Case No. 10-114

In the Supreme Court of the United States

RICKY D. FOX,

Petitioners,

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 NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include municipal, county, and state governments and officials throughout the United States. [1] These organizations regularly file *amicus* briefs in cases that, like this one, raise issues of vital concern to the Nation's cities, counties, and States.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that represents state legislatures throughout the United States. One of NCSL's core missions is to improve the quality and effectiveness of those bodies.

The National League of Cities (NLC) was established in 1924 by and for reform-minded state municipal leagues. Today it represents more than 19,000 cities, villages, and towns across the country. NLC's mission is to strengthen and promote cities as centers of opportunity, leadership, and governance; to provide programs and services that enable local leaders to better serve their communities; and to function as a national resource and advocate for the municipal governments it represents.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, the parties' have consented to the filing of this brief and their letters of consent were filed concurrently with this Brief.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's counties. It advances county-related issues with a unified voice before the federal government and assists counties in finding and sharing solutions.

The International City/County Management Association is a non-profit professional and educational organization for chief-appointed managers, administrators, and assistants in cities, towns, counties, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments worldwide.

The United States Conference of Mayors (USCM) is the official non-partisan organization of cities with populations of 30,000 or more. Among UCSM's primary roles are promoting the development of effective national urban/suburban policy, strengthening federal-city relationships, and ensuring that federal policy meets urban needs.

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization of over 3,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by

providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

Amici have a substantial interest in the question presented. The case of *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658 (1978) held that civil rights plaintiffs suing a municipal entity under 42 U.S.C. § 1983 must show that their injury was caused by a municipal policy or custom. This Court also has limited the circumstances in which Section 1983 liability attaches to municipal officers. The current case raises the question of whether a plaintiff who filed a lawsuit including both frivolous Section 1983 claims and "garden variety" state-law claims should be responsible for paying the attorneys' fees of the prevailing state or locality for expense incurred in defending the frivolous claims.

If the Supreme Court rejects the court of appeals' view of awarding attorneys' fees in a case where plaintiffs have included frivolous civil rights claims with potentially meritorious state law claims, it will open the door to increased litigation of frivolous claims in federal court for state and local governments. This increase will add unwarranted expenses and require the allocation of already limited state and local resources to defend these frivolous claims in federal court. For this reason, *amici* have a substantial interest in the question presented and a unique perspective on its proper resolution.

SUMMARY OF ARGUMENT

This Court has stated that the purpose of awarding attorneys' fees to prevailing defendants pursuant to 42 U.S.C. § 1988 (Section 1988) is "to protect defendants from burdensome litigation having no legal factual or legal basis." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978); *Hughes* v. *Rowe*, 449 U.S. 5, 15 (1980) (per curiam) (applying the *Christiansburg* standards to Section 1988). This applies equally to a plaintiff's filing of frivolous *lawsuits* as well as frivolous *claims*. *Christiansburg Garment Co.,* 434 U.S. at 422. Indeed, Section 1988(b) is designed to protect state and municipal defendants from both types of filings because even the inclusion of one frivolous civil rights claim unnecessarily increases the burden (and concomitant costs) of defending a lawsuit.

The district court's award of attorneys' fees to Respondents effectuates the purpose set forth in *Christiansburg* by encouraging plaintiffs to pursue only non-frivolous civil rights claims. It requires that plaintiffs thoroughly evaluate a potential claim under 42 U.S.C. § 1983 (Section 1983) *before* including such a claim in a lawsuit that otherwise implicates only ordinary state-law tort claims. In so doing, the Fifth Circuit's rule rightfully protects state and local government defendants from incurring the substantial costs of defending frivolous civil rights claims.

This decision is especially important in the context of lawsuits including both non-frivolous state-law claims and frivolous federal civil rights

claims based on a related set of facts. A plaintiff's inclusion of a frivolous Section 1983 claim in any lawsuit substantially increases the cost of defending that lawsuit. The additional burden is not, as Petitioner suggests, merely a small "incremental" increase incurred in identifying a few extra questions to ask at a deposition or in conducting additional legal research. Instead, the inclusion of a federal civil rights claim changes the entire landscape of the case. First, the addition of such a claim generally results in litigation in federal court. For a variety of reasons, litigating in federal court is far more expensive than litigating the same case in state court (particularly a civil rights claim with the attendant nuances and procedures). Further, a Section 1983 claim injects the issue of attorneys' fees squarely into the litigation, which increases the defendants' exposure. This alone increases the cost of defending the action – it may dictate a more aggressive litigation strategy, encourage plaintiffs to seek unreasonably high settlement demands, or even discourage plaintiffs from settling the case altogether.

The rule set forth below also gives teeth to this Court's decision in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) and other precedent of this Court limiting when Section 1983 liability may attach. Municipalities and their taxpayers are often hardest hit by the substantial costs associated with defending civil rights claims. To that end, this Court has limited a municipality's liability under Section 1983 to situations where an official acts "pursuant to official municipal policy," but not simply where the municipality "employs a tortfeasor." *See Monell*, 436

U.S. at 671. The decision below promotes the underlying purpose espoused in *Monell* – to protect local governments from the costs of defending the purportedly tortious behavior of an official, when those actions have no ties to municipal custom or policy.

Similarly, this Court has circumscribed the situations in which a state or municipal official may be liable under Section 1983. For example, an individual city official may only be liable under Section 1983 if the plaintiff demonstrates, *inter alia*, that the individual was acting "under color of law." *Parratt v. Taylor*, 451 U.S. 527 (1981). And no matter who the named defendant is, a plaintiff must show that the alleged injury suffered was one stemming from a violation of the Constitution or the laws of the United States. In other words, this Court has repeatedly warned that not every ordinary tort claim gives rise to a *constitutional* tort claim. *See e.g., Paul v. Davis*, 424 U.S. 693, 701 (1976). Again, the decision below shows respect for, and effectuates, this Court's precedent.

Amici recognize that some plaintiffs may have legitimate and serious *state-law* claims against a state or municipal official acting as an individual, but not all such claims rise to the level of offending the Constitution. Nor do such claims always implicate the municipality employing the alleged tortfeasor. Indeed, *amici* do not dispute that the facts of this case, as presented by the Petitioner, suggest that Mr. Vice acted improperly (as his criminal conviction attests). But *amici* urge this Court not to let the bizarre facts of this case make

bad law. Indeed, there are countless cases where a plaintiff attempts to turn an ordinary tort claim against a local official into a civil rights claim in the hopes of winning the "attorney-fee" lottery. It is widely recognized that Section 1983 was intended to address much weightier concerns than the routine civil lawsuit, and that not every colorable state-law claim has a constitutional dimension. The court of appeals appreciated the balance struck both by Congress and this Court's decisions. Accordingly, *amici* urge this Court to uphold the decision below.

ARGUMENT

I. A Frivolous Section 1983 Claim Substantially Increases the Cost of Defending a Lawsuit.

Defending frivolous civil rights claims takes its toll on the budgets of state and local governments, which are already strained in the present economic crisis. Plaintiffs often seek to drag (theoretically) "deep-pocket" municipal defendants into cases where they do not belong, in the hopes of receiving a larger damages award. Indeed, a municipality often bears the brunt of expenses imposed in defending both itself and its officials related to Section 1983 claims, even where the conduct at issue is related only to the local official's individual conduct. *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 & n. 87 (2010) (explaining that the municipality, not the officer himself, is almost always responsible for footing the bill for litigation); John C. Jeffries, Jr., *In*

Praise of the Eleventh Amendment and Section 1983, 84 VA. L. REV. 47, 49-50 (1998) ("[s]o far as can be assessed," governments defend their officers against constitutional tort claims).[2] Every penny spent by the states and municipalities in litigating frivolous civil rights claims comes from the taxpayers' pockets. Yet, Petitioner evinces no appreciation for the practical ramifications of the rule he urges, and his efforts to minimize the costs implicated by his rule do not withstand casual scrutiny.

While recognizing that filing an entire frivolous lawsuit may merit an award of attorneys' fees, Petitioner paradoxically contends that filing a frivolous *claim* does not. Pet. Br. at 31-36. Petitioner's argument, however, rests on an incorrect factual premise – that appending frivolous Section 1983 *claims* on to other potentially non-frivolous state-law claims imposes only a minimal "incremental" burden on governmental defendants. This is patently false, as the inclusion of even a single Section 1983 claim substantially increases the cost of defending such a lawsuit because it changes

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[2] The existence of qualified immunity as a viable defense for an individual defendant does not relieve the municipality's burden arising from frivolous Section 1983 claims. First, qualified immunity is a viable defense only where the plaintiff is seeking *damages* against an *individual officer*; it does not apply to a "suit to enjoin future conduct," or to a suit against a municipality. *See Sacramento v. Lewis*, 523 U.S. 833, 842 & n.5 (1988). Moreover, even if such a defense were viable, the municipality is required to expend much time, effort and expense before a court may decide that issue. Accordingly, the mere act of filing a frivolous civil rights claim – even if that claim is later dismissed on qualified immunity grounds – imposes a substantial burden on a defendant municipality.

the entire complexion of the litigation.

First, claims involving constitutional torts are generally initiated in or are removed to federal court. *See* Vincent Fontana, MUNICIPAL LIABILITY: LAW AND PRACTICE § 9.02(G), p.9-13 ("the vast majority of Section 1983 claimants choose the federal courts as their preferred forum."). Notably, over 33,000 civil rights cases were filed or removed to federal court in 2009 alone. *See* Judicial Business of the United States Court, 2009 Annual Report of the Director, at table C-3. Plaintiffs and defendants are prone to opt for a federal forum because federal judges understand the intricacies of Section 1983 litigation better than their state counterparts. And for plaintiffs, filing in a federal forum sends a message that the case is more "serious" (hoping that defendants will translate that message as meaning higher exposure).

Not surprisingly, the forum inflicts a cost. A multitude of factors – increased control over the discovery process, more extensive motions practices, or additional procedural requirements – makes litigation in federal court far more expensive and time-consuming than it is in state court. *See* Gregory M. Cesarano & Daniel R. Vega, *So You Thought a Remand Was Imminent? Post-Removal Litigation and the Waiver of the Right to Seek Remand Ground on Removal Defects*, 74 FLA. B.J. 22, 23-24 (2000); Marc E. Montgomery, *Comment, Navigating the Back Channels of Salvage Law: Procedural Options for the Small Boat Salvor*, 83 TUL. L. REV. 1463, 1494–95 (2009) ("Litigation in federal court is also generally more expensive and

time consuming than most state court actions").

For example, the Federal Rules of Civil Procedure set forth a number of mandatory steps in the litigation process – many of which are not present in the various state courts, or at least are not present to the same extent – that lead to increased litigation costs. The Federal Rules require mandatory disclosures, initial discovery and scheduling conferences, and other numerous pre-trial conferences. *See generally* Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DEN. U. L. REV. 377, 388-91 and n.56 (2009-2010) (discussing the expenses of litigating in federal court and explaining that "[t]here is a good deal of reason to believe that it is more expensive to litigate a case in federal court than the same case would cost for litigation in state court"). Moreover, the growing focus in federal courts on discovery of electronically stored information also yields substantial costs on state and local governments that are not always borne in a state forum. *See* Lee H. Rosenthal, *Perspectives from the Trenches: Electronic Discovery - Is the System Broken? Can it be Fixed?*, 51 THE ADVOCATE 8, 14 (Summer 2010) (noting that in a survey conducted by the Federal Judicial Center, "[b]oth plaintiffs' and defendants' attorneys reported that cases involving electronic discovery were more expensive than cases that did not have any such discovery"). Each pre-trial action requires a government attorney's time, and accordingly taxpayer money. These costs are borne by defendants even where the plaintiffs' civil rights claims are wholly without merit. At the outset of

any litigation, a prudent city or state attorney reviewing a complaint containing a Section 1983 claim has no choice but to examine the allegations of the complaint. Thus, while a plaintiff may file a claim that he knows has no merit, it is only after the city has spent countless hours and money investigating such a claim that it may determine the claim to be frivolous.

It must also be recognized that Section 1983 litigation is a specialized and complex field. *See e.g.*, Martin A. Schwartz, *Section 1983 in the Second Circuit*, 59 BROOKLYN L. REV. 285, 286 (Summer 1993) (discussing the complexities of Section 1983 litigation). By way of example, the doctrine of qualified immunity – an issue that often takes center stage in lawsuits involving civil rights claims – is constantly evolving. For example, in *Saucier v Katz,* 533 U.S. 194 (2001), this Court held that a district court must first must ask whether "the facts alleged show the officer's conduct violated a constitutional right." *Id.* at 201. Then, only if that right was violated, should the district court determine whether the constitutional right was "clearly established." *Id.* Only eight years later, this Court modified this rule, holding that courts are not required to follow that two-step procedure in sequence. *Pearson v. Callahan*, 555 U.S. 223 (2009). This is but one example of the complexities associated with litigation Section 1983 claims. *See* Federal Judicial Center, Martin A. Schwartz & Kathryn R. Urbonya, SECTION 1983 LITIGATION 4 (2d ed. 2008) ("Section 1983 litigation often requires courts to examine complex, multifaceted issues" . . . "including jurisdictional questions, such as the Rooker–

Feldman doctrine, the Eleventh Amendment, and standing and mootness; affirmative defenses, such as absolute and qualified immunity; and other issues, such as the statute of limitation, preclusion, and various abstention doctrines."). Against the backdrop of these complex and evolving doctrines, counsel for city or state defendants will be required to expend significant resources defending a Section 1983 claim – even one that a court later deems frivolous.

Further, the inclusion of a Section 1983 claim automatically thrusts the issue of attorneys' fees into the lawsuit.[3] This alone may increase the costs of the litigation, giving plaintiffs' counsel an incentive to devote more time to the litigation and defense counsel an incentive to defend more vigorously. Overconfident or overaggressive plaintiffs may use the possibility of fees as additional leverage in making an unreasonably high settlement demand. Indeed, for some plaintiffs, the possibility of recovering attorneys' fees actually *discourages* settlement altogether, and encourages prolonged litigation. *See* Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56 (1982) (stating that fee-shifting statutes may discourage settlement); Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71

[3] This initial concern regarding the requirement of paying attorneys' fees is always present at the inception of a lawsuit containing civil rights claims, even if the defendant believes the civil rights claims to be frivolous. Regardless of their beliefs, any decision-maker for a state or municipality must realize some uncertainty and plan for potential contingencies.

CHI.-KENT L. REV. 427, 445-47 (1995) (noting that under a two-way fee shifting scheme, there is an incentive to litigate rather than settle a dispute); Robert S. Miller, *Attorneys' Fees for Contractual Non-Signatories Under Civil Code Section 1717: A Remedy in Search of a Rationale*, 32 SAN DIEGO L. REV. 535, 541 (1995) ("[F]ee-shifting might discourage settlement. Adding the possibility of recovering fees into the litigants' calculus of the settlement value of their cases could make settlement less likely.").

Petitioner seeks to brush aside the inclusion of civil rights claims as minimal "incremental" burdens on defendants. But, when a plaintiff adds such a claim, the costs in defending such a suit increases substantially. It is not merely a matter of conducting additional research or drafting a motion related to the Section 1983 claim. The factors discussed above all increase the taxpayer costs of defending a lawsuit against a state or local government and its official, and all such costs are the result of the "mere" inclusion of a frivolous Section 1983 claim. The wisdom of this Court's rule, handed down three decades ago in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), that defendants can recover for frivolous Section 1983 claims, is validated by the litigation in the trenches in which *amici*'s members are involved on a daily basis.

II. The Decision Below Enforces this Court's Limits on Section 1983 Liability.

Not every tort committed by a city official can form the basis of a civil rights claim against that individual or against the municipality that employs him or her. Indeed, this Court has delineated when Section 1983 liability may attach to such individuals and entities, and it is these limitations that differentiate such claims from garden-variety state-law torts. The requirements for Section 1983 liability are threshold issues that a plaintiff must consider before including a civil rights claim in his lawsuit. Section 1988 reinforces that requirement by allowing an award of fees to defendants when a plaintiff completely ignores these threshold issues, and instead seeks to turn an ordinary tort claim into a Section 1983 claim without a factual or legal basis to do so.

With these parameters in mind, the district court properly determined that Petitioner's Section 1983 claims were frivolous. Petitioner did not seek *certiorari* on the question of whether his claims were frivolous, and it must be taken as a given here. Thus, the only issue is whether the district court correctly imposed consequences for filing such frivolous claims. *Amici* contend that it did. In promulgating Section 1988, Congress provided a disincentive for filing frivolous civil rights claims, and the district court here effectuated this policy by awarding attorneys' fees to Respondents. The award enforces the limits on Section 1983 liability, and appropriately creates consequences for plaintiffs who

file frivolous Section 1983 claims in disregard of those constraints.[4]

A cursory review of the requirements of municipal liability under Section 1983 demonstrates just how frivolous Petitioner's claims against the Town of Vinton were, and underscores the appropriateness of the district court's order. This Court has limited the scope of municipal liability under Section 1983 to situations "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under 1983." *Monell*, 436 U.S. at 694. Municipalities, therefore, incur liability when harm is caused by an official's action made pursuant to official municipal custom or policy, not "solely because [a city] employs a tortfeasor." *Id.* at 691. Again, this is a threshold requirement of municipal liability – if there is no municipal custom or policy, there is no municipal liability under Section 1983. Moreover, establishing an official custom or policy,

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[4] Petitioner's *amici* suggest that the rule below will deter meritorious claims because at the outset of many lawsuits including Section 1983 claims, a "scrupulous lawyer would have to advise [the client] . . . that, if a court found that failure on a threshold or procedural matter rendered part of her suit unreasonable . . [the client] could be ordered to pay all of the defendant's attorney's fees, even fees that would have been expended to address related, meritorious claims." *Amicus* Br. of Liberty Inst. at 12. First, dismissal of a Section 1983 claim based on a "threshold or procedural matter" does not automatically render a claim frivolous. Second, even Petitioner recognizes that in this case, the district court did not purport to award fees on the related, potentially meritorious state-law claims. *See* Pet. Br. at 24, 48, 52.

requires more than proof of the single incident of which the plaintiff complains. *City of Oklahoma v. Tuttle*, 471 U.S. 808, 823-24, (1985). That is because if every singular act by a local official led to municipal liability, *Monell*'s dictates would be a "dead letter." *Id*. at 823; *Mann v. Helmig*, 2008 U.S. App. LEXIS 15213, *12 (6th Cir. 2008). Thus, *Monell* and its progeny seek to protect local municipalities from exactly the type of frivolous civil rights claims Mr. Fox filed here – claims based on isolated actions of an individual defendant that in no way implicates an official custom or policy of the municipality. Section 1988 further reinforces *Monell* by deterring plaintiff from initiating such frivolous civil rights claims.

The district court's decision equally enforces other threshold limitations on the circumstances in which Section 1983 liability may attach. For example, a plaintiff's civil rights claim against a municipal official may stand only where that individual acted "under color of law." This Court made clear in *Parratt v. Taylor*, 451 U.S. 527 (1981) that not all conduct of a city official is conduct "under color of law." *Id.* at 533; *Screws v. United States*, 325 U.S. 91, 111 (1945) ("acts of [defendant] officers in the ambit of their personal pursuits are plainly excluded" from the definition of "color of law"). Further, no matter whether the defendants are individuals or municipalities, a plaintiff does not have a colorable Section 1983 claim unless the plaintiff demonstrates a violation of a right "secured by the Constitution or the laws of the United States." *McKinney v. Irving Indep. Sch. Dist.*, 309 F.3d 308, 312 (5th Cir. 2002), *cert. denied*, 537 U.S. 1194

(2003). In other words, this Court time and time again has said that facts and alleged injuries that may give rise to claims under state law do not necessarily amount to constitutional torts. *See e.g.*, *Paul v. Davis*, 424 U.S. 693, 701, (1976).

Here, Petitioner's claims were filed with blithe disregard for the limits on liability set forth above. There was no indication (either in Petitioner's complaint or in subsequent motions) that Mr. Vice acted pursuant to a municipal custom or policy. Accordingly, the Town of Vinton never should have been required to spend time and taxpayer money defending the frivolous Section 1983 claims lodged against it. Moreover, Petitioner conceded that the actions of Mr. Vice either were not made under "color of law" or did not cause the requisite "constitutional injury." Nonetheless, Mr. Vice (and the Town and its taxpayers) were required to expend significant funds defending against civil rights claims made without any basis in fact or law. Indeed, whatever the merits of Petitioner's state-law claims, Mr. Vice's factual allegations simply did not and could not support the civil rights claims Petitioner presented below. The district court correctly found his civil rights claims to be frivolous. Petitioner did not seek *certiorari* on that issue, and the claims must be presumed to be frivolous here.

To be clear, *Amici* do not defend Mr. Vice's conduct, nor do they dispute that Petitioner may have suffered harm as a result of his actions. In fact, a state court may at some point find that Petitioner is entitled to damages under state law. *Amici,* however, do oppose allowing Petitioner to include frivolous civil rights claims without any sort of

consequence, when such claims have no foundation under this Court's precedent. Plaintiffs should not be able to ignore the command of *Monell, Parratt,* and *Paul* with impunity. But this happens, unfortunately, every day. *See* Section III, *infra*. While Petitioner and his *amici* insist that affirming the rule set forth below will "chill" civil rights litigation, this is a drastic overstatement. There must be some disincentive for the pursuit of a frivolous claim, and Congress has provided one here.

Indeed, the award of fees falls squarely in line with Congress's intent in enacting Section 1988 and this Court's interpretation of the statute. Congress enacted Section 1988 to allow prevailing parties – both plaintiffs and defendants – to recover attorneys' fees in various civil rights claims. This Court has made clear that the statute serves the dual purposes of making it "easier for a plaintiff of limited means to bring a meritorious suit," but also "deter[ing] the bringing of lawsuits without foundation." *Christianburg,* 434 U.S. at 420. Thus, Congress has explicitly provided a disincentive for filing frivolous civil rights claims, and this Court has given district courts the discretion to effectuate such policy by awarding attorneys' fees in appropriate circumstances. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

The district court here properly exercised this discretion to award fees to Respondents. It determined that the entire "focus" of the case was on Petitioner's Section 1983 claims, and explained that Mr. Fox did not explicitly raise the state-law claims until Respondents sought summary judgment on the Section 1983 claims. Accordingly, the district court

appropriately awarded fees that were directly traceable to those civil rights claim. That decision correctly enforced both Congress' intent to deter frivolous civil rights claims and this Court's limits on Section 1983 liability set forth in *Monell*, *Parratt* and *Paul*.

III. Plaintiffs Across the Country Frequently File Frivolous Section 1983 Claims.

This Court should appreciate that lawsuits containing frivolous Section 1983 claims coupled with potentially non-frivolous state-law claims are not unusual, which is why affirming the decision below is so important to curbing the inclusion of frivolous claims. It should be axiomatic that facts giving rise to state-law tort claims do not necessarily implicate constitutional torts under Section 1983, but it is easy for a plaintiff to bring the claims hand-in-hand to increase pressure on state or local governments by raising the litigation stakes. *See Villarreal v. City of Mercedes*, 2003 U.S. App. LEXIS 23060 (5th Cir. 2003) (citing *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) for the proposition that some claims do not rise to the level of constitutional torts, but instead simply are "analogous to a fairly typical state-law tort claim.").

While courts have "stressed that 42 U.S.C. § 1983 is not an avenue for redress of any and all possible tort claims against the government," *Mertik v. Blalock*, 983 F.2d 1353, 1362 (6th Cir. 1993), many plaintiffs turn a blind eye to that admonition. *See, e.g., Paul v. Davis*, 424 U.S. 693, 700-01 (1976) ("[N]ot every tort by a state official is a constitutional violation, and . . . the Fourteenth

Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States."). They readily persist in using Section 1983 to "bootstrap garden-variety state-law torts into federal cases." *See* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away*, 60 N.Y.U. L. REV. 1, 2 (1985) (acknowledging the growing concern regarding frivolous Section 1983 claims).

Examples of recently filed civil rights claims confirm the point and illustrate the abuses that the Fifth Circuit's rule was designed to prevent. In *Moran v. S. Reg'l High Sch. Dist. Bd. of Educ.*, 2006 U.S. Dist. LEXIS 21100, *2 (D.N.J. Apr. 10, 2006), the plaintiff was a tenured employee of the local school system, who had been the subject of numerous complaints of sexual harassment. As a result of these complaints, Mr. Moran was placed on administrative leave and eventually entered into an agreement with the district school board where he would, among other things, voluntarily resign from his position and release the district from all claims arising from the severance of his employment. In exchange, the district agreed to pay Mr. Moran $200,000 and to make only limited statements regarding his employment. *Id*. at *4-5

Events subsequently occurred which led Mr. Moran to believe that the district had breached the agreement, and he brought claims regarding breach of contract, violations of Moran's privacy and other rights, and other state-law claims in state court. Not satisfied with just that approach, Mr. Moran also filed a completely duplicative suit in federal court

reciting the same claims against both the defendants in the state court action and two additional defendants who were employees of the district. *Id.* at *7. Mr. Moran included a claim under Section 1983 in his second suit, but that claim was based on the same exact occurrences that gave rise to his state court litigation. The district court eventually dismissed all of Mr. Moran's claims, and awarded attorneys' fees because of the frivolous nature of his federal civil rights claims. The court explained that, notwithstanding whether Mr. Moran had any rights because of his tenured status under the laws of New Jersey, the federal Section 1983 claims – which were used to invoke the federal court's jurisdiction – were wholly without merit. The court succinctly stated that "the § 1983 claims outlined above provided the *pretext* for the Plaintiff to invoke this Court's jurisdiction over a lawsuit that is *largely duplicative of the suit he was already pursuing in state court*." *Id.* at *23-24 (emphasis added). Section 1983 should not be wielded as a "pretext."

Similarly, in *Ingram v. Strother*, 2009 U.S. Dist. LEXIS 63107, *1-2 (M.D. Ga. July 17, 2009), the plaintiff filed a host of state-law claims against a city high school's resource officer related to a situation where the resource officer allegedly sexually assaulted the plaintiff while she was in his office. In addition to these claims against the individual defendant, the plaintiff also tacked on a claim under Section 1983 against the county, the county school board and the county sheriff's office. The sole premise of the Section 1983 liability was the plaintiff's conclusory allegation that the high school's principal should have investigated why the resource

officer had a female in his office with the door closed. *Id*. at *9. The court dismissed all of the claims against the county school board while leaving the claims against the defendant resource officer pending.[5] The court went on to awarded attorneys' fees because of the frivolous nature of the claims against the county school board, explaining: "It is clear to this Court that Plaintiff *simply named the School Board as a defendant without doing any legal research* to determine the types of claims, if any, that she should assert against it. *As a result of that lack of diligence, the School Board was forced to incur attorney's fees to defend against a suit that should have never been brought against it in the first place.*" *Id*. at. *10 (emphasis added). When the plaintiff has no basis for dragging the county into her lawsuit, there must be some repercussion.[6]

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[5] After the court dismissed the claims against the county school board, the plaintiff voluntarily dismissed her claims against the other county defendants. *Ingram*, 2009 U.S. Dist. LEXIS 63107, at *4.

[6] Other examples abound. *See also Villarreal v. City of Mercedes*, 2003 U.S. App LEXIS 23060 (5th Cir. Nov. 12, 2003) (affirming dismissal of civil rights claims against municipal defendant where the plaintiff did not even assert a constitutional tort against the city, and where it was clear that liability fell to the individual defendant, who happened to be a city employee); *Sabovik v. Castillo*, 2009 U.S. Dist. LEXIS 38547 (N.D. Ind. May 5, 2009) (granting municipal defendants motion to dismiss that liability clearly fell to the individual defendant, where there was not "even suggestion" that the injury was caused by a municipal policy or custom); *Butcher v. Guthrie*, 2007 U.S. Dist. LEXIS 84182 (E.D. Tex. Nov. 14, 2007) (dismissing Section 1983 claims where the plaintiff was merely trying to recast his probate claim in state court as a civil rights lawsuit for the mere purpose of invoking federal jurisdiction).

These are but two recent examples of the types of frivolous claims that *amici* see in the trenches. The pursuit of such claims burdens municipalities and their taxpayers with defending a Section 1983 claim when no such claim should have been brought in the first instance. In each of these instances, plaintiffs may have had legitimate claims against individuals under state law, but they sought to escalate these cases to the level of constitutional tort without any basis for doing so. The appellate court's approach rightfully encourages plaintiffs to take a hard look at the facts of their case *before* filing an unmeritorious Section 1983 claim. It does not deter plaintiffs from filing meritorious claims, or even colorable claims that have a chance at passing muster under *Monell* and this Court's other precedent limiting Section 1983 liability.

CONCLUSION

For these reasons, the Court should affirm the Fifth Circuit's decision.

Respectfully submitted,

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