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; TROY CARY, Policeman for the Town of Vinton; TOWN OF VINTON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* ARKANSAS, ALABAMA, COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO, LOUISIANA, MAINE, MISSISSIPPI, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, VIRGINIA, WASHINGTON AND WYOMING IN SUPPORT OF RESPONDENTS

DUSTIN MCDANIEL
Attorney General of Arkansas

ALI M. BRADY
Assistant Attorney General
Counsel of Record

ARKANSAS ATTORNEY GENERAL'S OFFICE
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-1319
ali.brady@arkansasag.gov

Counsel for State Amici Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

LUTHER STRANGE
Attorney General of Alabama
501 Washington Avenue
Montgomery, AL 36130

JOHN SUTHERS
Attorney General of Colorado
1525 Sherman Street
Denver, Colorado 80203

JOSEPH R. BIDEN III
Attorney General of Delaware
820 N. French Street
Wilmington, DE 19801

SAMUEL S. OLENS
Attorney General of Georgia
40 Capitol Square, SW
Atlanta, Georgia 30334

DAVID M. LOUIE
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

LAWRENCE G. WASDEN
Idaho Attorney General
P.O. Box 83720
Boise, ID 83720-0010

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, Louisiana
70804

WILLIAM J. SCHNEIDER
Attorney General of Maine
6 State House Station
Augusta, Maine 04333

JIM HOOD
Attorney General of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

E. SCOTT PRUITT
Attorney General
of Oklahoma
313 N.E. 21st Street
Oklahoma City, Oklahoma
73105-4894

ALAN WILSON
Attorney General
of South Carolina
P.O. Box 11549
Columbia, South Carolina
29211

GREG ABBOTT
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711

MARK L. SHURTLEFF
Attorney General of Utah
P.O. Box 142320
Salt Lake City, Utah
84114-2320

KENNETH T. CUCCINELLI, II
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219

ROBERT M. MCKENNA
Attorney General
of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, Washington 98504

BRUCE A. SALZBURG
Attorney General
of Wyoming
200 W. 24th Street
Cheyenne, Wyoming 82002

QUESTIONS PRESENTED

1. Can defendants be awarded attorney's fees under 42 U.S.C. § 1988(b) in an action based on a dismissal of frivolous claims, where the plaintiff has asserted other interrelated claims?

2. Is it improper to award defendants all of the attorney's fees they incurred in an action under 42 U.S.C. § 1988(b), where the fees were spent defending state-law claims that were intertwined with the frivolous federal claims?

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INTEREST OF *AMICI CURIAE*

This case deals with a defendant's ability to recover attorney's fees pursuant to 42 U.S.C. § 1988 when forced to defend a frivolous federal civil rights claim. Through their respective Attorneys General, the *amici* States provide legal representation to various state agencies, officials, boards, and commissions, which are frequently the target of such claims. Defending against frivolous lawsuits costs the *amici* States substantial time and public money each year. The *amici* therefore have an interest in preserving the important tool Congress provided in 42 U.S.C. § 1988 for plaintiffs to pay in appropriate cases the attorney's fees incurred by States and others in defending against such suits.

SUMMARY OF THE ARGUMENT

The *amici* States provide legal representation to various state agencies, officials, boards, and commissions. Defending against frivolous litigation is a fact of life for the *amici* States, which are required to spend significant time and public money each year litigating such claims. Through the attorney's fees provision of 42 U.S.C. § 1988, Congress has provided an important tool for discouraging frivolous litigation and providing reimbursement to those individuals forced to defend against them. The statute explicitly places decisions regarding attorney's fees within the trial court's discretion. This Court, in *Hensley v.*

Eckerhart, 461 U.S. 424 (1983), reiterated the importance of trial court discretion, explaining that "[t]his [discretion] is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437. Petitioner seeks a dramatic revision of § 1988 law, which would effectively strip trial courts of their discretion to award attorney's fees in frivolous federal civil rights claims. Petitioner's proposed rule would deny attorney's fees in any case involving multiple factually-interrelated claims. Such a rule would ultimately encourage plaintiffs to tack on a multitude of additional claims to each complaint, resulting in increased frivolous litigation. Furthermore, this drastic approach is unnecessary, as the Court's precedents already provide the framework for addressing factually-interrelated frivolous and non-frivolous claims. The proposed rule is also inequitable, always operating to the benefit of the party responsible for bringing the frivolous claim and to the detriment of the innocent party forced to spend time and money defending against it. Finally, Petitioner's proposed approach would violate § 1988 by stripping trial courts of the discretion mandated by the statute. The *amici* States respectfully request that the Court reject Petitioner's proposed rule and continue to allow trial courts to exercise their discretion pursuant to the guidance provided in *Hensley*.

ARGUMENT

I. Frivolous federal civil rights claims work a significant hardship upon the States, which provide publicly-funded legal representation for the state officials, boards, agencies, and commissions often targeted by such suits.

The United States has a strong tradition of free and open access to the courts, permitting *pro se* litigation, appointment of counsel in some cases, and waiving of filing fees based upon indigency. A consequence of our accessible justice system is that some claims are frivolous, vexatious, or intended to harass. Defending against frivolous litigation is a fact of life for the *amici* States, which provide publicly-funded legal representation for state officials, boards, agencies, and commissions.[1] For the States, the availability of attorney's fees for a prevailing defendant under § 1988 is one important tool in discouraging frivolous litigation.

42 U.S.C. § 1988 states that "the court, in its discretion, may allow the prevailing party, other than

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[1] Reliable data as to the extent and cost of frivolous litigation is notoriously difficult to obtain. One frequently cited study was conducted by the National Association of Attorneys General and cited by Senator Robert Dole during the consideration of the Prison Litigation Reform Act. That study, conducted more than fifteen years ago, estimated the financial impact of frivolous federal civil rights litigation at approximately $81.3 million annually. 141 Cong. Rec. S14, 413 (daily ed. Sept. 27, 1995) (statement of Sen. Robert Dole).

the United States, a reasonable attorney's fee as part of the costs." This Court's precedents establish that (1) defendants can recover attorney's fees under § 1988 only when the plaintiff's claims are frivolous; (2) a party can recover attorney's fees under § 1988 even when it prevails on some, but not all, claims; and (3) the award of attorney's fees is within the discretion of the trial court. *See Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978); *Hughes v. Rowe*, 449 U.S. 5, 14 (1980); *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Under these precedents a district court properly exercises its discretion by awarding a prevailing defendant attorney's fees under § 1988 for successfully defending against a frivolous claim, even when interrelated state-law claims remain to be resolved in state court.

A claim is frivolous if a reasonable person would have recognized the claim as meritless. *Donnelly v. Rhode Island Bd. of Governors for Higher Educ.,* 946 F. Supp. 147, 150 (D.R.I. 1996). Several factors are relevant in determining whether a claim is frivolous. One factor is whether the claim survived pretrial dispositive motions. *E.E.O.C. v. Kimbrough Investment Co.*, 703 F.2d 98, 103 (5th Cir. 1983); *E.E.O.C. v. Northwest Structural Components*, 897 F. Supp. 249, 252 (M.D.N.C.1995). Another factor is whether the plaintiff has established a *prima facie* case. *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir.), *cert. denied*, 469 U.S. 1018, 105 S. Ct. 433, 83 L.Ed.2d 359 (1984). Other factors include whether the defendant

offered to settle the case and whether the trial court disposed of the case without trial. *E.E.O.C. v. L.B. Foster Co.*, 123 F.3d 746 (3d Cir. 1997). These are merely factors rather than hard and fast rules, and determinations whether a claim is frivolous are to be made on a case-by-case basis.

Where a claim is found to be legally frivolous, the trial court may exercise its discretion in assessing a fee award. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). For example, whether a plaintiff was represented by counsel or proceeded *pro se* will be taken into account in determining whether to award fees to a successful defendant for a frivolous suit, because it cannot be assumed that *pro se* plaintiffs and attorney-represented plaintiffs have the same ability to recognize a claim's objective merit or lack of merit. *Miller v. Los Angeles County Bd. of Education,* 827 F.2d 617 (9th Cir. 1987). Similarly, the indigency of the plaintiff may affect the size of any attorney's fee award to the defendant. *See Durrett v. Jenkins Brickyard, Inc.,* 678 F.2d 911 (11th Cir. 1982); *Colucci v. New York Times Co.*, 533 F. Supp. 1011 (S.D.N.Y. 1982). And, where multiple claims are involved, each party's overall degree of success in the case should be considered. *Hensley,* 461 U.S. at 436-37.

Currently, § 1988 allows trial courts the necessary flexibility and discretion to deal with frivolous federal claims on a case-by-case basis. Petitioner asks this Court to eliminate that discretion and to adopt a bright-line rule denying attorney's fees in all lawsuits where any other factually related claims may still be

pending, even in another court. The *amici* States respectfully submit that the Court should reject Petitioner's proposal. Section 1988 is an important tool for discouraging frivolous and vexatious litigation in those relatively rare instances in which district courts deem a fee award to the defendant appropriate, and Congress correctly placed those decisions firmly within the trial court's discretion.

II. The attorney's fee provision of § 1988 is among several tools lawmakers have created to help discourage frivolous litigation.

Lawmakers have provided litigants and the courts several tools aimed at discouraging frivolous litigation. For example, Rule 11 of the Federal Rules of Civil Procedure prohibits attorneys and unrepresented parties from presenting any pleading, written motion, or other paper for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation, which is not warranted by existing law or by a non-frivolous argument for changing the law, or not supported by evidence. Fed. R. Civ. P. 11. Similarly, Rule 3.1 of the ABA Model Rules of Professional Conduct prohibits, as a matter of professional ethics, the filing of frivolous claims. Finally, the Prison Litigation Reform Act (PLRA) mandates that a prisoner who has had three cases dismissed as frivolous, malicious, or failing to state a claim for relief may not proceed *in forma pauperis* in a civil action unless the prisoner is under imminent danger of serious physical injury. 28 U.S.C.

§ 1915(g). The PLRA also includes other protections against frivolous federal civil rights claims brought by currently-incarcerated inmates, including its own attorney's fee provision.[2]

Section 1988 is one essential component for combating frivolous litigation in situations where the PLRA does not apply, including cases (1) filed by those who have been civilly committed, *see Perkins v. Hedricks*, 340 F.3d 582, 583 (8th Cir. 2003); (2) filed by former prisoners, *see Ahmed v. Dragovich*, 297 F.3d 201, 210 n.10 (3d Cir. 2002); (3) filed by prisoners while incarcerated who then amended their complaints after release, *see Prendergast v. Janecka*, 2001 WL 793251 at *1 (E.D. Pa., July 10, 2001); (4) filed on behalf of prisoners after the prisoner's death, *see Treesh v. Taft*, 122 F. Supp. 2d 887, 890 (S.D. Ohio. 2000); (5) filed by relatives bringing an action for a prisoner's death (*Id.*); (6) brought by a group of plaintiffs that include both prisoners and non-prisoners, *Turner v. Wilkinson*, 92 F. Supp. 2d 697, 704 (S.D. Ohio 1999); or (7) filed by all non-prisoners, including the large number of civil rights suits filed against the States each year by non-prisoner plaintiffs. For all of the claims not covered by the PLRA, § 1988 is one of the only tools available to deter frivolous litigation and provide some measure of protection for defendants forced to defend such suits.

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[2] The PLRA, intended to discourage frivolous litigation, contains a provision that restricts a plaintiff's ability to recover attorney's fees. 42 U.S.C.A. § 1998e(d)

For example, in *Harbulak v. County of Suffolk,* 654 F.2d 194 (2nd Cir. 1981), a driver sued when at a traffic stop the officer placed the ticket on his car dash. *Harbulak*, 654 F.2d at 195. The Second Circuit affirmed the district court's finding that the claim was frivolous, and ordered that plaintiff pay attorney's fees to the defendant. *Id*. at 198.

In *Sunn v. Dean,* 597 F. Supp. 79 (N.D. Ga. 1984), the plaintiff sued the jurors who had returned a verdict against him in a previous suit. *Sunn*, 597 F. Supp. at 80. The court found the claim so outrageous as to justify an award of attorney's fees to the defendant pursuant to § 1988. *Id*. at 83-84.

In *Kostiuk v. Town of Riverhead,* 570 F. Supp. 603 (E.D.N.Y. 1983), a woman sued the Town of Riverhead and the town dog catcher for picking up her dog and holding it overnight. *Kostiuk*, 570 F. Supp. at 605. The court found the claim to be legally frivolous and awarded the town $250 in legal fees pursuant to § 1988. *Id.* at 612. As these cases illustrate, § 1988 provides the trial court with one tool to address frivolous claims in the most egregious cases.

III. 42 U.S.C. § 1988 mandates that trial courts be given the discretion to equitably determine appropriate fee awards.

42 U.S.C. § 1988 specifically provides that "the court, *in its discretion*, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (emphasis added).

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), Justice Powell explained that, "[t]his [discretion] is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id*. at 437. Deference to the trial court's discretion in awarding attorney's fees is also appropriate where the fees are assessed against a plaintiff pursuant to a finding that his claim was frivolous. The Court should, therefore, reaffirm the *Hensley* rule and defer to the trial court's decision to award attorney's fees to Respondent.

Pursuant to *Hensley*, a trial court's discretion is to be guided by the twelve factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Hensley,* 461 U.S. at 430. These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id*. at n.4 (citing *Johnson*, 488 F.2d at 717-19). The *Hensley* court specifically focused on the importance of the eighth factor, the "amount involved and the results

obtained," explaining that the party's relative level of success is especially important in determining a fee award. *Id*.

Petitioner seeks a dramatic revision of § 1988 law, which would effectively strip courts of their discretion to award attorney's fees for frivolous federal civil rights claims and could encourage litigants to tack on a multitude of additional claims to each complaint. The Court should reject this approach. Nothing, either in the case at bar or in the broader development of § 1988 law, indicates that when Congress said that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" it intended to deny those courts that discretion in any case involving multiple factually-interrelated claims. "Discretion" means discretion, and the trial court in this case exercised its discretion exactly as anticipated by Congress and by this Court in *Hensley v. Eckerhart*.

IV. Petitioner's proposed rule is inequitable, unnecessary, and violates § 1988 by stripping the trial courts of discretion.

Petitioner argues that trial courts cannot adequately determine fee awards where the frivolous claims upon which the award is to be granted were factually-intertwined with remaining claims, and that this Court should preclude any fee award in all such situations. However, this issue is not a new one. The Court in *Hensley v. Eckerhart*, 461 U.S. 424

(1983) stated that a party may be "deemed 'prevailing' even though he succeeded on only some of his claims for relief." *Hensley*, 461 at 434. In fact, the Court directly addressed the situation of factually intertwined claims, stating that,

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

Hensley, 461 U.S. at 435. The Court explicitly rejected a proposed mathematical approach and emphasized the need to rely upon the trial court's discretion in determining the proper amount of any fee award. *Hensley*, 461 U.S. at 428.

In the present case, the trial court properly exercised its discretion in considering a fee award to the defendants, noting that "Defendant's [sic] do not appear to request attorney's fees related to the defense of the state-law claims remanded for decision to the Louisiana state court." Pet. App. 12a. However, even where interrelated claims pose difficulty in dividing the hours worked by attorneys on a claim-by-claim basis, that difficulty does not justify Petitioner's

drastic solution of denying attorney's fees altogether. Such a rule would be even more inequitable than the rigid mathematical approach rejected in *Hensley*, and would completely divest trial courts of discretion to award attorney's fees.

Petitioner urges the Court to adopt a new rule under which a defendant who has successfully defeated a frivolous civil rights claim may not recover any attorney's fees under § 1988 if the frivolous claim was factually intertwined with any remaining state claim no matter the merit of the state-law claim. Indeed, in the present case there has been no determination whether Petitioner's state-law claims were frivolous. To create a rule that would allow a plaintiff to avoid any fee award simply by asserting some number of additional, possibly frivolous, state-law claims would completely contravene the purposes of § 1988. Its practical effect would be to encourage plaintiffs to tack on as many additional claims to each complaint as they can, regardless of their merit. This would drastically increase the workload of both the courts and the state offices charged with defending such suits.

In each of the above-cited examples of frivolous federal civil rights suits in which attorney's fees were awarded pursuant to § 1988, the plaintiff could easily have added state-law claims, meritorious or not, to his federal claims and would, under Plaintiff's proposal, have thereby avoided paying any fees. For example, in nearly every case cited above, the plaintiff could easily have added a state claim for

intentional infliction of emotional distress, just as Petitioner did in this case. Alternatively, Plaintiffs in the above cases could have added state-law claims of negligence, nuisance, fraud, false imprisonment, conversion, detinue, assault, battery, trespass, invasion of privacy and conspiracy. Even though such claims might fail on their merits, they would have been sufficient to prevent an attorney's fee award under the Petitioner's proposed rule.

Amici agree with the appellate court in this case, and with the Ninth[3] and Eleventh Circuits, that "it would 'undermine the intent of Congress to allow plaintiffs to prosecute frivolous claims without consequences merely because those claims were joined'" with additional claims. Pet. App. 10a (citing *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1064 (9th Cir. 2006); *Quintana v. Jenne*, 414 F.3d 1306, 1312 (11th Cir. 2005); *Head v. Medford*, 62 F.3d 351, 356 (11th Cir. 1995)). Rather than discouraging frivolous litigation, such a rule could encourage litigants to add multiple additional claims to their complaint in an attempt to avoid attorney's fees.

Such a result is entirely unnecessary. Under existing precedent, trial courts are already instructed to consider "the amount involved and the results obtained," or the relative level of success achieved by each party, when making discretionary decisions

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[3] *But see Harris v. Maricopa County Superior Court*, No. 09-15833, 2011 WL 167040 (9th Cir., Jan. 20, 2011).

regarding fee awards under § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983). Where the plaintiff's state-law claims are a focus of litigation or clearly have merit, the trial court is already authorized to take that fact into consideration.

Petitioner attempts to support his proposed rule by arguing that Respondent should not recover for any legal work that could be used in the future to defend against Petitioner's state-law claims or which Respondent would have needed to perform even if the federal claims had not been included in the case. Pet. Br. 32. However, these arguments make clear that Petitioner's real concern is not that Respondent was wrongfully awarded fees for work unrelated to the frivolous claims, but that the work necessary to defend the frivolous claims might later also be used to defend against his state claims. Petitioner's argument seems to assume that Respondent would have an advantage in defending the state-law claims if he were allowed to rely upon legal work for which Petitioner has paid attorney's fees. However, any advantage that Respondent may have in defending the state-law claims as a result of the fee award could easily have been avoided by the Petitioner simply by not bringing the frivolous federal claims in the first place. Moreover, plaintiffs as well as defendants may benefit from legal work done in furtherance of the frivolous claims. For example, plaintiffs may gain access to discovery in pursuing the frivolous claims that they later use in prosecuting their state-law claims. Additionally, Petitioner's argument fails

because it is based only upon his guess as to the legal work necessary to defend against his state-law claims. However, under the current approach, it is already within the trial court's discretion, when assessing fees, to consider a plaintiff's concerns regarding the defendant's ability to use legal work covered by the fee award in future litigation. In the case at bar, the facts simply establish that the Respondent did expend a specified amount of time, effort, and money defending against the frivolous claims and was entitled to fees under § 1988, and the court was not persuaded to reduce the award based upon speculation that the burden Respondent bore in defending a frivolous lawsuit may possibly make it easier for him to defend against Petitioner's state-law claims.

Finally, the Court should reject the Petitioner's proposed approach because it will always operate in favor of the party at fault, the plaintiff found to have brought a frivolous claims, and at the expense of an innocent defendant forced to defend such claims. This is a far cry from the equitable outcome mandated by this Court in *Hensley*.

42 U.S.C. § 1988 mandates that decisions regarding attorney's fees rest firmly within the court's discretion. This Court affirmed the absolute need to rely on the trial court's discretion in *Hensley*, in which it provided ample guidance for lower courts as to how that discretion should be exercised. The *Hensley* factors have provided sufficient direction to lower courts for over two decades and should not be

abandoned now in favor of Petitioner's inequitable rule denying attorney's fees in all cases involving factually-interrelated claims. To do so would defy both the letter and the spirit of § 1988.

CONCLUSION

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

Respectfully submitted,

DUSTIN MCDANIEL
Attorney General of Arkansas

ALI M. BRADY
Assistant Attorney General
Counsel of Record