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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

If this were a contest for who could design a standard that would be most likely to discourage a plaintiff from including a meritorious, but untested, civil rights theory in an otherwise meritorious lawsuit, Defendants would win hands down. Under their rule, a judge calculates the reasonable fee *for the entire case*. Then, the judge decides whether to make the plaintiff pay that entire sum, based mainly on the defendant's "degree of success" so far. But in Defendants' view, the measure of "success" does not depend on whether the defendant has reduced its financial exposure (or other risk) by defeating the federal claim. And the ultimate award does not depend on whether the federal theory has saddled the defendant with any incremental burden. This rule has nothing to do with the reason Congress authorized prevailing defendants to recover fees: to compensate for *burdens* imposed by frivolous litigation.

There is ordinarily no reason to impose fees on a plaintiff who has merely included a federal theory along with other theories; the inclusion of an additional theory rarely imposes much by way of incremental burden. It should take a diligent defendant little effort to lop off a federal claim if it truly is frivolous.

But if it is ever appropriate to award fees in that circumstance, the fees should be tethered to the harm incurred—the actual incremental burden that the frivolous claim imposed. To the extent that the defendant would have done work anyway in the ab-

sence of the federal claim—and certainly to the extent that the fruits of that labor are still usable in the ongoing litigation—the defendant should not be compensated for the effort that was not wasted.

ARGUMENT

I. A DEFENDANT IS NOT ENTITLED TO FEES FOR A FRIVOLOUS FEDERAL THEORY THAT WAS FACTUALLY INTERTWINED WITH SURVIVING NON-FRIVOLOUS THEORIES.

As much as Defendants want to ignore it, this Court has taken a consistent approach to crafting fee-shifting rules: It has routinely adopted categorical rules based upon various "equitable considerations," and has never given primacy to parity between prevailing plaintiffs and prevailing defendants. *See infra* Point I.A. The "equitable considerations" compel the conclusion that defendants should not recover fees where the frivolous legal theory is factually intertwined with the surviving theories. *See infra* Point I.B.

A. Defendants Ignore This Court's Consistent Approach to Interpreting Fee-Shifting Provisions.

Defendants' position revolves around five themes—each of which represents a frontal assault on this Court's precedent.

Statutory language. Defendants declare that "[t]he statutory text imposes only two threshold requirements: The suit must be an 'action or proceeding to enforce' one of the specified statutes, and the party seeking fees must be a 'prevailing par-

ty.'" Resp. 18 (quoting 42 U.S.C. § 1988(b)). Defendants accuse Mr. Fox of "largely ignor[ing] the terms of the statute." Resp. 24. The accusation is both misdirected and outdated. More than 30 years ago, in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), this Court interpreted the statute to impose an additional threshold requirement that Congress did not explicitly write: No prevailing defendant may recover fees without also demonstrating that "the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart,* 461 U.S. 424, 429 n.2 (1983). That reading drastically diminishes the universe of "prevailing" defendants who are eligible for fees. The issue here is what are the precise contours of that already small subset. The sparse statute does not help answer that question.

Parity. In a paean to parity, Defendants repeatedly point to the precepts for prevailing plaintiffs and insist that "[t]he same should be true for defendants." Resp. 22; *see also* Resp. 3, 41. Defendants ignore this Court's repeated pronouncements that prevailing defendants occupy a very different status in the statutory scheme from plaintiffs. *See* OB 30. That difference in status means that "[a] successful defendant seeking counsel fees … must rely on quite different equitable considerations," *Christiansburg*, 434 U.S. at 419, which translate into different rules. *See* OB 36. Because Defendants ignore this clear holding, they offer no compelling basis to make this case the rare exception to the rule of differential treatment.

Discretion. Defendants prefer rules that give "district court[s] … discretion to award fees" over

rules that make it "categorically impermissible for a district court to award fees" under certain circumstances. Resp. 18, 30. Discretion *über alles* has never been the controlling principle in establishing the rules governing fee awards, and it should not be here: Because "limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike … , [this Court] ha[s] often limited courts' discretion to award fees despite the absence of express legislative restrictions." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005); *see Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989).[1] The most relevant example, again, is *Christiansburg*, which makes it "categorically impermissible" for a judge to award fees to the vast majority of prevailing defendants. Defendants ignore all the cases that belie their theme.

Prior precedent. Without any hint of irony, Defendants accuse Mr. Fox of "ignor[ing] … this Court's decisions"—specifically, *Hensley*—"explicating when a party is eligible for fees." Resp. 24. *Hensley* was not ignored, *see* OB vii; it was inapposite—at least as to this question. *Hensley* involved a partially prevailing *plaintiff* and prescribed a plaintiff-specific

[1] *See*, *e.g.*, *Buckhannon Bd. & Home Care, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 602 (2001) (categorical rule denying fees where relief is achieved by independent legislative action); *Zipes,* 491 U.S. at 761 (categorical rule denying fees against intervenors except "where the intervenors' action was frivolous"); *Hanrahan v. Hampton,* 446 U.S. 754, 758 (1980) (categorical rule limiting interim fee awards to parties who have prevailed on the merits of at least some claims); *Kay v. Ehrler*, 499 U.S. 432, 437-38 (1991) (denying fees to prevailing party who was a *pro se* attorney).

rule that depended entirely on attributes that are unique to plaintiffs: (1) the congressional imperative to encourage and reward "challenges to institutional practices or conditions," 461 U.S. at 436; and (2) the observation that *plaintiffs* "in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee," *id.* at 435. None of that reasoning applies to defendants.

Nevertheless, Defendants insist that "[t]he Court hardly could have been clearer" that it was deciding the rule for defendants as well by cramming an intricate equitable analysis into a 17-word footnote. Resp. 20. Assuming such a feat of concision were possible, that is not what this footnote does. In the relevant text, the Court addressed "cases [where] a plaintiff may present in one lawsuit distinctly different claims for relief *that are based on different facts* and legal theories," and twice repeated a reference to "*unrelated*" claims. 461 U.S. at 434-35 (emphasis added). Then came the footnote: "If the unsuccessful claim is frivolous, the defendant may recover attorney's fees incurred in responding to it." *Id.* at 435 n.10.

Defendants protest that "the Court's references to … 'separate lawsuits' are not in the relevant footnote," Resp. 21, which is rather like a passenger saying he's not technically "in" Washington (but "under" it) as the Metro pulls into Union Station. The reference to "*the* unsuccessful claim" must mean *the unsuccessful claim described in the text*—the one that is "unrelated" to the successful claim and "based on different facts and legal theories." 461 U.S. at

435. No lower court, including the panel below, has ever read that footnote as resolving the issue where claims are factually intertwined. *See, e.g.,* P.A. 11 n.25.

"Equitable considerations." Finally, Defendants fault Mr. Fox for an analysis that "begins and ends with what he describes as the equitable considerations that underlie this Court's attorneys' fees decisions." Resp. 24 (quoting OB 31; internal citations and quotation marks omitted). That is not *our* description; it is *this Court's*. In deciding to treat defendants and plaintiffs differently, *Christiansburg* began and ended its analysis with the "equitable considerations" that motivated Congress. *Christiansburg*, 434 U.S. at 419. There is no getting around the principle that "[h]ere as elsewhere, the judicial role is to reconcile competing rights that Congress has established and competing interests that it normally takes into account." *Zipes*, 491 U.S. at 765. We turn next to that reconciliation.

B. The "Equitable Considerations" Weigh Against Awarding Defendants Fees Where a Frivolous Claim Is Intertwined With the Surviving Claims.

The "equitable considerations" that this Court has identified make a compelling case against awarding fees in this context.

1. The burdens on defendants are minimal.

Defendants exaggerate both the burden that defendants generally shoulder when a frivolous legal theory is nestled among otherwise meritorious

claims and the likelihood that our proposed rule will cause an epidemic of frivolous theories.

Burden of an extra federal theory. First, some common ground: Defendants concede that *the* reason Congress authorizes a defendant to recover fees is "to protect defendants from *burdensome* litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420 (emphasis added) (quoted in Resp. 32). They do not dispute the corollary: Where a claim does not appreciably increase the litigation burden on the defendant, a fee award is unjustified. And finally, Defendants do not appear to dispute that a stand-alone frivolous suit (or a factually distinct federal claim, which might as well be a separate lawsuit) is generally much more burdensome than a federal theory that is factually intertwined with meritorious claims. "Although it is costly to defend against a frivolous suit, the marginal costs of knocking out the frivolous claims in a suit that has a meritorious core usually are not great." *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1168 (7th Cir. 1984). Defendants merely dispute just how much lower that marginal cost typically is.

For two reasons, the incremental burden in cases like this one is minimal. First, the defendant can almost always get the court to dismiss the frivolous federal claim founded on a meritorious factual core early in the case. After all, the meritorious factual core is the same. So when a frivolous claim is factually intertwined with surviving claims, the basis for the finding of frivolousness will almost always have to be—as it was here—that the theory is *legally* frivolous on its face.

It does not take much work to skewer a frivolous federal theory at the pleading stage. If a defendant fails—as Defendants here did—to take that simple step, they should not be heard to complain about discovery burdens arising from the federal theory. "As a general principle, it would be inequitable to permit a defendant to increase the amount of attorneys' fees recoverable as a sanction by unnecessarily defending against frivolous claims which could have been dismissed on motion without incurring the additional expense." *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986).

This is the point Defendants elide when they assert that § 1983 claims entail "significant additional discovery" to determine facts that are irrelevant under general tort law, such as "[w]hether a defendant acted 'under color of law'" and "whether a municipality maintained an 'official policy or custom.'" Resp. 37. If the legal theory is frivolous on its face, the defendant never needs discovery either on color of law or custom and policy.

At points, Defendants seem to be arguing that there may be times when discovery is necessary to discern the frivolousness of the federal theory even though the basic factual foundation is sound. Their point seems to be that there might be occasions where *the reason* a federal claim is frivolous is that the plaintiff is trying to hold the municipality liable for a tort for which it cannot be liable, because the tortfeasor was not acting in an official capacity or because the tortfeasor was not a policymaker and was not following a municipal policy or custom. In fact, they offer that excuse for failing to move to

dismiss the purportedly frivolous claim on the pleadings in this case. *See* Resp. 28 n.9.

Defendants do not even try to square that assertion with their "repeat[ed]" refrain "that the district court expressly rejected petitioner's argument that 'discovery issues impaired his determination of whether he had a viable 42 U.S.C. § 1983 case.'" Resp. 27 n.8 (quoting P.A. 26a). But the more fundamental point transcends the facts of this case: On the one hand, if Mr. Fox (or any other plaintiff) should have known the theory was frivolous from inception, then Defendants should have too. If, however, they needed discovery to figure out the theory's flaws—e.g., whether Chief Vice was a policymaker or whether his criminal conduct was directed by a policymaker—then so did Mr. Fox. Surely, the plaintiff should not be expected to know more than the defendant about whether the tort went all the way up to the mayor or about what customs infuse city hall.

The incremental burden is minimal in these circumstances for another related reason: When all the theories arise from the same nucleus of operative facts, the parties must necessarily conduct almost exactly the same fact discovery with or without the federal theory. In most cases, it will be evident, as it was to the original magistrate in this case, that "[a]ny trial preparation, legal research, and discovery may be used by the parties" on one or more of the state claims. P.A. 40a. Defendants have never pointed to a single deposition that they would not have taken—or a single document they would not

have scoured—had the complaint pled only state claims. *See* OB 32.[2]

Instead, Defendants point to comparatively trivial effects of adding a frivolous legal theory. First, they assert that a lawsuit with a § 1983 claim "weighs far more heavily on defendants than one without." Resp. 36. That makes no sense. What "weighs … heavily on defendants" is the prospect of losing large sums of money (or being subjected to burdensome injunctive relief, as the case may be). Rarely would a defendant confronting massive liability say, "Phew, good thing the plaintiff did not include a theory of federal law." And a warden confronting a prisoner's trivial complaint will not lose sleep just because the prisoner throws in a federal theory along with other claims.

True, "the risk of paying a fee award" to a *successful* plaintiff might incrementally raise the stakes, Resp. 36; that is one consequence for violating the law. But rarely does the fee award "dwarf the damages claimed." Resp. 36. More importantly, if, as Defendants insist, "there is no mistaking frivolous claims for meritorious ones," Resp. 14, then a

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[2] Even on the elements that are unique to federal claims, discovery will typically be valuable. For example, a plaintiff suing a governmental employer under any tort theory would be eager to know whether the employer had an official policy encouraging the employee's wrongdoing or whether the employee was acting within his official capacity. *See, e.g.*, RESTATEMENT (SECOND) AGENCY § 219 (1958) (master subject to liability for acts outside scope of employment where master intended the conduct or consequences, or servant purported to speak on behalf of principal and relied on apparent authority).

defendant should know a frivolous federal theory when he sees one and rest assured that it will not expose him to having to pay his adversary's legal fees.

Second, Defendants assert that frivolous § 1983 claims allow "plaintiffs ... to drag municipal defendants into cases where they do not belong." Resp. 36. That is also wrong. A plaintiff challenging a public official's misconduct can hold the municipality liable in tort merely because its agent acted "in the course of exercising a power delegated to the municipality by local law." *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 417 (1997) (Souter, J., dissenting). The plaintiff need not plead or prove that the municipality had adopted a policy or custom of tortious conduct. *See* RESTATEMENT (SECOND) AGENCY § 219 (1958) (master liable for torts of servants committed while acting in the scope of employment, regardless of policy or custom). In contrast, "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). Thus, municipalities always face the risk of "a personal dispute with a government employee" morphing into a lawsuit against the deep-pocketed governmental employer, Resp. 36, but frivolous § 1983 claims do not *increase* the risk.

The forecasted epidemic. Defendants predict that denying fees in a case like this will unleash an epidemic of frivolous federal theories appended to otherwise meritorious complaints. Resp. 32. These fears, too, are overwrought. The rule we espouse has long been "the overwhelmingly predominant view of the courts." 2 MARTIN A. SCHWARTZ & JOHN E. KIR-

KLIN, SECTION 1983 LITIGATION § 10.3, at 482-83 & n.46 (3d ed. 1997) (citing numerous cases). Yet no epidemic has materialized.

The main basis of Defendants' forecast is that "[a] plaintiff hoping to avoid a fee award would need only add a related, nonfrivolous cause of action … as part of his lawsuit." Resp. 35. That is backwards. A plaintiff who has been wronged will plead the meritorious claim because he wants to win the case, not because he wants to game attorneys' fees on a theory he cannot win.

More important, there are already strong deterrents to larding otherwise meritorious lawsuits with frivolous federal theories. Most notably, "Rule 11 … adequately protects defendants from frivolous allegations," *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65 (1987), and also "protect[s] public officials from undue harassment," *Crawford-El v. Britton,* 523 U.S. 574, 600 (1998). Defendants downplay Rule 11's deterrent value by noting it is "not a fee-shifting statute," but instead "aimed at curbing abuses." Resp. 40 (citation omitted). But *their* central point is that § 1988 should apply in these circumstances *to curb abuses.* Both Rule 11 and § 1988 punish frivolous claims and both compensate defendants for the same burden; the only difference is who writes the check.

2. The threat of punishing plaintiffs for including a federal legal theory will chill the very litigation Congress wished to encourage.

In support of their position that the threat of sanctions "chills nothing that is worth encouraging,"

Resp. 25 (internal quotation marks and citation omitted), Defendants catalog all the rules that *should* restrict a court from finding a claim frivolous. Resp. 25-30. The rulebook would be comforting if all plaintiffs and lawyers shared Defendants' faith in judicial infallibility. But the lawyers in the trenches—across the ideological spectrum—confirm that they do not. Resp. 18; *see* ACLU Br. 25-29; Liberty Br. 9-13. And the hard data show that trial courts get it wrong about one out of five times. *See* ACLU Br. 26 (citing Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 94 (1996)). Those are horrible odds, especially for a vulnerable population.

This case illustrates the problem. The rule that "a claim is not frivolous simply because it has been 'abandoned,'" Resp. 26 (citation omitted), did not help Mr. Fox: That was precisely *why* the magistrate awarded fees. *See* P.A. 6a-7a, 26a; OB 38-42.

Even while insisting (correctly) that the issue of frivolousness is not before this Court, Defendants spill quite a bit of ink trying to demonstrate that the courts below were justified in ruling the federal theory frivolous. *See, e.g.,* Resp. 7-8, 28, 36, 37-38. But their argument tacitly proves otherwise: They do not even try to defend the basis on which the lower courts awarded fees, substituting a completely different basis—and one that (if true) could only have been discerned after discovery.[3] If the magi-

[3] *Compare* P.A. 3a (court of appeals upholds fees because counsel conceded (1) that anonymous action cannot be "under color of state law"; and (2) that there is no First Amendment

strate's rationale had been defensible, Defendants would have defended it.

As our opening brief observed, the lapses of the courts below "provide cautionary tales that are instructive in crafting the correct legal rule." OB 26 n.2. The illustration is not an improper effort to "shift gears" away from "the premises on which review was granted." Resp. 48-49. No premise has changed. Mr. Fox's petition argued at length that "the Court of Appeals misapplied this Court's precedent … in finding that Mr. Fox's claims were frivolous." Pet. 25-28. In any event, an illustration is not improper just because it is drawn from the very record this Court is scrutinizing. Defendants, themselves, repeatedly cite the specifics of the allegations of frivolousness for the same illustrative purposes. *See, e.g.,* Resp. 28, 36, 38 (using the allegations of frivolousness here "for example" to illustrate three different points about what the rule should be); Resp. 27 n.8 (another illustration).

Finally, none of this even begins to account for the increased chilling that will result inevitably once the defense bar responds to the new opportunity to win windfall fee awards. *See* OB 46-47.

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deprivation where a state official tries to interfere with a campaign for public office, but fails), *and* P.A. 26a (same for magistrate), *with* Resp. 36 (asserting that "one of the principal reasons why petitioner's claims were frivolous" was the failure to allege that Vice's conduct was the product of a 'policy or custom' adopted by the Town," without noting that the Chief of Police could well have been a policymaker), *and* Resp. 7, 28 (same).

3. Defendants' rule will unduly burden the courts with ancillary litigation.

Defendants agree that a key consideration is which rule will more effectively reduce ancillary litigation over fees. Resp. 44. There is no contest on that one. Whereas the potential windfall for Defendants will encourage much more ancillary litigation under Defendants' rule, our rule appropriately eliminates fee-shifting litigation in an entire category of cases.

Defendants' only response is that courts applying our proposed rule will have "'difficulty … distinguishing between legal and factual issues.'" Resp. 37 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990)). But our rule does not implicate that distinction. The courts must merely be able to discern whether two (or more) causes of action arise from the same nucleus of operative facts. Courts have wide experience with that question.

* * *

In echoing Congress's concern about chilling meritorious federal claims, we are not suggesting that § 1988 should "be read to encourage litigation at all costs." Resp. 31 n.11. This case boils down to a situation where a rule can advance Congress's goals and relieve courts of ancillary litigation, *at no cost*.

II. THE COURT OF APPEALS ERRED IN AWARDING DEFENDANTS ALL THEIR FEES WITHOUT ANY REQUIREMENT OF SEGREGATING THE FEES THAT WERE ATTRIBUTABLE EXCLUSIVELY TO THE DISMISSED CLAIM.

If Defendants are entitled to *some* of their attorneys' fees, the next question is what standards govern the amount to be awarded. Three rules are on the table—our proposed "but-for" standard; a very different "main focus" standard applied by the panel majority; and Defendants' proposed "degree of success." *See infra* Point II.A. The but-for standard best satisfies the "equitable considerations." *See infra* Point II.B. But the judgment must be vacated whether the Court adopts our standard or Defendants'. *See infra* Point II.C.

A. This Case Continues to Present a Stark Choice—Now Among Three Distinct Rules.

Defendants assert—however tentatively—that the second question presented in the petition "*appears* to be no longer presented in this case because petitioner now concedes that the court of appeals 'stated the correct rule.'" Resp. 41 (quoting OB 48) (emphasis added). They are wrong. As is evident from the context, our opening brief pointed out that the panel majority uttered one correct sentence, but everything it said thereafter "transform[ed]" the rule into a very different standard than the one we propose. OB 48-49. It is also very different from the rule Defendants articulate.

Mr. Fox's "but-for" standard. Mr. Fox proposes a "but-for" standard: "A defendant should recover, at most, fees directly and exclusively attributable to a frivolous claim—fees that would not have been incurred but for the inclusion of the claim." OB 48-49. Under this standard, "[a]ny work that defense counsel would have had to do anyway cannot be the result of the frivolous claim." OB 49. So, a court could never award all the fees without examining the work actually performed and assessing what was attributable exclusively to the frivolous claim and what the defendants would have done anyway to respond to the state claims.

The court of appeals' "main focus" standard. While the panel majority paid lip service to the notion of "work which can be distinctly traced to a plaintiff's frivolous claims," P.A. 11a, the standard it actually applied bore no relation to a but-for standard. The panel never asked whether Defendants would have done the same work even without the federal claim. If it had, there could only have been two answers: Answer 1: "Of course, all of the work would have been done anyway, as the first magistrate observed." Answer 2: "We have no idea, because the second magistrate never even scanned the time entries to distinguish the work exclusively attributable to the federal claim from all the other work—and neither did we."

The majority asked two different questions that are irrelevant to a but-for test. The first was: What was the main "focus of … the plaintiff and defendants" as they were litigating? P.A. 12a. Who cares? Even if the parties focused mainly on one legal theory, the same efforts would have been necessary

for one or more of the surviving claims. The second question was: For which proceeding are the defendants seeking fees? The panel majority stated that Defendants' "'request for attorney's fees relates only to proceedings before this court'." *Id.* (quoting P.A. 33a). Of course that's true: That was the only proceeding up to that point because the whole case had been removed to federal court. But under a but-for standard the answer is irrelevant.

Thus, this appeal does not raise the "factbound issue" whether the court of appeals reached the wrong result under the correct standard. Resp. 45. This appeal challenges the very standards applied.

Defendants' "degree of success" standard. Defendants propose a two-step process. Step 1: "The district court should first determine a 'lodestar' amount by multiplying the number of hours reasonably expended by a reasonable hourly rate." Resp. 43 (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 568 (1986)). This will yield a number for how much the *entire* litigation cost the defendant. Step 2: "The court may then adjust that amount up or down by applying various factors, including the degree of success obtained by the prevailing party." Resp. 43. Or it may not. It is totally up to the district court whether to award the defendant all the fees incurred in the case—or even more.

Defendants offer no clue as to what the "various factors" are. More importantly, they do not explain how to calculate the "degree of success" for a prevailing defendant. By logic, a defendant's degree of success would be measured according to how much the defendant has succeeded in diminishing its expo-

sure. But that is not how Defendants define success. After all, they stand to lose much more from the extortion and defamation claims that survive than they ever stood to lose from the claim that they interfered with Mr. Fox's election to a post that he ultimately won. As best we can tell, Defendants believe that "success" is defined only with reference to the proportion of the *federal claims* that survive. *See* Resp. 22. They insist that "[a] defendant forced to defend against a frivolous Section 1983 claim should not have its eligibility for fees turn on whether the plaintiff also brought state-law claims that may or may not have been frivolous," because that would be the "wrong denominator." Resp. 21-22.

Similarly, logic dictates that "success" be defined in terms of what proportion of the total work was devoted to getting the frivolous federal claim dismissed. That is definitely not how Defendants here define it: One of their biggest selling points in favor of their test is that the court *never* has to "'divide the hours expended on a claim-by-claim basis.'" Resp. 43 (quoting *Hensley,* 461 U.S. at 435).

B. The But-For Test Most Satisfies the "Equitable Considerations."

The same "equitable considerations" that govern the decision whether to grant fees at all also govern the overarching standards by which fees should be granted. The but-for test best addresses those considerations—and for many of the same reasons.

To begin, the but-for standard is the only one that bears any relationship to the justification for awarding fees to a prevailing defendant—which is focused on "protect[ing] defendants from" the "*burdens[]*" of

"litigation having no legal or factual basis," *Christiansburg*, 434 U.S. at 420 (emphasis added), and allowing the "defendant the possibility of recovering his *expenses* in resisting … a groundless action," *id.* at 419 (emphasis added). Defendants' standard bears no correlation at all to the burdens actually imposed on the defendant; it is not even a consideration. Consequently, defendants can—and usually will—win far more in a fee award than what the frivolous legal theory cost them. That is both unjust and inconsistent with § 1988's purpose.

Defendants offer several justifications for their test—all of them off the mark. They begin, again, with the appeal to parity, insisting that the same "principle [that] governs calculation of fee awards to prevailing plaintiffs … should determine the size of fees awarded to prevailing defendants." Resp. 41. And it is wrong for the same reason. *See supra* at 3. If anything, the presumption should be that they are different.

The parity point is particularly inapt with regard to *Hensley*'s concern that "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." 461 U.S. at 435. When this consideration is applied to a prevailing *plaintiff*, the point is that efforts "devoted generally to the litigation as a whole" will often contribute to the plaintiff's success. *Id.* But where a defendant fends off only a frivolous legal theory—leaving intact other theories based on the same facts—it is highly unlikely that the defendant's "general efforts" will be attributable only to the frivolous claim. Moreover, it is much easier to isolate the efforts made to defeat a frivolous

legal theory than it is to parse out efforts between successful and unsuccessful claims that were nonfrivolous. If a single legal theory is frivolous, a defendant will rarely expend substantial effort to defeat it and whatever effort he takes will usually be distinct from general litigation.

Beyond the parity point, Defendants once again advocate judicial discretion rather than "a categorical rule." Resp. 42. And the answer is the same as it was before: This Court routinely limits discretion to award fees despite the absence of express legislative restrictions. *See supra* at 3-4.

Defendants' only critique of the but-for test is that the effort to attribute expenses to the frivolous claim will "spawn endless litigation." Resp. 44. The but-for standard, however, will spark less litigation than one that revolves around determining the "degree of success" and weighing "various" unstated "factors." Resp. 43. And because the potential rewards under Defendants' rule will be so much richer, the litigation is likely to be more intense and prolonged than litigation over whether some motion or another was attributable exclusively to the federal claim.

C. The Fee Award Must Be Vacated Under Either Standard.

Regardless of which alternative this Court adopts, the fee award must be vacated.

If this Court adopts Defendants' degree-of-success standard, then the district court must be given a chance to apply that standard—which bears no relation to the standard the magistrate applied. *See* OB

48-51. It would make no sense to adopt a standard that is promoted largely on the basis of the district court's "'superior understanding of the litigation,'" Resp. 44 (quoting *Hensley*, 461 U.S. at 437), but then affirm without giving the district court a chance to apply that understanding to a standard it never considered.

If, however, this Court adopts the but-for standard, it must also vacate the fee award. That is not the standard the magistrate applied in this case; she concluded that "segregation" was *not* "required" because the claims were "so interrelated that their prosecution or defense entailed proof or denial of essentially the same facts." P.A. 28a (citation omitted). And, for reasons explained above, that is also not the standard the panel majority applied. *See supra* at 17-18.

Defendants' efforts to salvage the judgment under the but-for standard are unavailing. Defendants argue about how "prominently" the state law claims were "featured ... in the complaint," Resp. 44, and echo the magistrate's observation that the federal theory was "'the focus of both plaintiff and defendants,'" Resp. 47 (quoting P.A. 33a). They do not even try to reconcile these points with (1) their concession that they "pleaded state-law defenses in their answers," Resp. 46; (2) their admission that Mr. Fox "stated that the alleged extortion by Vice constituted a 'civil wrong subject to tort liability and damages," Resp. 7; or (3) their request, upon dismissal of the federal claim, that the district court "continue to exercise supplemental jurisdiction over plaintiff's *state law claims*," P.A. 24a (emphasis added).

But in any event, their arguments are misdirected. *See supra* at, 16-18 (explaining why the panel majority's standard differs from the but-for standard). Under the but-for test, only two facts are relevant: (1) the state law claims were in the complaint, as every judge to consider this case has agreed, *see* P.A. 3a, 13a, 32a, 39a; and (2) all the discovery conducted, or at least the vast majority of it, remained relevant to those claims. Both points are evident without a deep "dive … into the intricacies of … Louisiana's especially lenient 'fact-pleading' standard." Resp. 46 (emphasis omitted).

In the end, the only work that could possibly qualify under the but-for standard was research Defendants may have conducted to distinguish the different legal standard of liability for municipalities and the motions practice devoted to dismissing the federal claim. Those had to be drops in the bucket compared to the effort devoted to discovery about Chief Vice's scheme to block Mr. Fox from becoming the Police Chief of Vinton. And the fee award, if there is one, should be similarly small.

CONCLUSION

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

Respectfully submitted,

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