No. 10-114

In the Supreme Court of the United States

RICKY D. FOX,

Petitioner,

v.

BILLY RAY VICE and THE TOWN OF VINTON, LOUISIANA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

This case arises from petitioner's lawsuit alleging violations of 42 U.S.C. § 1983. After nearly two years of litigation and discovery by the parties, petitioner conceded that he could not support his Section 1983 claims. The district court then dismissed all of the federal claims with prejudice and further concluded that they were frivolous. The district court determined that some of plaintiff's allegations "could be characterized as state law tort claims," Pet. App. 32a, and remanded the case to state court, where it remains pending. The district court ultimately awarded respondents attorney's fees under 42 U.S.C. § 1988(b) for their work defending the frivolous Section 1983 claims. The court of appeals affirmed.

The questions this Court granted certiorari to review are:

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

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BRIEF FOR THE RESPONDENTS

STATEMENT

Section 1988(b) of Title 42 authorizes district courts to award "a reasonable attorney's fee" to "prevailing part[ies]" in actions brought under 42 U.S.C. § 1983. It is undisputed that respondents are "prevailing" parties: The district court so found, the court of appeals affirmed, and petitioner has not challenged that holding. It is likewise undisputed that petitioner's Section 1983 claims were frivolous: The district court so found, the court of appeals affirmed, and petitioner acknowledges he did not seek review of that determination. It is also (now) undisputed that the court of appeals held that respondents could recover only fees "distinctly" and "exclusively" traceable to the frivolous Section 1983 claims. The question here is whether the fee award was nonetheless improper because petitioner claims to have asserted other, nonfrivolous claims as part of his lawsuit that were factually related to his frivolous Section 1983 claims.

Statutory Background

The basic standards for evaluating whether a prevailing party is eligible for fees under Section 1988 have been settled for nearly three decades. A successful *plaintiff* should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enters.*, 390 U.S. 400, 402 (1968). A plaintiff need not win the entire lawsuit to be considered "prevailing"; it is sufficient that he succeeds on "any significant issue in litigation which achieves some of

the benefit [he] sought in bringing suit." *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983) (internal quotation marks omitted). In contrast, a *defendant* may not recover fees unless the "plaintiff's action [is] frivolous, unreasonable, or without foundation." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978); accord *Hughes* v. *Rowe*, 449 U.S. 5, 15 (1980) (per curiam) (applying *Christiansburg* standard to Section 1988). The statute thus strikes a deliberate balance between "giving the private plaintiff substantial incentives to sue" and discouraging "frivolous" claims. *Christiansburg*, 434 U.S. at 419.

Once a party has crossed this "statutory threshold * * * [i]t remains for the district court to determine what fee is 'reasonable.'" *Hensley*, 461 U.S. at 433. The district court "necessarily has discretion in making this equitable judgment," given its "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* at 437; see *Perdue* v. *Kenny A.*, 130 S. Ct. 1662, 1679 (2010) (Breyer, J., concurring in part and dissenting in part) ("[O]ur tiered and functionally specialized judicial system places the task of determining an attorney's fee award primarily in the district court's hands.").

District court discretion plays a particularly important role in determining an appropriate fee in cases involving successful and unsuccessful claims that share a "common core of facts" or are "based on related legal theories." *Hensley*, 461 U.S. at 435. Where a plaintiff brings a successful Section 1983 claim along with related unsuccessful claims, a court may award fees for time reasonably spent on both sets of claims, subject to an adjustment based on "the degree of success obtained," among other consider-

ations. *Id.* at 435-437. "There is no precise rule or formula." *Id.* at 436. But where a plaintiff obtains "excellent results, his attorney should recover a fully compensatory fee" that "[n]ormally * * * will encompass all hours reasonably expended on the litigation." *Id.* at 435.

This case turns on whether the same standard applies to prevailing defendants. That is, once a district court has determined that a plaintiff's Section 1983 claims are "frivolous, unreasonable, or without foundation," *Christiansburg*, 434 U.S. at 421, is it within the district court's discretion to award fees where the plaintiff also asserted at least one related, nonfrivolous claim?

The Election Campaign

This case arises out of a political campaign for Chief of Police in the Town of Vinton, Louisiana (Town) between petitioner Ricky D. Fox and respondent Billy Ray Vice. J.A. 37-43. Petitioner alleged that Vice, the incumbent Chief, mailed an anonymous letter threatening to reveal information about petitioner's checkered tenure as a state trooper to a local newspaper. J.A. 33-36, 39. The letter noted, for example, that petitioner had been disciplined for sexually harassing female coworkers and suspended for engaging in illegal hunting activities. J.A. 33-34. Petitioner also alleged that Vice arranged for a third party to confront petitioner at a basketball game, accuse him of uttering a racial slur, and file a police report relating to the confrontation. J.A. 39-40. Petitioner ultimately won the election and replaced Vice as Chief. J.A. 145.

District Court Proceedings

In 2005, petitioner sued Vice, the Town, Troy Cary, and Arthur Phillips in Louisiana state court.[1] J.A. 37-43. The complaint alleged that the defendants "are liable under 42 U.S.C.S. § 1983, which protects petitioner's rights, privileges and immunities as secured by our Constitution and laws." J.A. 40-41. It then identified those constitutional rights as:

a) to seek public office[;]
b) to be free from extortion;
c) to be protected by [sic] unlawful interference by police;
d) to be protected by [sic] malicious abuse of process;
e) to not be slandered/defamed;
f) to Due Process;
g) to not be subjected to abuse of power; and
h) other violations to be proven at the trial of this matter.

J.A. 41. The complaint did not expressly allege any state-law cause of action. As the district court later found, "plaintiff made certain allegations that could be characterized as state law tort claims, but plaintiff did not make these allegations separate from his § 1983" claims. Pet. App. 32a.[2] Petitioner also filed a motion seeking to attach Vice's real property, in-

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[1] For purposes of this brief, respondents assume but do not concede that Fox named Vice as a defendant in both his individual and official capacities.

[2] By consent of the parties, the federal district court proceedings were conducted by a magistrate judge. Pet. 1 n.1. Unless otherwise indicated, this brief uses the term "district court" to refer to all such proceedings.

cluding his home and auto parts store. Mot. for Writ of Attachment, *Fox* v. *Vice*, No. 2005-5932 (La. Dist. Ct., Calcasieu Parish, Jan. 11, 2006). That motion described Fox's claims as alleging "violat[ions of his] civil rights, privileges, and immunities afforded * * * by our Constitution," but made no mention of any state-law claims. *Id.* at 1.

Respondents removed to federal court based on the Section 1983 claims. J.A. 44-48. Respondents then filed answers, contending, among other things, that petitioner had "fail[ed] to state a claim." J.A. 63, 70. Respondents asserted Section 1983 immunity defenses, as well as state-law limitations of liability. J.A. 66-70, 73-75. Respondents additionally pleaded the right to recover attorney's fees under Section 1988. J.A. 69, 75.[3]

Over the next several months, the parties proceeded with discovery while awaiting the outcome of a criminal prosecution against Vice.[4] See, *e.g.*, J.A. 220, 271, 300, 316. Meanwhile, petitioner aggressively pursued his Section 1983 claims, even as respondents repeatedly countered that the claims were groundless. In August 2006, counsel for the Town warned petitioner that he could not make out a

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[3] The district court granted petitioner's motion to dismiss his claims against Phillips early in the proceedings. J.A. 87-88. Cary did not present evidence of attorney's fees and did not appear before the court of appeals. References to "defendants" are thus to Vice and the Town.

[4] Vice ultimately was convicted of extortion in connection with the anonymous letter, and his conviction was later affirmed. *State* v. *Vice*, No. 08-255, 2008 WL 5169955 (La. Ct. App. Dec. 10, 2008). Vice died on August 26, 2010.

Section 1983 claim against the Town because "[t]here are no facts that show that plaintiff was damaged by any policy or custom." J.A. 200-201. But in November 2006, counsel for petitioner refused to relent, arguing that Vice's alleged misconduct constituted "official policy" because Vice was Chief of Police and that Vice could not assert qualified immunity as a defense to the Section 1983 claims. J.A. 217-219. These letters contained no mention of any state tort claims.

In January 2007, petitioner began pressuring respondents to settle the Section 1983 claims. "This case has been close to the 'back burner' for long enough," petitioner's counsel wrote. J.A. 202. Petitioner's counsel threatened to "put together [his] liability motion" unless respondents participated in mediation discussions. J.A. 203. Two months later, he turned up the heat: "Fox sat through the depositions the other day, and now I believe his anger, and accordingly, his expectations have risen. I believe it would be best for all of us * * * to get this matter resolved." J.A. 208. In April 2007, counsel argued in a letter to the Town that Vice's criminal conviction would support summary judgment "in our federal civil proceedings" and that "if your client is serious about getting this case resolved, circumstances are not likely to improve beyond this point." J.A. 209-210.

After respondents declined to yield, petitioner sought summary judgment, arguing that Vice's extortion conviction conclusively determined the Section 1983 claims. J.A. 77-81 (citing *Allen* v. *McCurry*, 449 U.S. 90 (1980)). Petitioner also asserted that the Town was vicariously liable for Vice's actions under Section 1983's "unconstitutional policy or custom" standard. J.A. 81-83 (citing *Roma Constr. Co.* v. *Russo*, 96 F.3d 566 (1st Cir. 1996)). Petitioner's

motion did not explain, however, how Vice's alleged actions amounted to a custom or policy of the Town, offering only the conclusory statement that "it seems clear Vice was acting in the area of authority of the Chief of Police when he threatened Fox with the anonymous letter." J.A. 83. Vice's response disputed the Section 1983 claims, but did not address any state-law claims. J.A. 89-103. The Town's response likewise challenged the Section 1983 claims, and it further declared that "[p]laintiff does not specifically set forth any state law claim in his" complaint. J.A. 104, 122.

Petitioner filed his reply memorandum on August 24, 2007, conceding—twenty months after filing his complaint—that he had "presented insufficient evidence" to support his Section 1983 claims against the Town. J.A. 126. Petitioner withdrew only his motion for summary judgment, not the underlying Section 1983 claims. J.A. 126-127 ("Plaintiff hopes to re-urge the motion against the Town of Vinton once additional discovery has been conducted."). As to Vice, petitioner claimed that "it is not necessary to show that Vice was acting under 'color of state law,'" because "[t]he simple act of extortion is sufficient." J.A. 125. In contrast to his concession regarding the Town, petitioner did not disavow his Section 1983 claims against Vice; rather, he asked the court to "hold the matter in abeyance" until Vice's conviction became final on appeal. *Ibid*. Petitioner also stated that the alleged extortion by Vice constituted a "civil wrong subject to tort liability and damages," citing a Louisiana state court decision. J.A. 126.

Respondents then moved for summary judgment. J.A. 128-167. In response, petitioner conceded that his "civil rights claims predicated on 42 U.S.C.

§ 1983" as to all defendants were not "valid" and that "defendants' motion to dismiss Fox's civil rights claims * * * should be granted." J.A. 168-169, 175. More particularly, petitioner conceded that "Vice did not act under 'color of law' concerning the extortion letter" because "it was sent anonymously." J.A. 169. "As to the fabricated basketball game incident," petitioner stated, "Fox cannot show a deprivation of a right, privilege or immunity secured by the United States Constitution and laws" because "Fox was not prevented from running for election." J.A. 169-170. Moreover, petitioner continued, "the defamation Fox suffered as a result of this fabrication [is not] deprivation of a property right." J.A. 170. Fox asserted, however, that his "remaining claims, based upon state tort law, should be maintained." J.A. 168-169.

The district court dismissed the Section 1983 claims with prejudice, noting that they were dismissed "by agreement of all parties * * * *on summary judgment*," not withdrawn. Pet. App. 39a (emphasis added). The court also emphasized that it had "had minimal involvement with the state law claims." *Id.* at 40a. The district court declined to exercise supplemental jurisdiction over the state-law claims that Fox claimed to have alleged; at petitioner's request, the district court remanded the case to state court. *Id.* at 35a-40a.[5]

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[5] The court did not determine whether the state-law claims were frivolous; it merely remanded them to state court for determination, where they remain pending. For purposes of this brief, respondents recognize petitioner's assumption—but do not concede—that those claims are nonfrivolous.

Respondents moved for attorney's fees incurred in defending the Section 1983 claims. J.A. 198-199. The district court first determined that respondents were "prevailing parties." Pet. App. 25a-26a. The court found that petitioner had pressed his Section 1983 claims for twenty months before conceding that they were invalid when respondents challenged their legal sufficiency. *Id.* at 26a. The court noted that petitioner could have voluntarily dismissed his federal claims when "he withdrew his own request for judgment," but did not do so. *Ibid.* It also rejected petitioner's argument that "discovery issues impaired his determination of whether he had a viable 42 U.S.C. § 1983 case," noting that petitioner "sought no assistance from the court on those issues." *Ibid.* Instead, the district court concluded that petitioner dismissed the Section 1983 claims simply "to avoid judgment on the merits." *Ibid.* (internal quotation marks and citation omitted).

The district court next concluded that petitioner's claims were "vexatious, frivolous, or otherwise without merit." Pet. App. 27a. Applying the Fifth Circuit's long-settled multifactor test for frivolousness, the court found that petitioner had failed to make out a prima facie case under Section 1983, that petitioner conceded his claims were invalid only after respondents resisted petitioner's repeated settlement demands, and that it had dismissed all of the claims without a trial. *Ibid.*

The court then turned to the amount of the fee award. The court considered whether a reduction from the lodestar amount was warranted, because the related state-law claims had arisen but had not been addressed. The court was "mindful that it should seek to avoid providing windfalls to

attorneys," but it emphasized the unusual course of the proceedings, noting that the parties had litigated petitioner's frivolous Section 1983 claims to the near total exclusion of any state-law claims. Pet. App. 30a, 32a-33a. Although "defendant[s] ha[d] not prevailed regarding plaintiff's state law tort claims," the court explained, "plaintiff failed to allege state tort law violations in the Complaint such that defendants were adequately noticed that a separate defense as to these claims would need to be prepared at the beginning of the litigation." *Id.* at 32a. Moreover, the district court found that "throughout the litigation, the focus of both plaintiff and defendants" was petitioner's Section 1983 claims, not any state tort claims. *Id.* at 32a-33a. The court also found that respondents had *not* "request[ed] attorney's fees related to the defense of the state law claims remanded for decision." *Id.* at 33a.

The district court therefore declined to deviate from the lodestar calculation. It awarded $32,868.00 to respondent Town, representing 273.9 hours at the rate of $120.00 per hour, and $15,183.00 to respondent Vice, representing 105.6 hours at $105.00 per hour. Pet. App. 34a.

Court of Appeals Proceedings

The Fifth Circuit affirmed. It agreed with the district court that respondents were prevailing parties and that petitioner's "§ 1983 claims" were "frivolous, unreasonable, or without foundation." Pet. App. 5a-9a. The Fifth Circuit also agreed with the district court's rejection of petitioner's contention that he dismissed his Section 1983 claims because discovery revealed insufficient evidence to maintain them. To the contrary, the court of appeals concluded that the "federal claims should never have been

brought" and that petitioner "could manufacture no argument to support them when he was challenged." *Id.* at 6a-7a. The court specifically rejected petitioner's attempt to rely on evidence developed during discovery, holding that petitioner had failed to present that material to the district court and had therefore "abandoned" it. *Id.* at 8a n.19.

The court acknowledged that petitioner's frivolous Section 1983 claims were factually related to his state-law claims, but it determined that "deny[ing] fees under these circumstances would defeat the purpose of ever recognizing defendants as 'prevailing parties,' which is to 'protect defendants from burdensome litigation having no legal or factual basis.'" Pet. App. 7a (citation omitted). The court refused to "make a defendant's entitlement to attorneys' fees 'depend not upon the district court's review of the merits of a plaintiff's § 1983 claims, but upon how a plaintiff chose to draft his complaint.'" *Id.* at 10a-11a (citation omitted).

The court then examined the amount of the fee award. When frivolous and nonfrivolous claims are brought in the same suit, the Fifth Circuit explained, "the court must consider the interrelated nature of the frivolous and non-frivolous claims to determine the appropriate fee" and award fees only for "work which can be distinctly traced to a plaintiff's frivolous claims." Pet. App. 11a; see *id.* at 12a ("[W]e are confident that the district court will be able properly to weigh and assess the amount of attorney's fees attributable *exclusively* to a plaintiff's frivolous * * * claims.") (internal quotation marks, citation, and alteration omitted; emphasis added).

The court observed that "[i]n its order awarding [respondents] attorneys' fees, the district court noted

that 'the focus of both [petitioner] and [respondents] was [petitioner's] § 1983 claim.'" Pet. App. 12a (quoting *id.* at 32a-33a). The court of appeals also observed that the district court "noted that '[respondents did] not appear to request attorney's fees related to the defense of the state law claims remanded for decision to the Louisiana state court.'" *Id.* at 12a (quoting *id.* at 33a). "Because the district court specifically restricted its award of attorneys' fees to the proceedings before it, and because the court found that [respondents] *did not seek attorneys' fees for the defense of the state law claims*," the court of appeals explained, "we do not find its award of attorneys' fees [to be] an abuse of discretion." *Id.* at 12a (emphasis added).

Judge Southwick dissented. He agreed that some fee award was appropriate because petitioner "continued too long after it became clear that there was no federal case." Pet. App. 12a-13a. Judge Southwick also agreed with the majority that "usually a party seeking attorneys' fees must allocate the fees separately between the successful claims and the unsuccessful." *Id.* at 13a. He asserted, however, that such allocation "was not done here because the claims were found to be too interrelated." *Ibid.* He then criticized the magistrate judge's reliance on *U.S. for Varco Pruden Buildings* v. *Reid & Gary Strickland Co.*, 161 F.3d 915 (5th Cir. 1998), although he acknowledged that "[t]he majority here does not refer to that same caselaw." Pet. App. 14a-15a. Judge Southwick also acknowledged that "the majority refers to another part of the Magistrate Judge's decision in which she stated that both parties focused throughout litigation on the federal claim." *Id.* at 17a. "That finding," Judge Southwick explained, "does not affect my view that any fee for services by

Vice's counsel that was also necessary for the state claims is not recoverable, no matter what the focus of counsel might have been." *Ibid.* Judge Southwick concluded that "[t]he only fees Fox should be required to pay are those solely applicable to his federal claims." *Ibid.*

SUMMARY OF ARGUMENT

I. More than three decades ago, this Court held that a defendant is eligible for fees where a plaintiff's Section 1983 claim was frivolous. Five years later, the Court held that an otherwise-eligible *plaintiff* need not succeed with respect to the entire lawsuit in order to seek a fee award. There is no reason to craft a different rule for prevailing defendants.

A. The text of Section 1988 asks only whether a litigant is a "prevailing party" in an "action or proceeding to enforce" Section 1983 or another enumerated statute. Respondents satisfied both conditions: They succeeded in establishing that petitioner's Section 1983 claims were frivolous (an issue on which petitioner did not seek this Court's review); and this was just as much an "action or proceeding to enforce" Section 1983 as the plaintiff's partially successful suit in *Hensley*. Indeed, *Hensley* specifically stated that a defendant could simultaneously *recover* fees for a frivolous claim and *owe* fees on a meritorious claim. And even if Section 1988 required defendants to achieve complete success, respondents prevailed on *all* of the claims that could have triggered a fee award in this case.

B. Petitioner's attempt to parse the legislative history does not support his position. He concedes that scattered references in floor statements to frivolous "litigation" and "lawsuits" are inconsistent

with this Court's repeated references to Section 1988 as applying to frivolous "claims." Moreover, the House Committee Report for Section 1988 shows that the drafters contemplated fee awards to partially prevailing defendants—even when such defendants were also required to pay fees on meritorious claims.

C. Petitioner is wrong in claiming that his rule is necessary to avoid chilling meritorious claims. There is no mistaking frivolous claims for meritorious ones. Frivolous does not mean "novel," "creative," "withdrawn," or "abandoned." Nor is it appropriate to presume that district courts will ignore this Court's admonition against allowing "hindsight bias" to affect frivolousness determinations.

Petitioner's proposed rule would subvert Section 1988(b)'s purpose of deterring frivolous claims under various federal civil rights statutes. Those who would abuse those statutes would gain an easy end-run around the statute's fee-shifting scheme, and those with ordinary causes of action—say, a breach-of-contract or employment claim—against potential Section 1983 defendants would have good reason to add a civil rights claim to the mix. Petitioner's rule would thus encourage frivolous claims, and that is no small burden, because even frivolous Section 1983 claims take a heavy toll on defendants. The notion that plaintiffs (or their counsel) are incapable of avoiding filing frivolous claims is groundless, as is petitioner's suggestion that Rule 11 is an adequate substitute for the statutory command of Section 1988.

II.A. As for how to calculate a "reasonable" fee award when only some of the claims are frivolous, *Hensley* is again instructive. Because much of counsel's time typically will be devoted to the litigation as

a whole, parsing fees claim-by-claim is inappropriate. Instead, the district court should focus on the significance of the overall success in relation to the hours reasonably worked. The district court's discretion in making that determination—and in deciding whether a defendant ought to receive fees at all—is paramount, and should be guided by decades of experience applying a long list of considerations.

Petitioner's "but for" rule flies in the face of those longstanding principles. What is more, it would allow many plaintiffs to evade substantial liability for filing frivolous claims. And it would undoubtedly lead to wasteful litigation over whether a particular time entry is "exclusively" related to the frivolous claim.

B. Even if petitioner's rule is correct, he now concedes that the Fifth Circuit articulated precisely the same rule. The court of appeals expressly held that respondents were awarded only fees exclusively and distinctly traced to the frivolous Section 1983 claims. Thus, petitioner disputes only the Fifth Circuit's factbound application of his own proposed standard. Even if that question were properly presented, the lower courts' conclusion was amply supported by the record: As the district court found (and the court of appeals affirmed), petitioner's frivolous civil rights claims were the focus of all parties throughout the federal-court litigation.

III. Alternatively, the writ of certiorari should be dismissed as improvidently granted.

A. Petitioner devotes much of his argument to disputing an essential premise upon which he secured this Court's review—namely, that his Section 1983 claims were frivolous. As petitioner concedes, however, that question is not before this Court.

Equally important, much of the sweeping rhetoric and allegations upon which petitioner's merits brief rests (including many of the most dramatic allegations in his Introduction and Statement) were not properly presented to the court below.

B. Petitioner now concedes that the court of appeals stated what he contends is the "correct legal rule" for calculating fee awards. Petitioner's redrafting of his own questions presented does not diminish the significance of that concession. Both petitioner and the court of appeals agree that fees must be "distinctly" and "exclusively" traceable to the frivolous Section 1983 claims. Judge Southwick's dissenting opinion below reached the same conclusion—it simply disputed whether the district court had actually separated the fees. This Court did not grant certiorari to determine whether the district court abused its discretion in concluding that it had successfully awarded those fees exclusively related to the frivolous Section 1983 claims.

ARGUMENT

I. Plaintiffs Who Bring Frivolous Section 1983 Claims Gain No Categorical Immunity From Fee Awards Simply By Including A Nonfrivolous And Factually Related Claim

Congress has provided that, "[i]n any action or proceeding to enforce a provision of" 42 U.S.C. § 1983, a district "court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). More than three decades ago, this Court held that that language authorizes fees to a prevailing defendant if the court "finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff

continued to litigate after it clearly became so." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422 (1978).[6] That frivolousness threshold, the Court explained, represents the "proper accommodation of [various] competing considerations," including "mak[ing] it easier for a plaintiff of limited means to bring a meritorious suit" while also "deter[ring] the bringing of lawsuits without foundation." *Id.* at 420 (internal quotation marks and citation omitted). And "entrusting the effectuation of the statutory policy to the discretion of the district courts," *id.* at 416, was "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* v. *Eckerhart*, 461 U.S. 424, 437 (1983).

Those longstanding principles require rejection of petitioner's first argument—*i.e.*, that a district court may not award fees for the defense of a frivolous Section 1983 claim so long as the plaintiff also pleads at least one related, nonfrivolous claim. Petitioner does not dispute that, as the court of appeals held, respondents "are 'prevailing parties' for purposes of * * * § 1988." Pet. App. 7a. And the fact that a plaintiff pleaded at least one nonfrivolous claim (which may well not even arise under a statute that authorizes fee-shifting) does not make a frivolous Section 1983 claim any less so.

Nor is petitioner's rule necessary to avoid chilling meritorious Section 1983 claims. It is well-settled that "frivolous" does not mean novel, or that the

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[6] For simplicity's sake, we refer to these criteria collectively as "frivolousness."

claim simply failed as a legal or factual matter. To the contrary, this Court has stated—and lower courts have acknowledged—that a claim is frivolous only if it is objectively baseless. There is thus little risk of confusing frivolous claims with meritorious ones. Indeed, adopting petitioner's proposed rule would likely generate an increase in frivolous claims.

A. Text And Precedent Establish That A District Court Has Discretion To Award Fees To Any Defendant Who Prevails On A Frivolous Section 1983 Claim

The plain meaning and longstanding operation of Section 1988 show that a district court has discretion to award fees for defending frivolous federal civil rights claims. The 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 party." 42 U.S.C. § 1988(b). As noted above, neither requirement is disputed here. Accordingly, the remaining question is whether it is categorically impermissible for a district court to award fees so long as the plaintiff has pleaded at least one nonfrivolous claim that is factually related to a frivolous claim. This Court's decisions demonstrate that the answer is "no."

1. In *Christiansburg*, *supra*, the Court considered "what standard should inform a district court's discretion in deciding whether to award attorney's fees to a successful *defendant*" under a fee-shifting statute that was materially identical to Section 1988. 434 U.S. at 417; see *Hughes* v. *Rowe*, 449 U.S. 5, 14-15 (1980) (per curiam) (applying *Christiansburg* standard to case under Section 1988). The Court

rejected the view that a defendant may be awarded fees only "where the plaintiff was motivated by bad faith in bringing the action." *Christiansburg*, 434 U.S. at 419. Explaining that "[a] fair adversary process presupposes both a vigorous prosecution and a vigorous defense," the Court declined to assume that "Congress intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith." *Ibid.*

At the same time, *Christiansburg* concluded that the threshold for awarding fees to a prevailing defendant should be higher than for a prevailing plaintiff. Prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Christiansburg*, 434 U.S. at 416-417 (quoting *Newman* v. *Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam)). In contrast, *Christiansburg* recognized both a greater hurdle for fees to a prevailing defendant and the central role of a district court's discretion: "[A] district court may in its discretion award attorney's fees to a prevailing defendant * * * upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Id.* at 421. That standard represents "a proper accommodation of the competing considerations" of "mak[ing] it easier for a plaintiff of limited means to bring a meritorious suit" while also "deter[ring] the bringing of lawsuits without foundation." *Id.* at 420 (internal quotation marks and citation omitted).

2. Because *Christiansburg* involved a plaintiff who had asserted a single claim, see 434 U.S. at 414-

415, the Court had no occasion to address how the frivolousness standard applied where the plaintiff asserted multiple claims, some frivolous and some not. In *Hensley*, *supra*, however, the Court considered the propriety of a fee award to plaintiffs who prevailed on some, but not all, of their civil rights claims. See 461 U.S. at 427-429.

Hensley addressed the issue in two parts, the first of which is most directly relevant here. See Part II.A, *infra* (discussing the second part of *Hensley*'s analysis). The Court began by concluding that a plaintiff's suit need not be 100% successful to qualify for a fee award. Instead, the Court stated that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on *any* significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433 (internal quotation marks and citation omitted; emphasis added).

The *Hensley* Court expressly recognized that its holding would produce situations where *both* plaintiff and defendant are "prevailing parties"—that is, those where some of the plaintiff's claims succeed and some fail. And the Court stated that, even in those situations, "the defendant may recover attorney's fees incurred in responding to" an unsuccessful claim "[i]f the unsuccessful claim is frivolous." 461 U.S. at 435 n.10. The Court hardly could have been clearer: Partial success does not categorically disqualify *either side* from eligibility for a fee award.

3. Petitioner's attempts to distinguish *Hensley* are unconvincing. Petitioner asserts (at 36) that *Hensley*'s first holding—that a partially prevailing plaintiff may recover fees—is inapplicable to partially prevailing defendants. But he cites no language from

Hensley supporting such a distinction, and such an interpretation requires ignoring what the Court said very clearly in footnote 10.

The same is true of petitioner's efforts to read the pertinent language in *Hensley* as barring any fees to a defendant unless "the frivolous claim is based on completely 'different facts and legal theories'" than the nonfrivolous claims. Pet. Br. 34 (quoting *Hensley*, 461 U.S. at 434-435 & n.10). That is not what *Hensley* said. The Court's references to "different facts and legal theories" and "separate lawsuits" are not in the relevant footnote, and they do not suggest that either party's status as a "prevailing party" turns on the "relatedness" of the unsuccessful claims. Instead, those references were made in discussing how unrelated claims should be considered in calculating the *amount* of a "reasonable" fee award to a partially prevailing party. See *Hensley,* 461 U.S. at 435.

Petitioner's argument also overlooks the more fundamental significance of the Court's statement in *Hensley*. That footnote indicates that a defendant may sometimes obtain fees for frivolous claims *even if the plaintiff wins outright on other claims*. It is hard to square that result—one in which even a partially victorious plaintiff can potentially be required to pay some of the defendant's attorney's fees—with petitioner's rule that a defendant must not only win every factually related claim but also demonstrate that each and every such claim is frivolous.

4. Even if the number of claims on which a party succeeded were determinative of the threshold question of whether that party is "prevailing"—and *Hensley* instructs it is not—petitioner has selected the wrong denominator. Section 1988 speaks of "prevailing" in an "action or proceeding to enforce"

several enumerated federal civil rights laws, including Section 1983. 42 U.S.C. § 1988(b). It does not speak of actions to enforce *other* laws—particularly not other *state* laws. Accordingly, when determining whether a party has "prevail[ed]" for purposes of Section 1988, all that could conceivably matter would be success or failure on the qualifying federal civil rights claims. A plaintiff who (like petitioner) brings both Section 1983 claims and state-law claims may not *recover* attorney's fees if the federal claims are rejected but the state-law claims succeed. See, *e.g.*, *Robles* v. *Prince George's Cnty.*, 302 F.3d 262, 272 (4th Cir. 2002). The same should be true for defendants: 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.

B. Section 1988's Legislative History Does Not Support Petitioner

Petitioner asserts (at 33) that various items of legislative history show that Congress intended to condition a defendant's (but not a plaintiff's) eligibility for fees on winning every factually related claim in an entire lawsuit. That is incorrect. For one thing, as petitioner acknowledges (at 34), this Court has repeatedly described Section 1988 as addressing Section 1983 "claims," not entire "lawsuits." See *City of Riverside* v. *Rivera*, 477 U.S. 561, 580 (1986) (district court has discretion "to award attorney's fees against plaintiffs who litigate frivolous or vexatious claims"); *Hensley*, 461 U.S. at 435 n.10 (defendant may recover fees if plaintiff included a frivolous "claim" in an otherwise meritorious lawsuit); *Rowe*, 449 U.S. at 15 (prevailing defendant can only recover

fees when "a court finds that [a plaintiff's] claim was frivolous, unreasonable, or groundless") (internal quotation marks and citation omitted); *Christiansburg*, 434 U.S. at 422 (purpose of fee-shifting statute was to "assure that this statutory provision will not in itself operate as an incentive to the bringing of claims that have little chance of success").

Nevertheless, petitioner asserts that the legislative history shows that Congress was concerned only with awarding fees "when the *entire lawsuit* is frivolous," quoting a sentence from *Christiansburg* discussing the legislative history of the fee-shifting statute at issue in that case. Pet. Br. 33. The passage on which petitioner relies cannot bear such weight. To be sure, the opinion quotes remarks by Senators Lausche, Pastore, and Humphrey, each of whom used the word "lawsuits" or "suits." But the Court described those "sparse" sources as "reveal[ing] little more than the barest outlines of a proper accommodation of the competing considerations" at work in the statute. 434 U.S. at 420. And the Court relied on those statements only as additional support for *rejecting* the notion that Congress did not intend any fee awards to defendants. *Id.* at 422.[7]

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[7] Even if it were appropriate to seize upon these scattered references to "lawsuits" or "litigation," it does not follow that Congress intended to preclude fee awards where a plaintiff has included a non-frivolous *state-law* claim. As explained above, *supra* pp. 22-23, all of petitioner's Section 1983 "lawsuit" was declared frivolous; it would be quite a stretch to assume that Congress meant to immunize a plaintiff from a fee award simply because he included a state cause of action that does not trigger Section 1988 at all.

Moreover, such "isolated statements" from mere floor discussions are "not impressive legislative history." *Garcia* v. *United States*, 469 U.S. 70, 78 (1984) (internal quotation marks and citation omitted). Far "more authoritative," *id.* at 76, is the official House Report for Section 1988(b), which confirms that Congress contemplated fee awards for frivolous claims included alongside nonfrivolous claims. In particular, the Report cited *Carrion* v. *Yeshiva University*, 535 F.2d 722, 729 n.9 (2d Cir. 1976), as an example of a case in which a "court may award counsel fees to the prevailing defendant." H.R. Rep. No. 94-1558, at 7 (1976). *Carrion* involved an action that "combine[d] a frivolous and an arguably non-frivolous *claim*." 535 F.2d at 729 n.9 (emphasis added). The claims also were factually related, because both arose out of the plaintiff's lack of promotion and discharge from employment. *Id.* at 724. The *Carrion* court not only upheld a fee award to the prevailing defendant for the "defense of the [frivolous] Title VII *claim*," it also expressly *rejected* the argument that the presence of a nonfrivolous claim somehow "altered" whether the defendant was eligible for fees incurred in "the defense of the [frivolous] Title VII *claim*." *Id.* at 729 n.9 (emphasis added).

C. Permitting Fees Against Any Plaintiff Who Brings A Frivolous Section 1983 Claim Appropriately Balances The Purposes Of The Fee-Shifting Statute

Petitioner largely ignores the terms of the statute and this Court's decisions explicating when a party is eligible for fees. Rather, petitioner begins and ends with what he describes as "[t]he equitable considerations that underlie this Court's attorneys' fee decisions." Pet. Br. 31 (internal quotation marks

omitted). Such considerations, however, only confirm that petitioner's proposed rule is contrary to Congress's intent.

1. Permitting Fees For Frivolous Section 1983 Claims Will Not Discourage Meritorious Ones

Petitioner and his *amici* repeatedly contend that authorizing fees for frivolous Section 1983 claims that are factually related to nonfrivolous ones will "chill" meritorious Section 1983 claims. That concern is misplaced: "When a court imposes fees on a plaintiff who has pressed a 'frivolous' claim, it chills nothing that is worth encouraging." *Hutchinson* v. *Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993).

a. The premise of petitioner's argument—that a reasonable plaintiff will fear having a potentially *meritorious* claim confused with a *frivolous* one—is false. Frivolousness is a high and specific bar. As this Court explained in *Christiansburg*, it does not mean "simply that the plaintiff has ultimately lost his case"; a claim is *frivolous* only if it is "groundless or without foundation." 434 U.S. at 421. Following that guidance, the courts of appeals have repeatedly recognized that the "standard for awarding attorney's fees to prevailing defendants in a civil rights suit is difficult to meet, and rightly so." *Lamboy-Ortiz* v. *Ortiz-Velez*, No. 09-1649, 2010 WL 5129824, at *5 (1st Cir. Dec. 17, 2010); see also, *e.g.*, *Sista* v. *CDC Ixis N. Am.*, 445 F.3d 161, 178 (2d Cir. 2006) ("[I]t is very rare that victorious defendants in civil rights cases will recover attorneys' fees.").

Not only is frivolousness a high threshold, it does *not* reach the circumstances that petitioner and his *amici* suggest. Courts have long recognized the "significant difference between making a weak

argument with little chance of success * * * and making a frivolous argument with no chance of success." *Khan* v. *Gallitano*, 180 F.3d 829, 837 (7th Cir. 1999); see, *e.g.*, *Tancredi* v. *Metropolitan Life Ins. Co.*, 378 F.3d 220, 230 (2d Cir. 2004) ("allegation * * * was very weak, but it was not completely without foundation"); *Riddle* v. *Egensperger*, 266 F.3d 542, 550-553 (6th Cir. 2001) (a ruling on summary judgment that a claim is "without merit[] does not necessarily support the conclusion that the plaintiff's claims were frivolous").

Likewise—and contrary to petitioner's repeated suggestions (Pet Br. i, 23, 43-44, 47, 48)—a claim is not frivolous simply because it has been "abandoned," "withdrawn," or "dismissed" ("voluntarily" or otherwise). As this Court has made clear, the fact of dismissal "is not in itself a sufficient justification for the fee award." *Rowe*, 449 U.S. at 14. Nor does a party risk a frivolousness determination simply because discovery revealed the claim to be without merit. "[T]he course of litigation is rarely predictable," and courts will not punish a party for withdrawing a claim because "[d]ecisive facts may not emerge until discovery or trial [or] [t]he law may change or clarify in the midst of litigation." *Christiansburg*, 434 U.S. at 422. To the contrary, a claim may be frivolous precisely *because* "the plaintiff continued to litigate *after it clearly became* so." *Ibid.* (emphasis added). Accordingly, petitioner's assertion that the decision below will discourage plaintiffs from

withdrawing claims when they are later discovered to be unsupported is baseless.[8]

Frivolousness also is not a proxy for novel claims, whether as an extension of a legal rule or a bid to overrule a particular case. See, *e.g.*, *Tancredi*, 378 F.3d at 230 ("Although [a contrary Supreme Court case] was decided after plaintiffs filed their complaint, it illustrates the nebulous character of the state action test, and lends some support, however quixotic, to litigants like the plaintiffs in this case."); *Barnes Found.* v. *Township of Lower Merion*, 242 F.3d 151, 162 (3d Cir. 2001) (claim not frivolous since the availability of a defense fatal to the claim "was not completely established in this court" and "other courts had not come to a uniform conclusion on the point"); *Khan*, 180 F.3d at 837 (existence of a "good faith argument for an extension of existing law" justified district court's denial of fees to defendant); *Jane L.* v. *Bangerter*, 61 F.3d 1505, 1514 (10th Cir. 1995) ("A legal argument is not frivolous merely because the Supreme Court has failed to affirmatively address and accept it."); *Tarter* v. *Raybuck*, 742 F.2d 977, 987 (6th Cir. 1984) (reversing fee award because legal issue had not been settled); cf. Fed. R. Civ. P. 11(b)(2) (parties not subject to sanction so long as they advance claims "warranted by * * * a nonfrivolous argument for extending, modifying, or reversing existing law").

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[8] It bears repeating 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." Pet. App. 26a.

For that reason, petitioner's *amici* are wrong to suggest that a claim seeking to overturn a decision of even this Court would be at risk of being declared frivolous. ACLU Br. 23 (asserting that claims challenging *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), would have been deemed frivolous). The hallmark of frivolousness is *ignoring* a binding decision. Here, for example, petitioner did not claim that the "official policy or custom" requirement of *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), did not apply to his claim against the Town—or even that *Monell* should be overruled. He simply failed to articulate any basis that he satisfied that standard.[9]

Petitioner's *amici* also erroneously claim that it is "difficult to distinguish, *ex ante*, between colorable claims * * * [and] those that a court could deem frivolous." ACLU Br. 25. *Amici* point to a study of Rule 11 sanctions finding that 19% of instances in which a court of appeals reversed a district court's

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[9] As part of his broadside attack on the lower courts' frivolousness determination, petitioner notes that respondents removed this case to federal court and did not immediately move to dismiss. The frivolousness question, however, is not before this Court. See Part III.A, *infra*. In any event, removal recognizes merely the defendant's right to have a federal forum adjudicate federal claims. The fact that respondents did not immediately move to dismiss petitioner's claims also proves nothing about their merit. To the contrary, discovery is often necessary for a defendant to determine whether the plaintiff's claims have any basis. See, *e.g.*, *Myers* v. *City of W. Monroe*, 211 F.3d 289, 292 (5th Cir. 2000) (defendant's failure to move for dismissal "should not be seen as conclusively establishing that [plaintiff's] claims were not frivolous," because it was unclear before plaintiff's testimony whether a "genuine question of material fact" existed).

sanctions award "were based on the appellate court's finding that the cases were meritorious." *Id.* at 26. (citing Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 U.C.L.A. L. Rev. 65, 94 (1996) (in turn citing Federal Judicial Center, Rule 11: Final Report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States § 5 at 21 (1991) (FJC Report))). But that indicates only that errors in frivolousness determinations are *corrected* on appeal. Far more telling—as the same study reports—is that appellate courts "reversed the denial of sanctions" only "6% of the time." FJC Report §1D at 2; see also *id.* §5 at 20. Thus, even when the district court and appellate court disagree, it is far more likely that the sanctions will be *eliminated* on appeal.[10]

b. Much of petitioner's argument rests on the assertion that "hindsight bias" will lead courts to make erroneous frivolousness determinations, such that plaintiffs with meritorious Section 1983 claims will be deterred for fear of a mistaken fee award. Leaving aside that such concerns are properly directed at the frivolousness determination itself—on which petitioner did not seek this Court's review, see Part III.A, *infra*—this Court has specifically cautioned courts *not* to allow "hindsight logic" to affect an evaluation of frivolousness. *Christiansburg*, 434 U.S. at 422; see *id.* at 421-422 (Courts must "resist the understandable temptation to engage in *post hoc*

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[10] That study also refutes the notion that novel or "creative" arguments will be deemed frivolous. *Id.* §1C at 4 (noting "few, if any, cases in which the argument that was the subject of sanctions could reasonably be construed as an argument for the good-faith extension or modification of the law").

reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation."). "Trial judges are presumed to know the law and to apply it in making their decisions." *Lambrix* v. *Singletary*, 520 U.S. 518, 532 n.4 (1997) (internal quotation marks and citation omitted). The law stated in *Christiansburg* is no exception.

Even if a district court erroneously deems a claim frivolous and awards fees to a defendant, courts of appeals "have not hesitated to reverse such awards [to prevailing defendants] in the past." *Lowery* v. *Jefferson Cnty. Bd. of Educ.*, 586 F.3d 427, 437 (6th Cir. 2009); see *Bonner* v. *Mobile Energy Servs. Co.*, 246 F.3d 1303, 1305 (11th Cir. 2001) (holding that district court abused its discretion by awarding fees to prevailing Title VII defendants even though the plaintiff's evidence was "markedly weak").

c. In addition, a finding of frivolousness is merely a necessary—but not sufficient—condition for a defendant to receive fees under Section 1988(b). Whereas district courts "*must* award fees to the prevailing plaintiff" under Section 1988 in the absence of special circumstances, district courts retain discretion whether to award fees to a prevailing defendant under Section 1988 for a frivolous federal civil rights claim. *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 761 (1989). Given their "intimate[] familiar[ity] with the course of the litigation," *Rowe*, 449 U.S. at 23 (Rehnquist, J., dissenting), district courts are well equipped to make the inquiries required by *Christiansburg* and necessary to effectuate Section 1988's dual purposes.

d. Even crediting all of petitioner's flawed assumptions, the possibility that some nonfrivolous Section 1983 claims may be deterred is not sufficient justification for petitioner's rule. The same objections could have been levied against allowing fee awards to *any* prevailing defendant, but that rule was laid down more than three decades ago in *Christiansburg* and *Rowe*.

The Court's reasons for doing so remain sound. Section 1988 is not designed to *maximize* the number of meritorious Section 1983 claims, but rather to strike the appropriate *balance* between encouraging those claims and discouraging frivolous ones. Congress entrusted the vindication of federal civil rights to the "adversary judicial process," which "presupposes both a vigorous prosecution and a vigorous defense." *Christiansburg*, 434 U.S. at 419. There is no reason to assume that Congress intended "to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action." *Ibid.*[11]

Petitioner's rule rests on precisely that assumption and mistakenly assumes that Section 1988 should be read to encourage Section 1983 claims at

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[11] The notion that Section 1988 is a litigation-maximizing statute cannot be squared with *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 610 (2001). That case rejected fee awards to plaintiffs where the lawsuit was the "catalyst" for a change in the defendant's practices but there was no judicial decree changing the parties' legal relationship. If plaintiffs are not necessarily entitled to fees for causing change, surely the statute cannot be read to encourage litigation at all costs.

every opportunity. But "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law," *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam), and Section 1988 is the classic example of Congress striking a compromise between sometimes competing objectives. As explained below, petitioner's rule would frustrate the statute's undisputed purpose to deter frivolous federal civil rights claims, and it ignores Congress's decisions concerning "what competing values will or will not be sacrificed to the achievement of a particular objective." *Ibid*.

2. Petitioner's Proposed Rule Would Encourage Frivolous Section 1983 Claims

Another important purpose of Section 1988(b)'s fee-shifting regime is to *discourage* frivolous claims invoking Section 1983 and the other enumerated statutes. *Christiansburg*, 434 U.S. at 420-422. Petitioner's all-or-nothing rule would eviscerate that goal; indeed, it would *encourage* frivolous Section 1983 claims.

a. "[W]hile Congress wanted to clear the way for suits to be brought," this Court explained in *Christiansburg*, "it also wanted to protect defendants from burdensome litigation having no legal or factual basis." 434 U.S. at 420. The availability of fee awards to defendants who successfully resist frivolous Section 1983 claims is essential to achieving that balance.

Such protection is necessary because Section 1983 defendants are inviting targets. Local governments and state and local officials constantly engage in activities—operating prisons, maintaining police and

fire departments, running schools—that expose them to frivolous civil rights claims. See, *e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 492 (1973) (recognizing the "boundless" possibilities for litigation under Section 1983 by state prisoners who "eat[], sleep[], dress[], wash[], work[] and play[] * * * under the watchful eye of the State").[12] Such claims involving "bare allegations" of a deprivation of a federally protected right would subject public employees and state and local governments to the possible crushing "costs of trial or to the burdens of broad-reaching discovery." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982).

Such defendants are typically the "least able to bear" the costs of such frivolous litigation, which could result in "a severe limitation on [governmental defendants'] ability to serve the public." *Owen* v. *City of Independence*, 445 U.S. 622, 670 (1980) (Powell, J., dissenting); see *Spallone* v. *United States*, 493 U.S. 265, 297 (1990) (noting that imposing costs "against the public fisc * * * curtail[s] various public services"). This threat is particularly acute because most municipalities and states indemnify employees for official actions. See *Monell*, 436 U.S. at 713 n.9 (Powell, J., concurring); Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 330-338.

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[12] Section 1983 litigation remains an attractive option for idle prisoners, even after passage of the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e *et seq*. See *Jones* v. *Bock*, 549 U.S. 199, 203 (2007) ("Prisoner litigation continues to account for an outsized share of filings in federal district courts.") (internal quotation marks and citation omitted).

Allowing prevailing defendants to recover fees against plaintiffs bringing frivolous civil rights claims does more than protect defendants. "[F]rivolous civil rights claims waste judicial resources that would otherwise be used for legitimate claims." *Ward* v. *Hickey*, 996 F.2d 448, 455 (1st Cir. 1993). Deterring abuse of civil rights statutes lessens the burden of frivolous lawsuits on judicial dockets, "ensur[ing] that the ability of the courts to remedy civil rights violations is not restricted by dockets crowded with baseless litigation." *Munson* v. *Milwaukee Bd. of Sch. Dirs.*, 969 F.2d 266, 269 (7th Cir. 1992) (citation omitted); see *Foster* v. *Mydas Assocs.*, 943 F.2d 139, 146 (1st Cir. 1991) (threat of fees for frivolous claims "actually benefits civil rights plaintiffs as a group by freeing up resources for worthy suits").

More broadly, abuse of civil rights statutes threatens their basic fairness. "The authority which federal courts possess * * * is an authority built upon respect for judicial process. That authority cannot, in the long run, be effectively invoked on behalf of civil rights enforcement if civil rights litigants could themselves disregard it with impunity." *Blue* v. *Department of the Army*, 914 F.2d 525, 535 (4th Cir. 1990). Inclusion of a related nonfrivolous claim does not diminish the damage done by the frivolous Section 1983 claim. That is particularly true where, as here, *all* of the Section 1983 claims are frivolous.

Petitioner asserts (at 33) "there is no evidence * * * that [petitioner's] motivation in adding the § 1983 claim was vexatious, harassing, or oppressive." Indeed, petitioner echoes that theme throughout his brief—suggesting that he did not know his Section 1983 claims were frivolous (Pet. Br. 12, 16, 38-42, 44-45)—and his *amici* explicitly con-

tend that "'if the action is not brought in bad faith, [attorney's] fees should not be allowed.'" Liberty Inst. Br. 8 (quoting H.R. Rep. No. 94-1558, at 7). This Court, however, explicitly *rejected* a subjective bad faith standard in *Christiansburg*. 434 U.S. at 419 (Congress "did not intend to permit the award of attorney's fees to a prevailing defendant only in a situation where the plaintiff was motivated by bad faith.").

b. Petitioner's proposed rule would eviscerate the protection that Section 1988(b) affords defendants. A plaintiff hoping to avoid a fee award would need only add a related, nonfrivolous cause of action—including one based on a federal statute or even state law—as part of his lawsuit. That other claim would need not be meritorious or even likely to succeed; rather, it would need only pass the extraordinarily low bar for being declared nonfrivolous. As those with long experience in the trenches will attest, such a claim would be surpassingly easy to pair with the most common frivolous Section 1983 claims. See generally Br. *Amici Curiae* Arkansas *et al.*

Conversely, petitioner's proposed rule would give plaintiffs with ordinary tort claims against government actors a significant incentive to add a Section 1983 claim—no matter how marginal—to the mix. Here too, doing so would often be quite easy. A simple breach-of-contract action against a municipality could be recharacterized as a violation of due process or some other constitutional tort. Yet again, those who represent state and local governments on a daily basis confirm that this possibility is all too real. See generally Br. *Amici Curiae* International Municipal Lawyers Ass'n *et al.* (State/Local Br.).

The enticements for bringing (or adding) Section 1983 claims are substantial. For starters, recharacterizing an ordinary claim as a Section 1983 claim may give a plaintiff access to (supposedly) deep-pocketed defendants. Take, for example, petitioner's Section 1983 claims against the Town. Petitioner's complaint did not allege that Vice's conduct was the product of a "policy or custom" adopted by the Town, see J.A. 37-43—an essential requirement for a damages claim under *Monell*. Indeed, that is one of the principal reasons why petitioner's claims were frivolous. Yet under petitioner's rule, plaintiffs would easily be able to drag municipal defendants into cases where they do not belong without any fear of exposure to fees under Section 1988(b). So too for plaintiffs trying to make a personal dispute with a government employee into a Section 1983 violation in hopes of triggering the possibility that the government employer would indemnify an otherwise judgment-proof defendant. By making actions "in the ambit of [the defendant's] personal pursuits," *Screws* v. *United States*, 325 U.S. 91, 111 (1945) (opinion of Douglas, J.)—such as, in this case, the *anonymous* extortion letter—into an "official capacity" action, plaintiffs would hope to gain access to (and extract settlements from) defendants with means to pay a substantial judgment.

c. Petitioner is incorrect (Pet. Br. 31) that a frivolous Section 1983 claim that is factually related to a nonfrivolous claim imposes little or no "incremental burden" on defendants. As a practical matter, a lawsuit that includes a Section 1983 claim weighs far more heavily on defendants than one without. The risk of paying a fee award is itself a serious burden; indeed, fee awards can dwarf the damages claimed. See *Rivera*, 477 U.S. at 565, 581 (upholding

fees of $245,456 where damages totaled $33,350). The additional work required to defend a Section 1983 claim is also significant—even if it is "factually interrelated" with a nonfrivolous claim. Whether a defendant acted "under color of law," for example, is a substantial question that typically requires significant additional discovery and has occasioned no shortage of legal controversy. Likewise, whether a municipality maintained an "official policy or custom" giving rise to alleged misconduct is a separate inquiry altogether. As those with vast experience defending such claims will again confirm, see generally State/Local Br., the addition of a Section 1983 claim is often a game-changer.

d. Petitioner also claims that plaintiffs need not—or cannot—be deterred from filing claims that are "legally" frivolous but factually related to nonfrivolous claims. That is wrong on several levels.

For starters, petitioner's argument presupposes an easy distinction between factually related legal theories and non-factually related legal theories. Pet. Br. 21. But this Court "has long noted the difficulty of distinguishing between legal and factual issues," *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 401 (1990), and the claims in this very case demonstrate the fallacy of petitioner's suggestion. While the frivolous Section 1983 claims and nonfrivolous state-law tort claims are related on some facts, there are other, crucial fact-intensive issues on which they are unrelated. Petitioner's portrayal of this case as a "single, indivisible tort suit" in which "all the legal claims were founded on the same facts" (Pet. Br. 21) ignores that reality.

For example, petitioner's Section 1983 claims required proof that Vice acted "under color of" state

law." *West* v. *Atkins*, 487 U.S. 42, 48 (1988). This inquiry often turns on a fact-intensive inquiry into "the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Martinez* v. *Colon*, 54 F.3d 980, 986 (1st Cir. 1995). With respect to the Town, petitioner was required to "identify a municipal policy or custom that caused the plaintiff's injury." *Board of Comm'rs of Bryan Cnty.* v. *Brown*, 520 U.S. 397, 403 (1997) (internal quotation marks omitted). And with respect to both Vice and the Town, petitioner had to establish that he was deprived of a "right secured by the Constitution and the laws of the United States." *West*, 487 U.S. at 48. That was no minor addition in light of petitioner's far-ranging allegations. J.A. 41 (listing seven constitutional theories plus "other claims to be proven at trial").

e. Petitioner's argument (at 44) that a litigant is incapable of determining whether a claim is "legally" deficient is likewise misguided. That argument once again presupposes an inevitably straightforward answer to whether a Section 1983 claim failed because of "legal" or "factual" deficiencies. In this case, for example, petitioner's Section 1983 claims were frivolous at least in part because of factual deficiencies—*e.g.*, the fact that the extortion letter was sent anonymously, and the fact that petitioner could make no allegation that the Town had a "custom or policy" relevant to this case. J.A. 37-43. And petitioner's claims were not declared frivolous because his "legal" theory was objectively baseless. Rather, petitioner ultimately acknowledged that he lacked a legitimate *factual* basis for claiming that Vice acted under color of law or that he had suffered

any constitutionally significant injury because he won the election. J.A. 169-170.

Even if the frivolousness question turned exclusively on a "legal" question, that cannot insulate a party from the statute's reach. Indeed, this Court recently confirmed that fee-shifting statutes like Section 1988(b) run directly to the litigant, not the lawyers. See *Astrue* v. *Ratliff*, 130 S. Ct. 2521, 2527 (2010) ("[T]he statute's plain text * * * 'awards' the fees to the litigant."); *id.* at 2529 (noting that Section 1988(b) "contains virtually identical" language). The statute's *burdens* likewise fall on the parties; as this Court has observed, Section 1988 "was not intended to permit recovery from opposing counsel." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 761 n.9 (1980); accord S. Rep. No. 94-1011, at 5 (1976) (Section 1988 was meant to provide for "an award of attorney's fees against a *party*.") (emphasis added). While there may be instances in which a losing attorney is to blame for a frivolous Section 1983 claim, it is up to Congress, not the courts, whether to limit fee awards accordingly.

In any event, petitioner's concern that innocent litigants will suffer at the hands of their lawyers is misplaced. If a client faces a fee award because a lawyer persuaded him to include a frivolous Section 1983 claim, a traditional malpractice action would be available to recover those costs. See, *e.g.*, *Durrett* v. *Jenkins Brickyard, Inc.,* 678 F.2d 911, 916 (11th Cir. 1982) (where a plaintiff's attorney was "primarily culpable" for asserting frivolous claims for purposes of Section 1988, a plaintiff "may find relief * * * in the form of a malpractice action").

f. Petitioner and his *amici* claim that Fed. R. Civ. P. 11 makes a fee award under these circumstances

unnecessary. Pet. Br. 23, 45; ACLU Br. 15. Not so. That argument is simply a disagreement with Congress's decision to make fee awards available to the "prevailing *party*" rather than to only a prevailing *plaintiff*. The argument likewise runs headlong into *Christiansburg* and *Rowe*, which declared in unmistakable terms that Congress intended to make defendants eligible for fee awards. Rule 11 and lawyers' general ethical obligations not to bring frivolous litigation long predated Section 1988(b), which was not enacted until 1976. See *Hensley*, 461 U.S. at 429. Congress plainly determined that more was needed.

More fundamentally, "Rule 11 is not a fee-shifting statute." *Cooter & Gell*, 496 U.S. at 409. Rule 11 is "aimed at curbing abuses of the judicial system," *id.* at 397, and is intended only "to govern those who practice before the courts," *Business Guides, Inc.* v. *Chromatic Communications Enters.*, 498 U.S. 533, 556 (1991) (Kennedy, J., dissenting). In contrast, fee-shifting statutes like Section 1988 "reflect policy choices by Congress regarding the extent to which certain types of litigation should be encouraged or discouraged." *Id.* at 567. In addition, this Court has already rejected the idea that Section 1988 should be construed to authorize an award of attorney's fees only in those situations in which a litigant would be able to recover fees in its absence. See *Christiansburg*, 434 U.S. at 419; *Newman*, 390 U.S. at 402 n.4.

II. The District Court's Judgment Should Be Affirmed

The second question presented in the petition for a writ of certiorari is whether it is "improper to award defendants all of the attorney's fees they incurred in an action under Section 1988, where the fees were spent defending nonfrivolous claims that were intertwined with the frivolous claim?" Pet. i. As explained below (see Part III.B, *infra*), that question appears to be no longer presented in this case because petitioner now *concedes* that the court of appeals "stated the correct rule" in holding that only fees "exclusively" and "distinctly" traceable to the frivolous Section 1983 claims were sought and awarded. Pet. Br. 48.

Nonetheless, we address both the question on which the Court granted certiorari and petitioner's assertion that the court of appeals "misapplied the rule" (Pet. Br. 48) that it announced in its opinion. Under Section 1988(b), if a defendant incurs fees defending a frivolous Section 1983 claim, the district court has discretion to award those fees in proportion to the defendant's overall "success" in defeating the plaintiff's claims, even if not all of the plaintiff's claims were deemed frivolous. That principle governs calculation of fee awards to prevailing plaintiffs, and it likewise should determine the size of awards to prevailing defendants. And even if fees awarded to a defendant must be traceable *exclusively* to a frivolous Section 1983 claim, the court of appeals correctly found that standard satisfied here.

A. A District Court Has Discretion To Award Fees For Work Directly Traceable To A Frivolous Section 1983 Claim, Even If Some Portion Of That Work Also Is Traceable To Nonfrivolous State Tort Claims

1. When it comes to calculating the *amount* of a fee award, the statutory text vests district courts with "discretion" to determine a "reasonable" fee. 42 U.S.C. § 1988(b). Those terms are inconsistent with a categorical rule permitting only fees traceable *exclusively* to a frivolous Section 1983 claim.[13]

Hensley confirms that flexibility is key. When considering how to calculate awards for partially prevailing plaintiffs, *Hensley* specifically confronted the issue of related claims—*i.e.*, those involving "a common core of facts or * * * based on related legal theories." 461 U.S. at 435. The Court recognized 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." *Ibid.* Yet that is precisely what petitioner urges in contending that fees are recoverable only if traceable *exclusively* to frivolous Section 1983 claims.

2. Instead, courts should look at the lawsuit as a whole and determine the extent to which the defendant succeeded in establishing that the plaintiff's

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[13] Respondents do not contend that a defendant may be awarded fees for work not directly traceable to a frivolous Section 1983 claim. The question is what to do with fees that are directly traceable *both* to a frivolous Section 1983 claim *and* a nonfrivolous claim.

claims were frivolous. See *Hensley*, 461 U.S. at 435 ("[T]he district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."); *Rivera*, 477 U.S. at 569 (same). The essential question is whether the defendant "achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Hensley*, 461 U.S. at 434.

Traditional methods for assessing fee awards are fully adequate to this task. The district court should first determine a "lodestar" amount by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Rivera*, 477 U.S. at 568. The court may then adjust that amount up or down by applying various factors, including the degree of success obtained by the prevailing party. *Blum* v. *Stenson*, 465 U.S. 886, 897 (1984); see *Hensley*, 461 U.S. at 429-430 & n.3 (listing twelve factors). Though obviously subject to meaningful appellate review, the primary responsibility for this process should remain entrusted to the sound discretion of the district court, which "often ha[s] the keener appreciation of those facts and circumstances peculiar to particular cases." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421-422 (1975).

3. Petitioner's "but for" rule (Pet. Br. 49) would have at least two additional negative consequences. First, it would permit a plaintiff who brings frivolous Section 1983 claims to evade most—and perhaps all—responsibility for the consequences that its filing imposed on the defendant. It often will be "difficult to divide the hours expended on a claim-by-claim basis," *Hensley*, 461 U.S. at 435, because most plaintiffs—unlike petitioner here—will not litigate the frivolous

Section 1983 claims to the practical exclusion of the nonfrivolous claim. And because the filing of a Section 1983 claim substantially raises the stakes, it will often lead to a greater number of hours "devoted generally to the litigation as a whole." *Ibid.*; see *Smith* v. *Wade*, 461 U.S. 30, 90 (1983) (Rehnquist, J., dissenting) (recognizing the "difference between the incentives that are present in state tort actions, and those in § 1983 actions" because of attorney's fee awards). Under petitioner's rule, those substantial additional burdens will be subsumed into "general" work on the litigation.

Petitioner's rule would also spawn endless litigation in district courts over whether particular hours are "directly and exclusively attributable" (Pet. Br. 55) to a frivolous civil rights claim. Appeals would follow, creating more of "one of the least socially productive types of litigation imaginable": litigation over fees. *Hensley*, 461 U.S. at 442 (Brennan, J., concurring in part and dissenting in part). Such litigation would "frustrate the purposes of § 1988," *ibid.*, and ignore 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.

B. In Any Event, The Lower Courts Correctly Held That The Fees Awarded Here Were Traceable Exclusively To The Frivolous Section 1983 Claims

1. Even if fees awarded to a prevailing defendant must be traceable exclusively to a frivolous Section 1983 claim, the award in this case still should be affirmed. Petitioner repeatedly acknowledges that this was the very rule stated by the court of appeals

when affirming the district court's fee award. See Pet. Br. 24, 48, 52.

2. Petitioner argues, however, that the Fifth Circuit "misapplied" (Pet. Br. 49) what he views as the correctly stated rule of law. Even assuming that resolving that factbound issue is within the Court's grant of certiorari and would constitute a wise use of the Court's limited resources, but see Part III.B, *infra*, petitioner is incorrect.

a. The district court determined that petitioner pressed his state-law claims only when his frivolous Section 1983 claims failed. See Pet. App. 32a ("[P]laintiff made certain allegations that could be characterized as state law tort claims, but plaintiff did not make these allegations separate from his § 1983 claim."); *ibid.* ("[P]laintiff failed to allege state tort law violations in the Complaint such that defendants were adequately noticed that a separate defense as to these claims would need to be prepared at the beginning of the litigation."). The court of appeals did not disagree with that finding, and there is no basis for this Court to question it.[14]

Nevertheless, petitioner seeks to relitigate the district court's finding by arguing that the state-law claims were "featured prominently in the complaint." Pet. Br. 52. But any state-law claims, far from

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[14] Petitioner's assertion (at 53) that "[t]he court of appeals evidently did not embrace the magistrate's view of the complaint" is wrong. The district court concluded that petitioner's state-law claims were specifically articulated only at the eleventh hour; the Fifth Circuit's characterization of the complaint as "claiming federal and state causes of action," Pet. App. 3a, is entirely consistent with the district court's conclusion.

"featured prominently," were in fact not expressly mentioned at all. See J.A. 37-43 (reproducing complaint). By contrast, the complaint expressly alleged numerous Section 1983 claims, including (among others) claims based on "the right to Due Process" and "the right to seek public office." J.A. 41.

Petitioner acknowledges that "the complaint did not set forth independent counts for each [state-law] claim." Pet. Br. 53. Nonetheless, he invites the Court to dive deeper into the intricacies of this particular case, arguing that *Louisiana's* especially lenient "fact-pleading" standard would not have required him to do so. *Ibid.* But even if the Court were inclined to follow petitioner that far, that still would not answer the question of whether state claims were actually *litigated* in federal court. As both courts below determined, they were not.

b. Those findings are amply supported by the record. Although respondents pleaded state-law defenses in their answers out of an abundance of caution, J.A. 50, 68, 75, petitioner pressed his civil rights claims in federal court to the exclusion of any state tort claims. Petitioner himself described the suit that way shortly after he filed it. See p. 5, *supra.* Likewise, in a series of letters, counsel for petitioner urged respondents to settle the Section 1983 claims but made no mention of state tort claims. See pp. 5-6, *supra.*[15]

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[15] Petitioner claims that he sought summary judgment "on his state law extortion claim," Pet. Br. 54, but that motion centered on his federal civil rights claims. See J.A. 81-83 (citing federal cases); pp. 6-7, *supra* (discussing same). Petitioner also claims that respondents answered the motion "as a matter of state law." Pet. Br. 54. But Vice's response said nothing about state

In fact, petitioner did not expressly *articulate* any state tort claims until *after* respondents sought judgment on the Section 1983 claims. The district court then swiftly dismissed the Section 1983 claims and refused to exercise supplemental jurisdiction over any state tort claims that had emerged. Pet. App. 40a. In dismissing the claims, the district court emphasized that it had "had minimal involvement with the state law claims." *Ibid.*

It was with these facts before it that the district court expressly found that "throughout the litigation, the focus of both plaintiff and defendants" was petitioner's frivolous civil rights claims. Pet. App. 32a-33a. The court of appeals affirmed this finding, emphasizing that the district court had "specifically restricted its award of attorneys' fees to the proceedings before it" and had "noted that '[respondents did] not appear to request attorney's fees related to the defense of the state law claims.'" *Id.* at 12a. "[B]ecause the court found that *Appellees did not seek attorneys' fees for the defense of the state law claims*," the court of appeals specifically explained, "we do not find its award of attorneys' fees an abuse of discretion." *Ibid.* (emphasis added). Under these circumstances, it was within the district court's discretion to award respondents the fees they incurred in defending the frivolous civil rights claims,

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law claims. J.A. 89-103. And the Town explicitly noted at the end of its response that "[p]laintiff does *not* specifically set forth any state law claim in his Petition for Damages." J.A. 122 (emphasis added).

even though they "faced the prospect," Pet. Br. 51, of defending state tort claims in the future.[16]

III. If The Judgment Below Is Not Affirmed Outright, The Writ Of Certiorari Should Be Dismissed As Improvidently Granted

Petitioner sought—and this Court granted—review of two carefully described legal questions. The first was whether a defendant who obtains a dismissal of a frivolous claim under a statute that triggers eligibility for fee-shifting under Section 1988 is categorically ineligible for such fees whenever "the plaintiff has asserted other interrelated and non-frivolous claims." Pet. i. The second was whether a defendant who is eligible for fees may recover for time "spent defending non-frivolous claims that were intertwined with the frivolous claim." *Ibid.*

Having obtained a writ of certiorari on the premise that this case offered an opportunity to resolve a "deep and entrenched conflict" (Pet. 28) that has led to "a patchwork of legal rules" (Pet. Reply 6), petitioner has shifted gears and now invites this Court to resolve several case-specific issues. Despite acknowledging that he never sought review of the court of appeals' holding that his Section 1983 claims were frivolous (Pet. Br. 26 n.2), petitioner's merits brief devotes substantial energy to attempting to re-

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[16] Petitioner makes much of the district court's statement that "[a]ny trial preparation, legal research, and discovery" in federal court "may be used by the parties in the state court proceedings." Pet. Br. 4-5, 16-18, 32, 54-55. But, even if such a statement were somehow binding on the state court, it does not undermine the court's detailed findings about what actually happened in federal court.

argue that threshold and concededly "fact-bound" (*ibid.*) question. See *id.* at 38-42; see also pp. 52-53, *infra.* Similarly, the petition attacked "[t]he *rule* adopted by the Court of Appeals" for determining the amount of a fee award to a prevailing defendant in situations where concededly frivolous claims are intertwined with nonfrivolous ones. Pet. 19 (emphasis added); see Pet. 21, 23. But petitioner's brief on the merits now declares that "the court of appeals announced the correct rule" (Pet. Br. 25) and shifts to arguing that the court of appeals' error lies instead in how it *applied* that rule to the particular facts of his case (*id.* at 52).

This Court should decide this case on the premises on which review was granted, and it should affirm the court of appeals' judgment for the reasons stated above. In the alternative, the Court should dismiss the writ of certiorari as improvidently granted. Petitioner is asking this Court to decide questions that are not within the grant of certiorari and that would not have warranted certiorari had petitioner sought it on those grounds. This Court's review of difficult legal questions is not facilitated by a process that treats their essential premises as moving targets.

A. Dismissal Is Warranted Because Petitioner Now Disputes The Premise Of Frivolousness On Which Certiorari Was Granted

1. In seeking this Court's review, petitioner made a calculated gamble. Before the lower courts, petitioner unsuccessfully argued that his Section 1983 claims were not frivolous. Pet. App. 8a. He could have pressed the argument before this Court as well. Instead, petitioner apparently concluded that

challenging the lower courts' "fact-bound" frivolousness determination (Pet. Br. 26 n.2) would decrease his chances of securing a writ of certiorari. See S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

Instead, petitioner embraced the court of appeals' frivolousness determination as the predicate for his request for certiorari. Both questions (as presented in the petition) were premised on the notion that this case included both frivolous and nonfrivolous claims. Question 1 spoke of "*other* interrelated and *non-frivolous* claims" and inquired whether the presence of such claims posed an absolute bar to any award of attorney's fees to a prevailing defendant. Pet. i (emphasis added). Question 2 was even clearer, asking whether it was improper for the courts below to award fees "spent defending non-frivolous claims that were intertwined with *the frivolous claim*." *Ibid.* (emphasis added).

Petitioner does not assert that either of these questions "fairly included" the issue of whether his Section 1983 claims were in fact frivolous. S. Ct. R. 14.1(a). And although petitioner notes that the body of the petition concluded with a brief argument that the court of appeals misapplied the *Christiansburg* standard in determining that his dismissed claims were frivolous, Pet. Br. 26 n.2 (citing Pet. 25-28), petitioner does not (and could not) contend that such a reference could expand the scope of this Court's grant of certiorari. See *Mazer* v. *Stein*, 347 U.S. 201, 206 n.5 (1954) ("The fact that the issue was mentioned in argument does not bring the question properly before us."); see EUGENE GRESSMAN *ET AL.*,

SUPREME COURT PRACTICE 464 (9th ed. 2007) (collecting cases).

2. Petitioner's merits brief reframes the questions presented to remove the most express acknowledgement that his dismissed Section 1983 claims were frivolous. Compare Pet. i with Pet. Br. i (rewriting Question 2 to remove the words "frivolous" and "non-frivolous"). The bulk of the brief also revolves around various attacks—some subtle, some direct—on the lower courts' fact-bound determination of that issue.

Petitioner's strategy is evident throughout his dramatic Introduction and Statement of Facts, and in his Argument. In each, petitioner devotes substantial effort to contending that his Section 1983 claims not only were *not* frivolous, but actually *meritorious*. Pet. Br. 3-4, 6, 8-13, 22-23, 26, 37-42. On petitioner's retelling, this case is no longer about frivolous claims at all; instead, it involves claims that were "withdraw[n]," "voluntarily dismissed," or "abandon[ed]." *Id.* at i, 16, 43. Even a rare acknowledgement that "this appeal is premised on the assumption that the § 1983 claim was frivolous," *id.* at 26, is followed immediately by an assertion that "the errors of the courts below [on the frivolousness question] provide cautionary tales that are instructive in crafting the correct legal rule," *id.* at 26 n.2.

Because petitioner's arguments rely heavily on his views about a threshold issue that is undisputedly not before the Court, the prudent course would be to dismiss the writ of certiorari as improvidently granted. See *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 105 (2001) (per curiam) (dismissing writ because judgment on the merits would require the Court to rule on a threshold question decided below but not presented in the petition for certiorari);

Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) (per curiam) (noting the Court's "disapprov[al of] the practice of smuggling additional questions into a case after we grant certiorari") (internal quotation marks and citation omitted); *Norfolk Southern Ry. Co.* v. *Sorrell*, 549 U.S. 158, 164-165 (2007) (same).

3. Petitioner's *method* for challenging the lower courts' frivolousness determination also is improper. When arguing before the district court that his Section 1983 claims were not frivolous, petitioner relied exclusively on the four corners of his complaint. Pet. App. 8a n.19, 20a-21a. When the case reached the court of appeals, however, petitioner attempted to change course by presenting evidence and inferences accumulated during discovery. *Id.* at 8a n.19. But the court of appeals concluded that petitioner had "abandoned the[m] at the district court" level. *Ibid.* That forfeiture holding went entirely unchallenged in the petition.

As a result, petitioner's bid to persuade this Court that his claims were not frivolous—and, more generally, to color the actual questions of law at issue—relies heavily on "facts" not considered by either court below. For example, petitioner's complaint (again, the only document considered by either court in determining frivolousness) accused respondent of sending an anonymous letter "threatening to take certain actions." J.A. 39. In contrast, petitioner's merits brief contains additional accusations designed to vilify Vice, including that Vice allegedly contacted petitioner's former supervisor to obtain information about him and tried to leak an anonymous letter to the press. Pet. Br. 6, 8. Similarly, whereas the complaint accused Vice of

conspiring to direct a confrontation between petitioner and another individual, J.A. 39, petitioner's merits brief asserts that Vice promised the man leniency in exchange for his cooperation and that one of Vice's officers dictated the man's official complaint. Pet. Br. 9-12. Given the uncertain record and petitioner's impermissible use of evidence, this case would be a particularly poor vehicle for resolving the issues at hand—*even if* this Court were inclined to entertain petitioner's assertion that the lower courts' frivolousness determination is somehow "instructive." *Id.* at 26 n.2.

B. Dismissal is Warranted Because Petitioner Now Asserts That The Fifth Circuit "Stated The Correct Rule" About Calculating A Fee Award To A Prevailing Defendant

1. When seeking certiorari, petitioner repeatedly attacked the *rule* adopted by the Fifth Circuit for calculating the amount of a fee award to a prevailing defendant. See Pet. 19 ("[t]he rule adopted by the Court of Appeals lowers the bar for Section 1988 defendants to recover fees in a number of ways"); Pet. 19-23 ("the rule adopted by," "the rule set forth by," and three references to "[t]he Court of Appeals' rule"). In his merits brief, however, petitioner *acknowledges* that "[t]he court of appeals stated" what he regards as "the correct rule"—*i.e.*, that a prevailing defendant should be awarded only fees that are "directly and exclusively attributable to a frivolous claim." Pet. Br. 24; accord *id.* at 48 (same).

Because of that concession, the second question stated in the petition for a writ of certiorari is not properly presented. The petition asked: "Is it improper to award defendants all of the attorney's fees

they incurred in an action under Section 1988, where *the fees were spent defending non-frivolous claims* that were intertwined with the frivolous claim?" Pet. i (emphasis added). But, as petitioner now acknowledges, the Fifth Circuit's answer is the same as his: yes. Accord Pet. App. 11a ("[A] defendant is only entitled to attorneys' fees for work which can be *distinctly* traced to a plaintiff's frivolous claims.") (emphasis added); *id.* at 12a ("[T]he district court will be able properly to weigh and assess the amount of attorney's fees attributable *exclusively* to a plaintiff's frivolous * * * claims.") (internal quotation marks, citation, and alteration omitted) (emphasis added).

2. Perhaps recognizing the significance of a merits-stage concession that "[t]he court of appeals stated the correct rule" (Pet. Br. 24), petitioner attempts to redraft his own second question presented to focus on the "effort" a district court must expend "to isolate the fees" "attributable to" a dismissed claim from those that are not. *Id.* at i. That is no answer. The scope of this Court's review is determined by the questions set forth in the petition; a party may not simply remake a question to remedy a defect in his case. *Izumi*, 510 U.S. at 34; S. Ct. R. 24.1(a) ("The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari * * * but the brief may not * * * change the substance of the questions already presented in those documents."). Petitioner did not seek—and this Court did not grant—review to determine whether the district court expended sufficient "effort" in determining that the fees were exclusively attributable to the frivolous Section 1983 claims.

3. Even had it been properly presented, petitioner's reframed question would not have merited

this Court's review. Petitioner has not claimed any split of authority regarding how much "effort" a court must expend in attempting to isolate fees exclusively attributable to frivolous claims.

Petitioner asserts that his particular frivolous and nonfrivolous claims were "factually intertwined"—*i.e.*, so inextricably linked that "[t]his was a single, indivisible tort suit." Pet. Br. 31. The Fifth Circuit disagreed, concluding that petitioner's claims were not so "intertwined" as to prevent the magistrate judge from identifying and awarding only fees "exclusively" and "distinctly" traceable to the frivolous civil rights claims. Pet. App. 11a-12a. Nor did the court of appeals question the district court's "effort." Rather, the Fifth Circuit stated that district courts have discretion to "weigh and assess" the appropriate award in such circumstances, and it concluded that the district court did not abuse its discretion in finding "that [respondents] did not seek attorneys' fees for the defense of the state law claims." *Id.* at 12a.

In arguing otherwise, petitioner leans heavily on Judge Southwick's partial dissenting opinion, Pet. App. 12a-18a, but that reliance is misplaced. All three judges agreed that the district court was required to parcel out fees that were exclusively traceable to frivolous claims; their "narrow" disagreement (*id.* at 12a) concerned only whether the district court actually did so. Judge Southwick read the magistrate's opinion to say it need not "allocate the fees separately between the successful claims and the unsuccessful * * * because the claims were found to be too interrelated." *Id.* at 13a. In contrast, the majority concluded that the district court "found that [respondents] did not seek attorneys' fees for the

defense of the state law claims," and that the only fees awarded were "exclusively" and "distinctly" traced to frivolous claims. *Id.* at 11a-12a.[17]

Petitioner's dispute is not with the legal rule adopted below but with the district court's application of it to his particular claims. Petitioner's reframed second question presented is thus a classic request for factbound error correction, turning on an examination of the pleadings, correspondence, discovery, and billing records. This Court typically does not wade into such matters, particularly when the ultimate question is merely whether the district court abused its discretion in examining the same materials. Such reluctance would be particularly appropriate here, where the inquiry would turn in large part on the extent to which petitioner properly pleaded his state-law claims under Louisiana's idiosyncratic civil law system. See Pet. Br. 54**.**

CONCLUSION

The judgment of the court of appeals should be affirmed. Alternatively, the writ of certiorari should be dismissed as improvidently granted.

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[17] Notably, Judge Southwick acknowledged that the majority did not "refer" to decisions he deemed misguided on the need to segregate fees. Pet. App. 15a.

Respectfully submitted.

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