No. 10-114

IN THE

Supreme Court of the United States

RICKY D. FOX,

Petitioner,

v.

BILLY RAY VICE, Chief of Police for the Town of Vinton, and TOWN OF VINTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE LIBERTY INSTITUTE, CATO INSTITUTE, INDEPENDENCE LAW CENTER, INSTITUTE FOR JUSTICE TEXAS CHAPTER, AND JAMES MADISON CENTER FOR FREE SPEECH AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

Should civil rights defendants be awarded all of the attorneys' fees incurred in defending unsuccessful federal civil rights claims where those claims are intertwined with other claims directed at the same illegal conduct?

Should civil rights defendants be allowed mid-litigation fee awards based on unsuccessful federal claims, even though such awards could derail otherwise meritorious suits on related state claims?

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INTEREST OF *AMICI CURIAE*

Amici are libertarian and conservative advocacy institutions dedicated to the defense of liberty and our constitutional traditions, including but not limited to free speech and religious freedom. Several *amici* have deep experience as litigants under the civil rights provisions enumerated in 42 U.S.C. § 1988 and are gravely concerned that the Fifth Circuit's judgment in this case, if not reversed, will chill the private enforcement of civil rights, contrary to Congress's purpose in enacting the fee-shifting provision.[1]

Liberty Institute is a legal organization devoted to the defense of religious freedoms and First Amendment rights, representing individuals and institutions across the country. Liberty Institute is committed to the principles of limited government, robust protections of constitutional freedoms, and government accountability. Liberty Institute has considerable experience in civil rights litigation, including argument and numerous appearances before this Court, and frequently serves as counsel in litigation subject to 42 U.S.C. § 1988. *See, e.g.*, *Barrow* v. *Greenville Indep. Sch. Dist.*, 332 F.3d 844 (5th Cir. 2003) (public school teacher denied promotion because she enrolled her children in private religious school). Liberty Institute is greatly concerned about the threat this case poses to

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

the Nation's privatized system of civil rights enforcement.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, and publishes the annual Cato Supreme Court Review. While the Cato Institute does not itself bring lawsuits, many of the *amicus* briefs it files support civil rights claims. *See, e.g.*, Brief of *Amici Curiae* Alliance Defense Fund and Cato Institute in Support of Respondent, *Connick* v. *Thompson*, No. 09-571, *available at* 2010 WL 3232484 (plaintiff unconstitutionally convicted and sentenced to death because prosecutor hid exculpatory evidence); Brief *Amicus Curiae* of Cato Institute and Pacific Legal Foundation in Support of Petitioners, *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010), *available at* 2009 WL 4030387 (unconstitutional ban on handgun possession).

The Independence Law Center is a pro bono law firm located in Harrisburg, Pennsylvania, focusing on civil rights and public policy litigation. The Independence Law Center frequently serves as counsel in litigation subject to 42 U.S.C. § 1988 involving such issues as speech outside of abortion clinics, the level of protection to be afforded to adult businesses, freedom of expression and free exercise of religion for students, prayer in public places, parental rights, and religious exercise in private daycare. *See, e.g.*, *Snell* v. *City of York*, 564 F.3d 659 (3d Cir. 2009) (pro-life counselor arrested in

violation of the First Amendment). In the experience of the Center and its staff, the primary question raised by prospective civil rights plaintiffs is whether bringing suit could expose them to personal liability. Most prospective plaintiffs are not in a position to pay their own attorney, let alone risk incurring liability for a defendant's attorney's fees.

The Institute for Justice is our Nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. The Institute for Justice seeks a rule of law under which individuals can control their destinies as free and responsible members of society. The Institute for Justice frequently serves as counsel in litigation subject to 42 U.S.C. § 1988. *See, e.g.*, *Pagan* v. *Fruchey*, 492 F.3d 766 (6th Cir. 2007) (*en banc*) (unconstitutional restriction on commercial speech); *Ballen* v. *City of Redmond*, 466 F.3d 736 (9th Cir. 2006) (same).

The James Madison Center for Free Speech is a not-for-profit public interest organization dedicated to defending the rights of political expression and association guaranteed by the First Amendment. The Madison Center frequently serves as counsel in litigation subject to 42 U.S.C. § 1988, including several cases before this Court. *See, e.g.*, *Randall* v. *Sorrell*, 548 U.S. 230 (2006) (unconstitutional restrictions on campaign contributions and expenditures); *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002) (unconstitutional restriction on judicial candidates' speech).

In addition to the cases mentioned above, several of the undersigned *amici* submitted *amicus* briefs in recent cases in this Court involving attorney's fees in civil

rights cases. *See* Brief *Amici Curiae* of Liberty Legal Institute, American Center for Law and Justice, Cato Institute, Institute for Justice, Liberty Counsel, Alliance Defense Fund, James Madison Center for Free Speech in Support of Respondents, *Perdue* v. *Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010), *available at* 2009 WL 2777657; Brief of Americans United for Separation of Church and State, Center for Inquiry, Center for Public Representation, Institute for Justice, Liberty Legal Institute, People for the American Way Foundation, Public Citizen, and the Rutherford Institute as *Amici Curiae* in Support of Respondents, *Sole* v. *Wyner*, 551 U.S. 74 (2007), *available at* 2007 WL 1022675.

SUMMARY OF ARGUMENT

Civil rights suits, though essential to the enforcement of civil rights, are notoriously difficult and expensive to bring and win. Congress enacted the fee-shifting provision of 42 U.S.C. § 1988 to address this impediment by creating economic incentives to encourage private enforcement of civil rights. In this case, the Fifth Circuit misapplied Section 1988 in a way that, unless corrected, will create an economic *disincentive* to the bringing of federal civil rights claims, exactly contrary to congressional purpose.

First, civil rights defendants typically raise numerous threshold jurisdictional, procedural, and substantive objections and defenses, many of which depend on uncertain areas of the law or on factual predicates inaccessible to plaintiffs at the outset of a case. A plaintiff's initial assessment of his claim is necessarily uncertain. By awarding the defendant fees for the entire suit based on the dismissal of one claim, the Fifth Circuit's

decision imposes prohibitive costs on the enforcement of civil rights.

Second, the exceptional timing of the fee award in this case—before resolution of the plaintiff's related state-law claims—creates a dangerous precedent that threatens to derail meritorious civil rights suits. Like plaintiffs in other complex litigations, civil rights plaintiffs frequently and appropriately narrow the issues as the case unfolds. The threshold arguments available to civil rights defendants further encourage this step-wise narrowing. By prematurely deeming a plaintiff's suit frivolous and immediately ordering the plaintiff to pay the defendant's fees before the conclusion of the litigation, the Fifth Circuit's rule imposes financial penalties that would shut down meritorious suits midstream.

Third, this Court should not permit fee awards in situations where a plaintiff dismisses a federal claim in order to secure a remand of related state-law claims to state court. Otherwise, the threat of a fee award will improperly burden the plaintiff's decision to bring a federal claim in state court at all. *Amici* respectfully submit that, in addition to reversing the judgment below, the Court should reinforce that a fee award is improper when a plaintiff voluntarily drops a federal claim in order to return to state court.

ARGUMENT

I. SECTION 1988 REFLECTS CONGRESS'S USE OF ECONOMIC INCENTIVES TO ENCOURAGE PRIVATE ENFORCEMENT OF FEDERAL CIVIL RIGHTS

42 U.S.C. § 1988 facilitates the private enforcement of civil rights by citizens in cases where the government itself violates those rights. As the House Judici-

ary Committee observed when it reported Section 1988:

> The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens … In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality … Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts …. [42 U.S.C. § 1988] is designed to give such persons effective access to the judicial process[.]

H.R. Rep. No. 94-1558, at 1 (1976).

"This private enforcement system decentralizes enforcement decisions … and helps insulate enforcement from capture by established interests" and "is also less expensive for taxpayers." Albiston & Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. Rev. 1087, 1090 (2007). By enacting Section 1988, Congress harnessed free market principles, creating an economic incentive for citizens to vindicate their civil rights directly rather than relying exclusively on enforcement actions by the federal government itself.

Recent data confirm the importance of private enforcement. Of the 33,761 civil rights suits in federal courts last year, the United States brought only 423—scarcely more than 1%. *See* Admin. Office of the U.S. Courts, 2009 Annual Report of the Director, *Judicial Business of the United States Courts*, tbl. C-2 (2009). Private parties—which this Court has called "private attorney[s] general," *Newman* v. *Piggie Park Enters.*,

Inc., 390 U.S. 400, 402 (1968)—bear almost the whole burden of enforcing civil rights.

As this Court has recognized, the fee-shifting provision is the engine that sustains this private enforcement:

> [The petitioner] complains that "it would be very hard to find a lawyer to take a case such as this," *but 42 U.S.C. § 1988(b) answers this objection.* Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs.

Hudson v. *Michigan*, 547 U.S. 586, 597-598 (2006) (emphasis added) (citation omitted). Because the recoverable monetary damages in a civil rights case are often far smaller than the cost of litigation, and the victims of civil rights violations are often individuals of ordinary means, plaintiffs are exceedingly sensitive to fee-shifting rules.[2]

Congress's recognition of the importance of fee-shifting to civil rights plaintiffs is reflected not only in the availability of fee awards *in favor* of plaintiffs, but also in its reaction to the threat of fee awards *against* plaintiffs. When it reported Section 1988, the House

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[2] The same is true of counsel for many civil rights plaintiffs. *See* Tobias, *Rule 11 & Civil Rights Litigation*, 37 Buff. L. Rev. 485, 496 n.41 (1989) ("The civil rights bar is comprised essentially of specialized, solo practitioners, who depend on fee shifting and contingency fees for their income."); Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 768-769 (1988) ("local, small-firm lawyer[s]" bring "the bulk of constitutional tort litigation").

Judiciary Committee emphasized that the legislation borrowed language that this Court had already interpreted to prevent a "chilling effect." H.R. Rep. No. 94-1558, at 7. The report acknowledged that "courts have developed a different standard for awarding fees to prevailing defendants because they do 'not appear before the court cloaked in the mantle of public interest.'" *Id.* at 6 (quoting *U.S. Steel Corp.* v. *United States*, 519 F.2d 359, 364 (3d Cir. 1975)). The Committee referenced case law holding that "an award may be made [to the defendant] only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely 'to harass or embarrass' the defendant." *Id.* at 7 (quoting *U.S. Steel*, 519 F.2d at 364). "[I]f the action is not brought in bad faith, such fees should not be allowed." *Id.* The Committee emphasized that civil rights defendants should not enjoy "the same standard of recovery" as civil rights plaintiffs:

> With respect to the awarding of fees to prevailing defendants, it should further be noted that governmental officials are frequently the defendants in cases brought under [Section 1988]. Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. Applying the same standard of recovery to such defendants would further widen the gap between citizens and government officials and would exacerbate the inequality of litigating strength.

Id. The Senate Judiciary Committee similarly reported: "'[P]rivate attorneys general' should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they

lose." S. Rep. No. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912.

Accordingly, this Court has held that, under Section 1988, "[a] prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 n.2 (1983).

II. Unless Reversed, The Fifth Circuit's Ruling Will Chill Private Enforcement Of Civil Rights, Contrary To Congress's Purpose

The Fifth Circuit's decision departs from the market-based principles that Congress employed to encourage private enforcement of federal civil rights. Unless reversed, the decision will chill private enforcement because of the uncertainty inherent in civil rights suits and the threat of mid-litigation fee awards, effectively creating an economic *disincentive* to bringing federal civil rights claims at all, contrary to Congress's stated purpose.

A. Plaintiffs Who Cannot Confidently Predict Outcomes On The Numerous Threshold Objections Available To Civil Rights Defendants Will Be Chilled From Bringing Meritorious Claims

A civil rights plaintiff often confronts "a host of complex procedural, as well as substantive, objections" that collectively render a civil rights suit "lengthy and arduous." *Perdue* v. *Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1681 (2010) (Breyer, J., concurring in part and dissenting in part). Civil rights defendants commonly invoke qualified immunity, standing, ripeness, mootness, abstention, limitations on municipal liability pursuant to *Monell* v. *Department of Social Services*, 436

U.S. 658 (1978), and pleading requirements—each of which can entail substantial delay and uncertainty. It is often impossible for a plaintiff to predict which arguments will even be asserted, much less what discovery will yield, how a court will rule, and whether the court will conclude that an ultimately unsuccessful claim warrants a fee award. The Fifth Circuit's decision risks chilling civil rights plaintiffs from bringing meritorious claims, simply because of the difficulty of predicting the outcomes of the many threshold defenses available to civil rights defendants. *See, e.g.*, *Oliveri* v. *Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986) ("[I]t is extremely unlikely that before formal discovery any citizen would or could be in possession of such information [regarding improper training and supervision by a government defendant]; consequently, if sanctions were to bar possible exploration of such claims, the agency would be effectively immunized even if it were engaged in unconstitutional policies and practices.").

Amici have litigated dozens of meritorious civil rights cases that presented this unavoidable uncertainty. In one example, *amicus* Liberty Institute represented Karen Jo Barrow, an accomplished public school teacher who was denied a promotion because she chose to enroll her children in a private religious school. Ms. Barrow filed suit against both the superintendent and the school district in May 2000, and the defendants asserted typical threshold defenses. After two years of litigation, the district court granted summary judgment in favor of the superintendent on grounds of qualified immunity. *See Barrow* v. *Greenville Indep. Sch. Dist.*, 2002 WL 255484 (N.D. Tex. Feb. 20, 2002). A year later, the Fifth Circuit reversed that decision, holding that its precedents left "no doubt that public-school employees like Barrow have a protected right to edu-

cate their children in private school" and that "no reasonable official could conclude that the application of the school district's public-school patronage policy to Barrow was constitutional." *Barrow* v. *Greenville Indep. Sch. Dist.*, 332 F.3d 844, 848-849 (5th Cir. 2003). The superintendent petitioned for certiorari, which this Court denied. *Smith* v. *Barrow*, 540 U.S. 1005 (2003).

Meanwhile, in separate motion practice regarding the school district defendant, the district court granted summary judgment as to one aspect of Ms. Barrow's Section 1983 claim, ruling that the unconstitutional acts were not pursuant to a policy under *Monell*. *See Barrow* v. *Greenville Indep. Sch. Dist.*, 2002 WL 628665, at *2 (N.D. Tex. Apr. 18, 2002). However, the court denied the school district's motion for summary judgment on another theory under Section 1983, because Ms. Barrow presented evidence that the constitutional violations occurred pursuant to a custom or practice. *See id.* at *6. At the same time, the court granted summary judgment for the school district on some Title VII religious discrimination claims, but allowed alternate claims. *See id.* at *7-9. The Fifth Circuit later affirmed these rulings, and this Court again denied certiorari. *See Barrow* v. *Greenville Indep. Sch. Dist.*, 480 F.3d 377 (5th Cir.), *cert. denied*, 552 U.S. 888 (2007).

Finally, after five years of litigation, Ms. Barrow's claims were heard by a jury, which awarded damages against the superintendent in the amount of $35,455. The district court added costs and attorneys' fees of almost twenty times that amount: $654,068. The Fifth Circuit affirmed, seven and a half years after Ms. Barrow filed suit. *See Barrow* v. *Greenville Indep. Sch. Dist.*, 2007 WL 3085028, at *2 (Oct. 23, 2007) (unpublished).

Karen Barrow is exactly the sort of plaintiff Section 1988 was enacted to protect: a private citizen who vindicated her civil rights through her own efforts and those of private counsel, rather than by relying on the enforcement resources of the Department of Justice or another federal agency. It took Ms. Barrow seven years and over $650,000 in legal expenses to prevail on a claim worth $35,455. Congress enacted Section 1988 to encourage Ms. Barrow to assert that claim with the assurance that, if she persevered and succeeded, she would be able to recover her attorney's fees—a necessary incentive given that her claim against a powerful government defendant (indeed, against her own employer) did not promise a judgment remotely large enough to fund the ordeal that she was required to endure.

Under the Fifth Circuit's decision, however, a scrupulous lawyer would have had to advise Ms. Barrow at the outset that her lawsuit not only might cost her seven years of effort, but also posed the risk that, if a court found that failure on a threshold or procedural matter rendered *part* of her suit unreasonable, she (like Petitioner Fox here) could be ordered to pay *all* of the defendants' attorney's fees, even fees that would have been expended to address related, meritorious claims. On that backdrop, a cautious lawyer or plaintiff would be well-advised not to file a federal civil rights claim at all, but instead to proceed only on other claims that do not carry the host of unpredictable side issues that have arisen under federal civil rights laws. The consequence would be economic incentives that actually *discourage* federal civil rights claims, the opposite of what Congress intended for Section 1988.

To preserve private enforcement, the Court should rule that Section 1988 does not authorize an award of

fees incurred defending multiple intertwined claims unless the court concludes that *all* the intertwined claims were "vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley*, 461 U.S. at 429 n.2.

B. Awarding Fees Mid-Litigation Risks Derailing Meritorious Civil Rights Suits

The Fifth Circuit's error was compounded by its decision to award fees against the plaintiff before the conclusion of the overall litigation. Awarding fees mid-litigation risks derailing meritorious civil rights suits for two reasons.

First, a premature award of fees is based on an incomplete, and possibly misleading, assessment of the basis for the plaintiff's allegations. Here, the district court in this case awarded fees when the record suggested that Petitioner could not prove a Section 1983 claim. The broader facts—most notably those developed in the parallel criminal proceeding against Respondent Vice—supported Petitioner's resolve to pursue his additional state-law claims. Most civil rights plaintiffs are not so fortunate; a mid-litigation fee award might well end the entire suit by ruining the plaintiff's financial ability to develop a factual record. *Cf. Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989) ("Congress cannot have meant 'prevailing party' status to depend entirely on the timing of a request for fees[.]").

Second, in addition to generating capricious results in pending cases, the prospect of mid-litigation fee awards creates disproportionate one-sided incentives against bringing federal civil rights claims at all. As noted above, fee awards can be large compared to re-

coverable damages and the resources of a plaintiff and her counsel, and civil rights cases typically last longer than other complex litigation. *See, e.g.*, Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 672 (1987) (constitutional tort suits last longer than other suits and are more likely than other suits to require more than five years to litigate). The possibility that a defendant might collect a fee award mid-litigation, years before the plaintiff is entitled to recover damages for meritorious claims, provides a strong reason for a plaintiff not to bring a federal civil rights claim.

Accordingly, the Court should rule that Section 1988 does not authorize a mid-litigation fee award based on the dismissal of one claim before the resolution of related claims.

C. Fee Awards Should Not Be Imposed Against Plaintiffs Who Drop Federal Claims To Preserve Their Choice Of Forum

As the Fifth Circuit acknowledged, fees should not be awarded against plaintiffs who voluntarily drop federal claims in order to preserve their choice of state court as a forum. When Congress passed the Civil Rights Act of 1871, "legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." *Patsy* v. *Board of Regents of State of Fla.*, 457 U.S. 496, 506 (1982). When a plaintiff files in state court and a same-state defendant removes the suit to federal court, the plaintiff may then choose whether to drop the federal claim to secure a remand to the state forum. The Fifth Circuit has correctly noted that "[t]his type of strategic decision reveals nothing about the merits of a plaintiff's case but merely indi-

cates his preferred forum. As such, it does not warrant a conclusion that a defendant in such a case has prevailed within the meaning of § 1988." *Dean* v. *Riser*, 240 F.3d 505, 510 (5th Cir. 2001) (citations omitted); *see also* Pet. App. 6a & n.14 (citing *Dean*, 240 F.3d at 510).

This Court should not permit a fee award against a plaintiff who sues in state court and, in response to removal to federal court, voluntarily dismisses a federal claim in order to secure a remand to the state forum. Otherwise, plaintiffs would either (a) maintain federal claims they would rather drop in federal courts they would rather leave—contrary to the principle that the plaintiff is the master of the complaint and the forum—or (b) not bring federal civil rights claims in state court at all, in order to guard against the risk of removal, contrary to Congress's decision that civil rights be enforced in state as well as federal courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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