society periodically commences 42 U.S.C. § 1983 ("§ 1983) litigation seeking redress for an unlawful governmental policy or systemic practice, often in conjunction with supplemental state law claims, when that is the most efficient means to provide legal assistance. The Society is vitally concerned that the holding of the Fifth Circuit Court of Appeals will, if affirmed, chill victims of an unlawful governmental policy or practice who have limited financial means from seeking judicial redress on federal grounds; will spawn satellite litigation whenever a federal claim is voluntarily dismissed, thus discouraging voluntarily dismissals; and will provide a windfall to defendants who would have litigated over the same core of operative facts regardless of the dismissal of a federal claim.

The National Employment Lawyers Association, New York ("NELA/NY") is the New York chapter of a national bar association dedicated to the vindication of individual employees' rights. In addition to the daily participation of its members in employment cases, NELA/NY has filed numerous amicus briefs in

cases presenting important questions of anti-discrimination law. The aim of this participation has been to cast light not only on the subtleties of the legal issues presented but also on the practical effects of legal decisions on the lives of working people.

The National Fair Housing Alliance ("NFHA") is a consortium of private, non-profit fair housing organizations, state and local civil rights groups, and individuals that was formed in 1988 to lead the fight against housing discrimination in this country. In conjunction with its members, NFHA strives to eliminate housing discrimination and ensure equal housing opportunities for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement. As part of its enforcement activities, NFHA assists its members and participates itself in federal and state court litigation brought under the Fair Housing Act and state and local fair housing laws. The legal issue presented in this appeal is of great importance to NFHA and its members. The Fifth Circuit's decision, if allowed to stand, would undercut private enforcement of state and federal fair housing laws, in contravention of clear legislative intent.

People For the American Way Foundation ("PFAW Foundation") is a nationwide, non-profit, non-partisan citizens' organization established to promote and protect civil and constitutional rights and devoted to our nation's heritage of tolerance, pluralism, and liberty. PFAW Foundation has frequently represented parties, or sued on its own behalf, in cases involving constitutional and statutory civil rights including the Speech, Free Exercise, and Establishment Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amend-

ment, the Equal Access Act, and the Voting Rights Act. The resolution of this case is of extreme interest to PFAW Foundation, its members, and potential future litigants whom they may counsel.

Public Justice is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable. Public Justice specializes in precedent-setting and socially significant individual and class action litigation designed to advance civil rights and civil liberties, consumer and victims' rights, workers' rights, the preservation of the civil justice system, and the protection of the poor and powerless. Public Justice frequently brings civil rights cases—and, in particular, cases under § 1983. For example, they currently represent a prisoner who was terribly beaten by guards and the family of a prisoner who died of penile cancer as a result of officials' deliberate indifference to his serious medical needs. Moreover, throughout its history, Public Justice has participated in numerous cases to highlight the role that attorneys' fees can play in either promoting or hindering plaintiffs' access to justice. Public Justice believes that, in the present case, if the defendants' fee award is upheld, the enforcement of the nation's civil rights laws could be stifled, and access to justice will be denied.

SUMMARY OF ARGUMENT

Civil rights litigation is at equipoise under this Court's precedent. While plaintiffs, regardless of their means, are empowered to vindicate meritorious civil rights claims under the fee-shifting provision of § 1988, the law also discourages plaintiffs from pursuing weak or frivolous claims by denying compensation for unsuccessful lawsuits and subjecting plain-

tiffs and their counsel to Rule 11 or other sanctions. This regime is largely successful at winnowing out cases and claims that should never be brought while also serving Congress's intent of supporting the prosecution of righteous civil rights claims. Pursuant to this framework, *amici* are able to pursue the crucial work of vindicating plaintiffs' civil rights and advocating novel arguments essential for the evolution of Constitutional jurisprudence.

The Fifth Circuit's decision threatens to disrupt this careful balance by expanding the circumstances wherein defendants will be awarded fees under § 1988. The lower court erroneously affirmed an award of all of defendants' attorneys' fees based on one allegedly frivolous claim, even where Mr. Fox has clearly meritorious state-law claims still pending against defendants, which arose from the same underlying misconduct. Even assuming for purposes of this brief that the federal claim was frivolous, *but see* Pet'r Br. at 39-41, an award that grants fees to a civil rights defendant in these circumstances is manifestly overbroad.

Instead, this Court should adopt the rule proposed by Petitioner and hold that defendants cannot recover attorneys' fees under § 1988 where a plaintiff's "frivolous" claim is factually intertwined with non-frivolous claims. Under this approach, defendants could only recover attorneys' fees where they can demonstrate that the entire lawsuit was frivolous or that the frivolous and non-frivolous claims were factually distinct. *Amici* reach this result recognizing that an award of attorneys' fees to defendants, while appropriate in the face of wholly frivolous litigation (and, indeed, required under § 1988),

should not be expanded beyond this Court's precedents.

The broader approach presented by the Fifth Circuit's opinion should be reversed for the following reasons:

- The Fifth Circuit's approach errs in ignoring the interrelatedness between the meritorious claims and the claim deemed frivolous here. *See* Section I, *infra*.
- The Fifth Circuit's approach excessively penalizes civil rights plaintiffs given the existing regime, which sufficiently discourages frivolous lawsuits. *See* Section II, *infra*.
- Excessive fees to civil rights defendants are unjustified in the absence of market failure; government actors need no incentive to *defend* against civil rights actions. *See* Section III, *infra*.
- The Fifth Circuit's rule, by making plaintiffs vulnerable to excessive fees, would have a profound chilling effect on legitimate civil rights claims. *See* Section IV, *infra.*
- This chilling effect is heightened because determinations that claims are frivolous are often unpredictable. *See* Section V, *infra*.
- The Fifth Circuit's rule would have the effect of increasing litigation. Plaintiffs will be reluctant to abandon weak claims, fearing liability for defendants' fees. Additionally, fee litigation will multiply, as defendants will frequently seek fees when a plaintiff fails to prevail on each claim. *See* Section VI, *infra*.

ARGUMENT

I. Congress Seeks to Empower Civil Rights Plaintiffs While Deterring Frivolous Lawsuits

In enacting § 1988, Congress expressed its clear desire to empower civil rights plaintiffs to bring lawsuits which vindicate their federal rights. Section 1988 recognizes a marketplace imbalance from the fact that many civil rights plaintiffs do not have the resources to retain counsel and typical alternative fee structures (such as the classic contingency fee) are often unviable. Unlike medical malpractice cases for example, many civil rights cases do not yield the large damage awards that would motivate a private attorney to take a case on a contingency basis. *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986); *see also Blanchard v. Bergeron,* 489 U.S. 87, 90, 96 (1989) (holding that "a § 1988 fee award should not be limited by a contingent-fee agreement between the attorney and his client;" "Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the action seeks monetary damages."); *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982) ("The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel."). Accordingly, § 1988 and the cases interpreting it generally award attorneys' fees to prevailing plaintiffs to encourage them to sue as "private attorneys general," recognizing that where the plaintiff pre-

vails, the fees are paid by a governmental actor who violated the federal constitution or a federal statute. *See Indep. Fed'n 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").

In marked contrast, and consistent with the American rule, defendants are only awarded their attorneys' fees under § 1988 (which we will call "reverse fee shifting" in this brief) in the rare case 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). The purpose of this asymmetrical approach is to ensure that the incentives are as Congress intended them to be: to encourage plaintiffs to seek vindication while still ensuring that defendants are protected from the "vexatious" plaintiff who brings a civil rights lawsuit solely in order to "harass or embarrass the defendant." *Id.*

Nonetheless, there are also significant limitations to a prevailing plaintiff's attorneys' fee award. To give just some examples of the significant body of jurisprudence that has developed in this area: If a civil rights plaintiff declines a Rule 68 Offer of Judgment from defendants, the plaintiff cannot recover for subsequent attorneys' fees if his or her ultimate recovery at trial is less than the defendants' Offer—even if the plaintiff obtains a substantial jury verdict. *Marek v. Chesny*, 473 U.S. 1, 9 (1985). Additionally, plaintiffs are awarded no attorneys fees where plaintiffs' lawsuit "achieved the desired result" and "brought about a voluntary change in the defendant's conduct," but plaintiffs have "failed to secure a judgment on the

merits or a court-ordered consent decree." *Buckhannon Bd. and Care Home, Inc. v. W.V. Dep't Dept. of Health and Human Res.*, 532 U.S. 598, 600 (2001). Moreover, a court may reduce the fee award to a prevailing plaintiff where it determines that "a plaintiff has achieved only partial or limited success." *Hensley*, 461 U.S. at 433-35. And, more specifically, even where a jury holds that the defendants violated plaintiff's constitutional rights, if the jury awards only nominal damages "the only reasonable fee is usually no fee at all." *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). Accordingly, these other hurdles under the current regime restrict plaintiffs' recovery of fees and protect against undue awards to plaintiffs.

The Fifth Circuit's approach threatens to disrupt this balance. Here, the Fifth Circuit awarded defendants their attorneys' fees even though the litigation, in the main, was indisputably not frivolous, because the Court found that one claim—which arose from the same underlying misconduct—was frivolous. This was error.[2] To be clear, *amici* do not condone

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[2] *Amici* do not agree that petitioner's federal allegation was frivolous. *See* Pet's Br. at 39-41. However, accepting this premise as true *arguendo*, the Fifth Circuit erred by requiring Mr. Fox to pay Mr. Vice's attorneys' fees, though the federal and state law claims were factually interrelated; and the court compounded this error by ordering Mr. Fox to pay *all* of defendants' fees, even those incurred for depositions and other discovery that were directly useful for the state law claims. (While the Fifth Circuit stated that defendants can only recover for "attorneys' fees for work which can be distinctly traced to a plaintiff's frivolous claims," Petition Appendix 11a, the Circuit made that language meaningless by upholding the magistrate judge's decision awarding *all* fees without any meaningful review of that fee award.) *Amici* urge this Court to hold that no fees should

(*Footnote continued*)

the filing of frivolous claims, but, as detailed *infra* Section II, there are other powerful disincentives against such filings. The bigger risk, in *amici*'s view, is that meritorious civil rights claims will be deterred.

The Fifth Circuit's rule misunderstands Congress's intent, which focused on deterring frivolous litigation that can be an unfair burden to an innocent defendant. *See Hensley,* 461 U.S. at 429 n.2 (providing for reverse fee shifting where "the *suit* was vexatious, frivolous, or brought to harass or embarrass the defendant" (emphasis added)). As this Court noted in *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 420 (1978), during "Senate floor discussions of the almost identical attorney's fee provision of Title II . . . several Senators explained that its allowance of awards to defendants would serve 'to deter the bringing of *lawsuits* without foundation,' 'to discourage frivolous *suits*,' and 'to diminish the likelihood of unjustified *suits* being brought.'" (Internal citations omitted, emphasis added). Congress's intent was "to protect defendants *from burdensome litigation* having no legal or factual basis." *Id.* (emphasis added).

This might counsel towards a rule where fees should only be awarded to defendants where the entire litigation is frivolous. *Amici* recognize, however,

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have been awarded to Mr. Vice because the supposedly frivolous claim was intertwined with the non-frivolous claim, and this brief focuses on that argument. However, even if the Court were to hold that the district court could properly award Mr. Vice some fees, we urge the Court to reverse the fee award, and limit fees to those directly and exclusively spent defending against a frivolous federal claim.

that such a rule would place form over substance because the liberal joinder rules of the Federal Rules of Civil Procedure permit plaintiffs to combine claims arising from wholly unrelated events into one litigation. *See* Fed. R. Civ. P. 18(a) ("A party asserting a claim . . . may join, as independent or alternative claims, as many claims as it has against an opposing party."). In such a situation, as this Court has recognized, where a plaintiff alleges *unrelated* claims in a single lawsuit, such "unrelated claims [should] be treated as if they had been raised in separate lawsuits," for purposes of fee shifting. *Hensley,* 461 U.S. at 435.

But this same rationale is why *interrelated* claims—i.e. claims arising from the same factual underpinnings—should be treated differently for reverse fee shifting purpose. Such claims are not "separate lawsuits," *id.*, but merely varying legal theories seeking recovery for the same, or similar, underlying misconduct. To grant defendants their attorneys' fees in circumstances where one legal claim is deemed frivolous but is factually intertwined with meritorious claims (as here) would lead to a cascade of prejudice to civil rights plaintiffs that is out of step with Congressional intent. As discussed below, funding defense costs in this situation is antithetical to the purpose of § 1988. *See infra* Sections II-V.

Amici accordingly urge the Court to adopt Petitioner's approach and hold that defendants cannot recover attorneys' fees under § 1988 where a plaintiff's "frivolous" claim is factually intertwined with non-frivolous claims. Defendants should only be able to recover attorneys' fees where they can demonstrate that the entire lawsuit was frivolous or that the frivolous and non-frivolous claims were factually

distinct, such that the claims were, in reality, "separate lawsuits." *Hensley,* 461 U.S. at 435.

This approach avoids the anomalous situation that the Fifth Circuit's precedent could create, in which a plaintiff largely succeeds in his or her litigation, is awarded damages or injunctive relief along with attorneys' fees as the prevailing party, and is nonetheless ordered to pay defendants' attorneys' fees because a single claim is deemed frivolous (due perhaps to the distorting effects of hindsight, as detailed *infra* Section V). Such a result would be both unfair and inconsistent with Congress's desire to facilitate plaintiffs' pursuit of meritorious civil rights claims.

II. This Court's Jurisprudence, the Federal Rules, and the Reality of Civil Rights Lawyering Already Provide Defendants Appropriate Protection From Frivolous Lawsuits

Frivolous claims are anathema to civil rights litigation which seeks to vindicate the most important values of the Republic. Appropriate checks and balances are necessary to prevent the fee-shifting framework of § 1988 from abuse by vexatious plaintiffs. These disincentives are an important counterweight to fee-shifting. But this regime is a delicate one. The Fifth Circuit's precedent disrupts this balance by radically increasing the potential costs to civil rights plaintiffs despite ample disincentives for frivolous litigation. Plaintiffs and their counsel already consider these risks, which dissuade the filing of weak claims and sufficiently accomplish Congress's goal of "protect[ing] defendants from burden-

some litigation having no legal or factual basis." *Christiansburg,* 434 U.S. at 420.

At the outset, the realities of the practice of law serve as a practical bar against the filing of weak or frivolous claims. Fee-shifting statutes, of course, only provide for recovery of attorneys' fees if a plaintiff is successful. Plaintiffs' counsel and civil rights organizations are thus financially motivated to screen their cases to ensure that only those with a high likelihood of success are brought. This is not to say that counsel never err, but the current regime effectively winnows weak or frivolous claims.

Moreover, plaintiffs bringing non-frivolous cases are of course not assured of victory. For example, there may be an intervening change to the controlling law, discovery may not provide the proof needed, or the jury may find that the plaintiff has not met his or her burden of proof. *See Christiansburg*, 434 U.S. at 422 ("No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation."). Plaintiffs are then liable for their own costs and potentially liable for the defendants' costs. Fed. R. Civ. P. 54(d)(1). Moreover, civil rights organizations like *amici* must expend the cost in attorney time for bringing the claim, and such time is not compensable if the organization (or its client) does not ultimately prevail.

Additionally, there is no question that under this Court's established precedent, a prevailing defendant may be awarded its attorneys' fees where the entire

lawsuit (*i.e.*, *all* of the claims asserted) is found to be frivolous. *See Hensley*, 461 U.S. at 429 n.2; *Christiansburg,* 434 U.S. at 421.

Most importantly for this case, Rule 11 deters plaintiffs from bringing frivolous claims, even where there are non-frivolous claims brought at the same time. Rule 11 is more suited to the task of appropriately deterring the filing of frivolous claims than is § 1988 in at least two ways.

First, Rule 11 contains a "safe harbor" provision: opposing counsel cannot seek sanctions "if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service" of the sanctions motion. Fed. R. Civ. P. 11(c)(2). Rule 11 thus gives the plaintiff an opportunity to evaluate—with considerably more information than he or she would have at the pleading stage—the potential financial risk of going forward. Moreover, in counseling clients about the potential risks of bringing a civil rights lawsuit, the right to such notice is a significant protection against unpredictable reverse fee shifting.

Second, Rule 11 permits courts to sanction counsel, represented parties, or both, depending on the source of the frivolous filing. *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 545-46 (1991) (explaining that represented parties are accountable for sanctionable activity after the 1983 amendments to Rule 11). In marked contrast, under § 1988, it is *the client*, the civil rights plaintiff, who is responsible for *all* the defendants' attorneys' fees if the court orders reverse fee shifting. The attorney owes nothing. (In *amici*'s view, the better

practice would be for the court to direct sanctions to the appropriate payer, on a case-by-case basis.)

This disparity is particularly striking in the context of this case. Mr. Fox's factual allegations were completely meritorious, as a criminal jury found and as civil discovery demonstrated: Mr. Vice used his power as a police officer to learn negative information about Mr. Fox; Mr. Vice sent Mr. Fox an extortive letter containing that information in order to induce him to drop out of the election; Mr. Vice then caused a drug dealer to file a false criminal complaint against Mr. Fox; and Mr. Vice then tried to disseminate these false allegations in the media. There was nothing *factually* frivolous about Mr. Fox's claims.

Instead, the Fifth Circuit found (erroneously, but a conclusion we accept *arguendo* for purposes of this brief) that the claims were *legally* frivolous. This is a vital distinction. Experience suggests that counsel learn of the underlying facts from their clients. And it is then *counsel* who determines whether those facts state a § 1983 claim or merely state-law claims. A lay client, who generally has no legal training, would be wholly unequipped to determine whether his complaint stated a valid cause of action under § 1983.[3]

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[3] This situation is in marked contrast, for example, with *Business Guides,* 498 U.S. 533, where this Court affirmed a Rule 11 sanction (pursuant to the pre-1993 version of Rule 11) against a represented plaintiff who had alleged—based on information in its business records—that the defendant had false information in a directory it produced, though a reasonable inquiry would have indicated that defendant's directory was accurate, save for the false information plaintiff had purposefully

(*Footnote continued*)

The drafters of Rule 11 *explicitly* recognized the distinction between legal frivolousness and factual frivolousness. Both are clearly sanctionable under Rule 11, but in different ways. Rule 11(b)(2) prohibits legally frivolous claims, stating that the signer of a court filing must certify that

> the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law[.]

Yet, Rule 11 prohibits courts from punishing a represented party when his or her counsel files "claims" which are not "warranted by existing law or by a nonfrivolous argument for extending" that law. Specifically, Rule 11(c)(5) states that the "court *must* not impose a monetary sanction . . . against a represented party for violating Rule 11(b)(2)." The Advisory Committee explained that "[m]onetary responsibility for such violations is more properly placed solely on the party's attorneys." Fed. R. Civ. P. 11, advisory committee's note.

Of course, § 1988's requirement that clients, and not counsel, are the ones held liable for any reverse fee shifting applies regardless of whether the frivolous claim is factually intertwined with non-frivolous claims. Yet the problem is particularly apparent where frivolous and non-frivolous claims are inter-

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planted. As *Business Guides* recognized: "Quite often it is the client, not the attorney, who is better positioned to *investigate the facts* supporting a paper or pleading." *Id.* at 549 (emphasis added). In contrast, it is counsel who is "better positioned," *id.*, to determine whether those facts amount to a federal claim.

twined. In such situations, it is more likely that the attorney is the blameworthy party because it was counsel who chose to bring frivolous legal claims, even though the client's underlying allegations made a non-frivolous case. At a minimum, this unfairness should caution the Court against *extending* the reverse fee shifting provision of § 1988 to hold clients financially liable for their attorneys' errors of judgment.

III. The Harsh Fifth Circuit Rule Is Not Necessary to Remedy a Market Imbalance

Congress passed § 1988 to remedy a market imbalance—the market "failed to provide many victims of civil rights violations with effective access to the [courts]." *City of Riverside*, 477 U.S. at 576 (citing H.R. Rep. No. 94-1558, at 3 (1976)). First, "victims [of civil rights violations] ordinarily cannot afford to purchase legal services at the rates set by the private market." *Id.* (citing H.R. Rep. No. 94-1558, at 1 (1976) and S. Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912). In addition, "the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries." *Id.* at 577.

Congress had no similar concern in providing for the reverse fee shifting component of § 1988. There is no need to encourage government actors to *defend* themselves against civil rights actions. Municipalities themselves are repeat players in civil rights lawsuits and, accordingly, obtain insurance, or choose to

self-insure, to cover defense costs of such suits. Moreover, municipal officials and actors who are sued based on alleged civil rights violations are virtually always defended and indemnified.[4]

Indeed, the only financial imbalance here is the windfall sought by defendants and their counsel in this case. Defendants now stand to receive *all their attorneys' fees* (over $50,000), though they relied on the claim they now argue is frivolous to remove the action to federal court and never sought to dismiss it until after expending attorney costs during discovery.

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[4] *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 U.C.L.A. L. Rev. 1023, 1038 (2010) ("Given the prevalence of indemnification, a damages award is highly unlikely to be paid out of the officer's pocket."); Lant B. Davis, John H. Small & David J. Wohlberg, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 812–14 (1979) (asserting that municipalities indemnify officers for any settlement or judgment); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 686 (1987) (noting that a study of Section 1983 cases in one federal district found no case in which an officer was not indemnified); Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 Fordham Urb. L. J. 587, 596–600 (2000) (describing indemnification practices in New York City); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 Colum. L. Rev. 247, 284 (1988) ("[I]ndividual defendants virtually never pay damages to plaintiffs."); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. Pa. J. Const. L. 797, 812 (2007) ("Public employers are usually required by statute to indemnify their employees or otherwise pay judgments against those employees arising from torts committed within the scope of their employment.").

In evaluating the effects of extending reverse fee shifting, then, this Court should consider that there is no need for the financial incentive that would be created by the overbroad rule crafted by the Fifth Circuit. (Nor is there a need for the deterrent effect of such a harsh rule to prevent frivolous claims, given Rule 11 and other existing disincentives, as detailed above).

IV. The Fifth Circuit's Rule Threatens to Chill Civil Rights Plaintiffs from Vindicating Federal Claims

The Fifth Circuit's rule also threatens to chill the assertion of meritorious civil rights claims.

Under the Fifth Circuit's approach, private plaintiffs and civil rights organizations would be forced to confront the risk of being responsible for defendants' legal fees if a court were to find that *any one* of several claims were frivolous, even if that claim were factually intertwined with other, meritorious claims. In this case, the amount of reverse fee shifting was more than $50,000—a potentially bankrupting amount to a middle-class family. In other cases, where attorneys' rates are higher than they are in Louisiana or where there was more substantial discovery, such reverse fee shifting could easily run into the hundreds of thousands or even millions of dollars—an amount that could bankrupt even large civil rights organizations. Worse yet, the scale of the risk created by reverse fee shifting is unknown, hard to estimate at the time of filing, and largely outside a plaintiff's control. Where the potential gravity of the harm is so debilitating, the fact that the risk of an erroneous frivolousness finding is low is of little com-

fort to a prudent plaintiff doing an appropriate cost-benefit analysis.

Courts and Congress have recognized the substantial risk that reverse fee shifting awards would chill civil rights plaintiffs, thus frustrating Congress's purpose. The Seventh Circuit, for example, has explained that, "[i]f prevailing defendants were *routinely* awarded attorney's fees under § 1988, civil rights plaintiffs would be extremely reluctant to initiate litigation for fear of being charged with a fee award vastly exceeding the expected recovery, and in some cases their ability to pay, thereby vitiating the underlying purpose of § 1988." *Coates v. Bechtel*, 811 F.2d 1045, 1049 (7th Cir. 1987) (emphasis added) (citing S. Rep. No. 94-1011 at 5, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 ("civil rights plaintiffs should not be deterred 'from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose'")); *see also Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 574 (E.D.N.Y. 1986) (stating, in context of Rule 11, that fee shifting "will discourage attorneys from pursuing novel yet meritorious legal theories").

Such potentially debilitating liability, especially when imposed through the blunt instrument of a fee-shifting statute rather than the more flexible and calibrated Rule 11 regime, creates its own *in terrorem* effect, particularly when coupled with the pre-existing costs of pursuing a civil rights claim. It is not easy to be a civil rights plaintiff in any event: bringing a lawsuit means, among other things, opening one's life to the broad-ranging discovery permissible under the federal rules, continually responding to counsel's inquiries for documents, being interro-

gated during a deposition, and missing work for a potentially weeks-long trial. While these costs are common to all plaintiffs, those in non-civil-rights cases can be incentivized by the prospect of large damages awards if they succeed. That is often not true for civil rights claimants. As Congress recognized, the very reason that fee-shifting statutes are necessary is that the monetary damages resulting from civil rights violations are often low—too low for private attorneys to be willing to take these cases without fee shifting and too low to create an economic incentive to sue. *See City of Riverside,* 477 U.S. at 576-78 (citing H.R. Rep. No. 94-1558, at 2 (1976)). Indeed, many civil rights lawsuits seek only injunctive relief. Adding the potentially ruinous costs of paying the defendants' attorneys' fees—even where the plaintiff is ultimately victorious on factually-intertwined claims—threatens to dissuade many prudent civil rights plaintiffs.

Additionally, the Fifth Circuit's rule has the potential to deter creativity in theorizing new legal arguments, which has been described as "the very lifeblood of the law." *LaSalle Nat'l Bank v. First Conn. Holding Grp., LLC.*, 287 F.3d 279, 289 (3d Cir. 2002). Faced with the prospect of reverse fee-shifting of the sort approved by the Fifth Circuit in this case, civil rights plaintiffs may well choose to pursue only well-established claims and abandon more innovative claims that a skeptical court, late in the case, might deem frivolous. If so, necessary changes in the law may be delayed and valid claims may be foregone. "Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the

common law itself." *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985). Indeed, Judge Weinstein has noted that the "first attorney to challenge *Plessy v. Ferguson* was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to *Brown v. Board of Education*." *Eastway Constr. Corp.*, 637 F. Supp. at 575 (noting further that "the apparently useless challenges by attorneys of the still relatively recent Supreme Court decision in *Swain v. Alabama* have induced the Court quickly to reconsider and reject that ill-conceived ruling"). The Fifth Circuit's approach would dissuade plaintiffs from "challeng[ing] the received wisdom," *Eastway Constr. Corp.*, 762 F.2d at 254, even if counsel believed they had a good faith basis for modifying existing law.[5] The loss of such creativity due to a fear of expansive reverse fee shifting would not only frustrate Congressional intent, it would cause stagnation in the common law.

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[5] For example, one *amicus*, the Lawyers' Committee for Civil Rights Under Law, Washington, D.C., recently brought a constitutional challenge to Ohio's voting system. *See League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008). While the voting system was clearly defective, there was scant caselaw establishing whether that violated the constitution, and, if so, which constitutional rights were violated by such defects. The Lawyers' Committee and its co-counsel theorized innovative and meritorious legal arguments; the District Court, recognizing the novelty of these claims, certified for interlocutory appeal its denial of the motion to dismiss. *Id.* at 471-72. After the Sixth Circuit affirmed the denial of the motion to dismiss as to two of the claims, the case settled and the State of Ohio agreed to transform its voting procedures. Such creative lawyering risks being chilled if the Fifth Circuit's rule is affirmed.

This is not to say that some civil rights cases are not, indeed, frivolous and brought solely in order to harass a defendant. Some cases undoubtedly are. But ample mechanisms already exist to deter such lawsuits. *See supra* Section II. And the Fifth Circuit's rule goes far beyond the mere punishment of those who bring wholly frivolous cases. Indeed, under the Fifth Circuit's rule, a plaintiff could win a lawsuit, obtain significant damages or injunctive relief, yet still face a reverse fee shifting award because one of its claims—even a claim factually intertwined with the winning claims—were deemed frivolous. This case demonstrates that point (even assuming Mr. Fox's federal claim was frivolous, which is disputable): given Mr. Vice's criminal conviction, Mr. Fox may well succeed on his lawsuit (currently pending in state court) and defendants may well be held liable for their tortious conduct against Mr. Fox. Yet if this Court affirms the lower court, the defendants would be compensated for *that same misconduct*, in the form of payment for their attorneys' fees.

Accordingly, should the decision below be affirmed, responsible counsel would be required, at the start of each litigation, to advise their clients about the risks they face in pursuing their civil rights claims, even where the litigation is indisputably not brought for purposes of harassment. Counsel would undoubtedly advise their clients that, in counsel's view, none of the claims were frivolous (responsible counsel would never bring claims that they believed were frivolous). But responsible counsel would also be forced to admit that more novel claims, or claims where the entire factual basis cannot be known at the outset, create significant risk for the plaintiff. Findings of frivolousness are not entirely predictable

(as detailed further, *infra* Section V). Clients would then be in the awkward position of having to determine whether to trust their counsel's analysis, knowing their attorney's error could lead to financial ruin.

V. The Fifth Circuit's Rule Is Particularly Chilling Because Frivolousness Determinations Are Often Unpredictable and Influenced by the Hindsight Effect, as Demonstrated by this Case

The *in terrorem* effect of the Fifth Circuit's rule is particularly strong because frivolousness determinations are difficult to predict and are frequently influenced by hindsight.

It can often be quite difficult to distinguish, *ex-ante*, between colorable claims that nevertheless present an uphill battle (for which success may depend on favorable discovery, an attentive and sympathetic jury, and other factors), from those that a court could deem frivolous. As commentators have observed, "claims which appear frivolous and baseless in the eyes of one judge may seem respectable losers to others," and "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, 94 (1996) (hereinafter "Yablon, *Essay on Probability*"); *see also* Jessica Butler-Arkow, *The Individuals with Disabilities Education Improvement Act of 2004: Shifting School Districts' Attorneys Fees to Parents of Children with Disabilities and Counsel*, 42 Willamette L. Rev. 527, 537-542 (2006) ("The definition of frivolous may be in the eye of the beholder—another reason for caution in shifting fees."); *East-*

way Constr. Corp., 637 F. Supp. at 574 ("Court opinions on attorneys' fees speak easily of cases being either frivolous or nonfrivolous . . . [but r]eality is more complicated. In the legal world, claims span the entire continuum from overwhelmingly strong to outrageously weak.").

Indeed, one study by the Federal Judicial Center found that 19 percent of Rule 11 reversals by the Courts of Appeals were based on the appellate court's finding that the cases were meritorious, though the lower court had found otherwise. Clearly, even judges do not always agree about which cases cross the line into frivolousness. Yablon, *Essay on Probability*, 44 U.C.L.A. L. Rev. at 94 (citing Federal Judicial Ctr., Rule 11: Final Report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States 21 (1991)). Another study showed that, when presented with the same hypothetical scenario, judges were not far from evenly split on whether to award sanctions: "60.3% of the judges would have awarded sanctions and the others would not." *Id.* (citing Saul M. Kassin, *An Empirical Study of Rule 11 Sanctions* 17 (1985)).

Even judges hearing the same case at the same time may differ wildly, with a claim that some find meritorious being dismissible as frivolous by others. In a recent civil rights case in Washington state court, two concurring justices found that the argument that same-sex couples have a constitutional right to marry was "so *frivolous* as to merit dismissal without further argument." *Andersen v. King County*, 138 P.3d 963, 999 (Wash. 2006) (Alexander, C.J., concurring) (emphasis added). In marked contrast, four dissenting justices concluded that the same claim not only was not frivolous, but was meri-

torious. *Id.* at 1013 (Fairhust, J., dissenting, concurred with by Bridge, J., Owens, J. and Chambers, J.).

Whether a claim is frivolous must be analyzed from the perspective of what was known or knowable at the time a suit was brought. Fed. R. Civ. P. 11, advisory committee's note (courts should "avoid using the wisdom of hindsight"). Yet courts generally resolve sanctions motions *after* a claim has been dismissed—either by the Court or voluntarily by the party—indeed, counsel often tactically decide to seek sanctions only at that late stage. At that point, it is very difficult for the benefits of hindsight not to cloud the court's judgment.[6] *See Christiansburg*, 434 U.S. at 421-22 (decrying the "understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success."). Simply put, despite the urgings of this Court in *Christiansburg*, "a judge is more likely to find a violation of Rule 11 (which is, after all, a finding that a case or

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[6] As psychologists have explained, "hindsight bias" is an established "tendency for people to overestimate the predictability of past events." Chris Guthrie, et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 799 (2001). A study of 167 federal magistrate judges has shown, not surprisingly, that judges are susceptible to this type of bias, including in the decision on whether a claim is sanctionable. *Id.* at 800 (stating that "the hindsight bias likely influences . . . the levying of sanctions under Rule 11 of the Federal Rules of Civil Procedure [because] a motion or allegation seems less meritorious after a court rejects it").

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, 605 (2004).[7]

The defendants' behavior in this case both invited such hindsight bias and magnified its costs. At the time Mr. Fox filed his complaint, *not one* of the defendants thought it was so legally deficient that a motion to dismiss was warranted. Instead, the defendants removed the case to federal court and decided to pay their attorneys for the costs of discovery, including numerous depositions, accruing substantial fees in the process. Had they sought dismissal of plaintiff's federal claim after the Complaint was initially filed—at the time when any frivolousness should have been obvious, if the claim were indeed frivolous—Mr. Fox would be liable for a fraction of the total attorneys' fee award he now faces. And, as detailed in Petitioner's brief, there is a significant argument that plaintiff's federal claim was not legally frivolous. *See* Pet'r Br. at 39-41.

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[7] The consequences of this hindsight effect are likely to be even more severe in the context of reverse fee-shifting under § 1988 than in the Rule 11 context. In the Rule 11 context, "the court may impose an appropriate sanction," which "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c). This sanction can include a penalty paid to the court, nonmonetary actions, or "part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." *Id.* In marked contrast, § 1988 provides for an award of a "reasonable attorney's fee," and there is "a "strong presumption" that the lodestar represents the "reasonable" fee. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).

These realities—that frivolousness determinations are unpredictable and made with the benefit of hindsight, that the defendants' failure to file a motion to dismiss does not preclude them from later arguing that a claim was frivolous from inception, that the extent of the defendants' fees is unknowable at the time of filing, and that even ultimately winning a case does not preclude a determination of liability for reverse fee shifting where a plaintiff asserts a single claim that is found to be frivolous even when factually intertwined with winning claims—open a civil rights plaintiff to ruinous attorneys' fees under the Fifth Circuit's rule, regardless of whether the plaintiff's litigation is fundamentally meritorious.

VI. The Practical Effect of the Fifth Circuit's Rule Will Be to Increase Litigation Over Both Borderline Claims and Attorneys' Fees

As detailed above, the Fifth Circuit's rule, if affirmed, would chill civil rights plaintiffs and impose an unfair penalty on clients who are unable to evaluate the merit of various potential legal claims. Yet that is not the decision's only infirmity. From the perspective of the federal courts, the most obvious result of this rule would be a multiplication of unnecessary litigation in two ways: plaintiffs may be more reluctant to abandon weak claims, and defendants will be more likely to seek fees whenever a weak claim is abandoned.

Under the current regime, prudent plaintiff's counsel plead all viable, non-frivolous claims at the outset. Such an approach ensures that a plaintiff's complaint maximizes the chance of recovery given that discovery often proceeds in unexpected ways;

indeed, at times intervening changes in the law can weaken strong claims and *vice versa*. The corollary to this approach, however, is that as discovery proceeds, prudent counsel should voluntarily dismiss claims at various points before trial.

In practice, plaintiffs can and do abandon claims through the course of litigation. At the summary judgment stage, for example, a plaintiff often recognizes that the allegations it hoped to prove simply were not borne out through discovery. Moreover, it is often very useful, as a matter of trial strategy, to voluntarily dismiss even winnable claims (or defendants) to present a more streamlined theory of the case to the jury. This is particularly true where such claims provide no additional relief as compared to claims that present a higher likelihood of success.

An efficient judicial system should *encourage* parties to use the process of discovery to winnow their claims, where appropriate. Such winnowing ensures that courts, opposing counsel, and jurors need only focus on the most important claims.

But under the Fifth Circuit's approach, plaintiffs may be reluctant to engage in this efficient winnowing process because voluntary dismissal of claims could be viewed as a concession that the claim was frivolous. Accordingly, opposing counsel, the court, and ultimately the jury will have to expend scarce resources considering the merits of claims that might otherwise have been voluntarily dismissed.

In this case, Mr. Fox's voluntary dismissal was viewed as such a concession. Had Mr. Fox pursued his § 1983 claim, and opposed summary judgment on the grounds detailed in Petitioner's brief at 39-41, the outcome might have been far different. Had the

magistrate judge struggled with the existing authority and written an opinion resolving it—even if that resolution was ultimately in defendants' favor—the magistrate might have been significantly less likely to find that Mr. Fox's case was "vexatious, frivolous, or otherwise without merit." P.A. 27a. Indeed, the hindsight effect discussed above suggests that where courts learn counsel has abandoned claims, they more readily believe such claims should have never been brought in the first place.

Commentators repeatedly criticized the pre-1993 version of Rule 11 precisely because that incentive structure—which is similar to the incentives created by the Fifth Circuit's approach—led to an increase in litigation. Prior to the 1993 amendments, Rule 11 had no safe harbor provision permitting counsel to withdraw challenged filings. Accordingly, "parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11." Fed. R. Civ. P. 11 advisory committee's note to 1993 amendments; *see also* Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure 3 (May 1, 1992), *reprinted in* 146 F.R.D. 519, 523 (1993) (noting that the 1983 version of Rule 11 "provide[d] little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable"); Edward D. Cavanagh, *Rule 11 of the Federal Rules of Civil Procedure: The Case Against Turning Back the Clock*, 162 F.R.D. 383, 395 (1995) (observing that under the 1983 version "the very act of voluntary dismissal [could] be used as evidence that the claim was baseless"); *Lawyers' Responsibilities To The Courts: The*

1993 Amendments To Federal Rule Of Civil Procedure 11, 107 Harv. L. Rev. 1629, 1640 (1994) (noting reluctance to correct claims under the 1983 version because such correction could be viewed as an admission of liability).

Similarly, an affirmance of the Fifth Circuit would increase the amount of satellite litigation over fees. Under the Fifth Circuit's approach, defendants would be encouraged to seek fees *whenever* a plaintiff abandons a claim, because such abandonment alone could constitute evidence of frivolousness, as detailed above. (And even if a defendant loses such a motion, and that ruling is affirmed on appeal, a plaintiff would be significantly chilled in the interim, knowing that he or she was one court ruling away from potentially substantial fee liability). In marked contrast, under the rule advocated by Petitioner—and supported by *amici*—the law would be clear: defendants could not seek fees under a fee-shifting statute based on allegedly frivolous legal claims if such claims are factually intertwined with non-frivolous claims. Accordingly, defendants could only seek fees for allegedly frivolous legal claims if the entire lawsuit was frivolous, or if the frivolous and non-frivolous claims were factually distinct.

Neither increasing plaintiffs' reticence to abandon claims due to a fear of a § 1988 motion nor an onslaught of motions for fees by defendants can be reconciled with the overriding purpose of § 1988, which was to encourage rather than discourage the litigation of civil rights claims.

CONCLUSION

For the foregoing reasons, this Court should hold that a defendant may only recover attorneys' fees

under § 1988 if the plaintiff's entire lawsuit was frivolous or if the plaintiff presents a frivolous claim which is factually distinct from the non-frivolous claims in the lawsuit. Accordingly, the decision below should be reversed and the fee award should be vacated.

Respectfully submitted,

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