No. 12-168

In the Supreme Court of the United States

STEVEN LEFEMINE, d/b/a Columbia Christians for Life,

Petitioner,

v.

DAN WIDEMAN, individually and in his official capacity; MIKE FREDERICK, individually and in his official capacity; LONNIE SMITH, individually and in his official capacity; BRANDON STRICKLAND, individually and in his official capacity; and TONY DAVIS, Sheriff, in his official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Materials

ARGUMENT

INTRODUCTION

The issue before this Court is whether the Fourth Circuit erred when it refused to consider the Plaintiff, Mr. Lefemine, a prevailing party under the civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988), despite affirming the district court's issuance of injunctive and declaratory relief. In his Petition for a Writ of Certiorari, Mr. Lefemine explained three reasons why this Court should grant his Writ. The answers given by Respondents, employees of the Greenwood County, South Carolina, Sheriff's Office (herein after "Officers"), to these reasons are unavailing. One attempted answer amounts to a non-answer and a red herring. The other two answers variously mis-state case law, fail to understand Mr. Lefemine's arguments, and concede his points. Thus, the Officers' reasons for not granting the Writ evaporate, while Mr. Lefemine's reasons for granting the Writ remain compelling.

I THE OFFICERS FAIL TO REBUT MR. LEFEMINE'S FIRST REASON FOR GRANTING THE WRIT, NAMELY THAT UNTOLD NUMBERS OF CIVIL RIGHTS PLAINTIFFS WILL BE STRIPPED OF ATTORNEY'S FEES CONGRESS INTENDED THEM TO HAVE.

The Officers cite this first reason from Mr. Lefemine's Petition and chide him for not making this "argument" in the court below. (Br. in Opp. 3.) The Officers initially correctly characterize Mr. Lefemine's assertion as a "reason for granting a writ

of certiorari." (*Id.*) Unfortunately, they later (as noted) mis-characterize this assertion as "an argument [not] made … below …." (*Id.*) Perhaps the Officers are seeking to insinuate that this "argument" is waived. However, Mr. Lefemine's assertion is not an "argument" in that sense at all. Rather, it is a "reason" of the sort referred to in this Court's Rule 10, which states (emphasis added) that "[a] petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the *reasons* the Court considers …." The rule then describes that character, using the word "important" five times.

The Officers make no argument as to why the loss of congressionally-intended attorney's fees to untold numbers of civil rights plaintiffs does present the important question of when plaintiffs prevail under federal fee-shifting statutes. Here, Mr. Lefemine's free exercise, free speech, and free assembly rights were all denied by the Officers. (App. 43-44.) But law enforcement officers can and do violate the rights of all sorts of protesters: pro-life, as here, or pro-choice; pro-union or pro-management; or indeed religious, political, or social protestors for or against any issue.

And § 1988 authorizes fee awards in cases brought under eleven different federal statues, including various Reconstruction-era civil rights laws, the Civil Rights Act of 1964, Title IX, the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act. Furthermore, as Mr. Lefemine pointed out in his

Petition, this Court has frequently stated that "prevailing party" is a term of art that is interpreted similarly across the various fee-shifting statutes. (Pet. 18 n.7.) Thus, the issue of which plaintiffs have prevailed will impact plaintiffs bringing suit under a myriad of federal statutes. In 1983, this Court noted that more than 150 federal statutes awarded fees to "prevailing," "substantially prevailing," and "successful parties." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983). The Officers have not explained why putting at risk fee awards in all these contexts is not an important federal question.

However, the Officers' do attempt to cover this non-answer with a red herring. The Officers wrote that Mr. Lefemine has "not surprisingly fail[ed] to cite a single decision from a district court, circuit court or this Court that actually awarded attorney's fees under § 1988 to a plaintiff that lost on qualified immunity defense." (Br. in Opp. 4.)

Presumably, the gist of this statement is that since Mr. Lefemine did not cite any such cases, they are non-existent or at least not common, thus belying the assertion that numerous fee awards are endangered by the Fourth Circuit's opinion. But this statement is misleading on multiple fronts.

First, it actually is not surprising that Mr. Lefemine did not cite such cases, but not in the sense the Officers mean. Given the points that Mr. Lefemine made in his Petition (that the Fourth Circuit's opinion ignored this Court's precedent and that it creates two circuit splits and two intra-circuit conflicts), there is a much wider circle of cases from which to draw than merely those in which a court

"actually awarded attorney's fees under § 1988 to a plaintiff that lost on qualified immunity defense." (*Id.*) Cases involving any (or at least most) of the 150 fee statutes mentioned above, cases involving any of numerous immunity defenses other than qualified immunity, cases in which plaintiffs were held *not* to be prevailing parties, cases in which courts note that fees might or will be awarded upon application (and often are by separate order), and cases in which damages are not sought were *all* relevant to Mr. Lefemine's points.

Two additional items demonstrate the misleading nature of this red herring. First, Mr. Lefemine did cite, (Pet. 9), one of this Court's opinions that puts the issue beyond dispute: "The legislative history of § 1988 clearly indicates that Congress intended to provide for attorney's fees in cases where relief properly is granted against officials who are immune from damages awards." *Pulliam v. Allen*, 466 U.S. 522, 527 (1984).

Second, 1988/qualified immunity/actual award cases do exist. *See*, *e.g.*, *Jensen v. Clarke*, 94 F.3d 1191, 1196-97, 1203 (8th Cir. 1996); *Wolfel v. Morris*, 972 F.2d 712, 714, 720-21 (6th Cir. 1992); *Culebras Enterprises Corp. v. Rivera Rios*, 813 F.2d 506, 509, 512 (1st Cir. 1987); *LaFleur v. Wallace State Community College*, 955 F. Supp. 1406, 1427-28 (M.D. Ala. 1996); and *Solomon v. Emanuelson*, 586 F. Supp. 280, 282-83 (D. Conn. 1984).

Two cases deserve special mention. The first is *Paxman v. Campbell*, 612 F.2d 848, 852, 855-66 (4th 1980) (*en banc*), in which the Fourth Circuit *correctly* held that a plaintiff who "lost" on qualified

immunity, but who obtained injunctive relief was a prevailing party entitled to attorney's fees. The court remanded for the fee determination. *Id.*[1]

The second is *Summers v. Adams*, 669 F. Supp. 2d 637, 672-73 (D.S.C. 2009). This case is significant for several reasons. It was litigated in the District of South Carolina, the same court in which the instant case originated. Counsel of Record for one of the *Summers* defendants is the same attorney serving as Counsel of Record for the Officers here. An order granting $202,705.57 in expenses and attorney's fees under § 1988 was issued on May 26, 2010, *Summers v. Adams*, No. 3:08-2265 (D.S.C. May 26, 2010), less than two weeks before the opinion was issued in the instant case. (App. 51.) Although the attorney did object to the amount of expenses and the amount of fees sought for litigating the fee motion itself, he did not object to the fees requested for the litigation on the merits, and he did not argue that the plaintiffs had not prevailed, *Summers* at 2, despite the fact that the plaintiffs lost on qualified immunity and obtained "only" injunctive relief, 669 F. Supp. 2d at 672-73.

Thus, 1988/qualified immunity/actual award cases do exist, and the Fourth Circuit's opinion threatens congressionally-intended fees in those and countless other cases.

Because the Officers' non-answer and red herring cannot disguise the very real threat to proper

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[1] This case was not cited in the Petition because it addresses neither the prevailing party test nor the standard of review.

fee awards, this Court should grant the Writ to prevent the pernicious effects of the Fourth Circuit's opinion from spreading.

II. THE OFFICERS FAIL TO REBUT MR. LEFEMINE'S SECOND REASON FOR GRANTING THE WRIT, NAMELY THAT THE FOURTH CIRCUIT MISUNDERSTOOD AND MISAPPLIED THIS COURT'S "PREVAILING PARTY" JURISPRUDENCE.

The Officers claim that Mr. Lefemine has argued that "plaintiffs whose § 1983 claims are denied on the basis of qualified immunity should still be deemed a 'prevailing party' …." (Br. in Opp. 3). Quite to the contrary, Mr. Lefemine has argued that plaintiffs who *win* relief on their § 1983 claims, should be considered prevailing parties. In the instant case, qualified immunity barred only an award of damages; Mr. Lefemine *won* declaratory and injunctive relief. (App. 20, 25.).

Thus, Mr. Lefemine clearly prevailed under this Court's prevailing party jurisprudence, which Mr. Lefemine briefed in his Petition (pages 11-16) *and* which the Officers explained in their Brief in Opposition (pages 5-7). Much that the Officers explain is actually correct *and supports Mr. Lefemine's view*.

First, quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987), the Officers write that this "Court require[s] the plaintiff to prove 'the settling of some dispute which affects the behavior of the defendant towards the plaintiff.'" (Br. in Opp. 5.)

Mr. Lefemine agrees.

Next, quoting *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988), the Officers write that this "Court explained that '[a] declaratory judgment … is no different from any other judgment. It will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff.'" (Br. in Opp. 5.)

Mr. Lefemine agrees.

Third, quoting *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989); and *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992), the Officers assert that the "touchstone" of the prevailing party analysis is whether the relationship between the parties has been *materially* altered. (Br. in Opp. 5.)

Mr. Lefemine agrees.

Later, (Br. in Opp. 7), the Officers apply this jurisprudence to the instant case. They argue that the Fourth Circuit's analysis—that Mr. Lefemine's declaratory and injunctive relief did not create "a material alteration of the legal relationship of the parties"—was correct.

Here, Mr. Lefemine *disagrees*.

As the Fourth Circuit acknowledged, Mr. Lefemine, through counsel, attempted to obtain a commitment from the Sheriff's Office that he could engage in pro-life protests in the County without the risk of arrest that he had previously faced.

Respondent, Chief Deputy Frederick, answered in writing, "'should we observe any protester or demonstrator committing the same act, we will again conduct ourselves in exactly the same manner: order the person(s) to stop or face criminal sanctions.'" (App. 9, *quoting* Frederick's letter.)

After obtaining declaratory and injunctive relief, Mr. Lefemine may now conduct his protests freely. This is a material alteration in his legal relationship with the Officers.

Yet under the Officer's and the Fourth Circuit's reasoning, neither Mr. Lefemine nor any other plaintiff who obtains injunctive relief, declaratory relief, or both, can be awarded attorney's fees if, due to the defendant's immunity, that plaintiff failed to obtain damages. This Court should grant the Writ in order to quickly stop the Fourth Circuit's error from spreading.

The Officers also attempt to turn the tables on Mr. Lefemine, claiming *he* "disregards key precedent from this Court …." (Br. in Opp. 3.) Yet, the Officers' invocation of *Kentucky v. Graham*, 473 U.S. 159 (1985), and *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), and two other cases in support of this assertion (Br. in Opp. at 3-4), is virtually impossible to understand: in *Graham*, immediately following the quotation used by the Officers, that Court quoted the same passage from *Consumers Union* that the Officers did. The combined quotations plus appropriate context read as follows:

> in [*Consumers Union*] … a three-judge District

> Court had found the Virginia Supreme Court and its chief justice in his official capacity liable for promulgating, and refusing to amend, a State Bar Code that violated the First Amendment. The District Court also awarded fees against these defendants pursuant to § 1988. We held that absolute legislative immunity shielded these defendants for acts taken in their legislative capacity. We then vacated the fee award, stating that we found nothing "in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity. Thus, liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant.

Graham, 473 U.S. at 164-65 (citation and footnotes omitted).

What makes the Officers' use of this passage impossible to understand is the very next sentence and a footnote that occurs in the middle of the passage. Footnote 8, appended to the next to last sentence of the above quotation reads:

> We did hold that the court and its chief justice in his official capacity could be enjoined from *enforcing* the State Bar Code and suggested that fees could be recovered from these defendants in their enforcement roles. Because

> the fee award had clearly been made against the defendants in their legislative roles, however, the award had to be vacated and the case remanded for further proceedings. That fees could be awarded against the Virginia Supreme Court and its chief justice pursuant to an injunction against enforcement of the Code further illustrates that fee liability is tied to liability on the merits.

Id. at 165 n.8.

Thus, this Court has clearly stated that a defendant against whom an injunction has issued has been found "liabl[e] on the merits" and that "fees [can] be awarded against" such a defendant. *Id.*

Yet, the Officers cited these cases for the *exact* opposite proposition.

To compound their error, the Officers also overlooked the very next (citation) sentence in the *Consumers Union* quotation. Occurring immediately after a sentence that the Officers themselves quoted (*i.e.*, not one that Mr. Lefemine added for context), that sentences reads: "Cf. *Pulliam v. Allen,* 466 U.S. 522, 543-544, (1984) (state judge liable for injunctive and declaratory relief under § 1983 also liable for fees under § 1988)." *Graham*, 473 U.S. at 165.

Finally, in support of their assertion, the Officers' argue that Mr. Lefemine has suggested that this Court modified the prevailing party test in *Buckhannon Board and Care Home, Inc. v.*

West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001). (Br. in Opp. 6.) This is the exact opposite of the argument Mr. Lefemine made. He argued that *Buckhannon* merely "connected the dots" from prior cases. (Pet. 15) His point was that the Fourth Circuit illegitimately felt free to *ignore Buckhannon's* instructions by adding an additional step to its test, a step that awards fees to only a *subset* of the plaintiffs this Court stated in *Buckhannon* and prior cases were eligible for awards. *Id.*

One other point is important: The Officers claim that Mr. Lefemine believes that *every* time a plaintiff obtains a judgment or consent decree, the legal relationship between the parties is automatically materially altered. (Br. in Opp. 7). This is not true. There can be circumstances in which declaratory relief, at least, will not render the plaintiff a prevailing party. Mr. Lefemine acknowledged this with a direct quotation of *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988). (Pet. 14.)

Because Mr. Lefemine has correctly argued that the Fourth Circuit's opinion misunderstands and misapplies this Court's jurisprudence and because the Officers have demonstrated how defendants can commit the same mistake when invoking the Fourth Circuit's opinion, this Court should grant the Writ to prevent other Circuits from following suit.

III. THE OFFICERS FAIL TO REBUT MR. LEFEMINE'S THIRD REASON FOR GRANTING THE WRIT, NAMELY THAT THE FOURTH CIRCUIT CREATED TWO CIRCUIT SPLITS AND TWO INTRA-CIRCUIT CONFLICTS.

Because the Officers misunderstood Mr. Lefemine's argument about *Buckhannon,* they also misunderstood his argument about the Circuit split and intra-circuit conflict over the prevailing party test. Mr. Lefemine *agrees* with the Officers that "[i]n not one of those cases [cited in the Petition] did the Fourth Circuit abandon the 'material alteration test' …. The same is true for the alleged circuit split." (Br. in Opp. 8.) It was only in the *instant case* that the Fourth Circuit added an additional, invalid step to this Court's test. And it is that additional step that creates a circuit split. Further, as Mr. Lefemine argued (Pet 7-17), because that circuit split so seriously threatens congressionally-intended fee awards, this Court should not wait to see whether the Fourth Circuit's error spreads. It should instead grant the Writ to correct this error at its earliest opportunity.

As for the circuit split and intra-circuit conflict over the standard of review, the Officers' argument again partially re-makes Mr. Lefemine's argument and partially misses the mark. The Officers concede that the correct standard review is *de novo.* (Br. in Opp. 9.) However, the Officers fail to address Mr.

Lefemine's argument that the panel in this case conflated two questions: "the question of abuse of discretion in failing to award fees [and] the question of whether Mr. Lefemine is, in fact, a prevailing plaintiff, and declared that this conflated question is subject to abuse of discretion review." (Pet. 21.)

Furthermore, Mr. Lefemine acknowledged that this question was *by itself* not as important as the remainder of the Fourth Circuit's errors, but noted that it went hand-in-hand with the other errors. Certainly, this error can only heighten, and not diminish, the importance of granting the Writ.

The Officers also argue that Mr. Lefemine should be estopped from making this argument. (Br. in Opp. 9.) Mr. Lefemine can only assume that the Officers failed to note those portions of his Argument just cited and the pertinent portions of his Statement of the Case, each of which independently explain the reason for the difference between Mr. Lefemine's argument to the panel and his argument to the *en banc* court—reasons that make estoppel inapplicable. (Pet. 5-6, 20-21.)

In sum, because the Officers variously concede Mr. Lefemine's arguments or misunderstand them, they have not rebutted Mr. Lefemine's circuit split (or intra-circuit conflict) arguments. And, to repeat, this circuit split is not one that should be allowed to percolate.

CONCLUSION

For the foregoing reasons, this Court should grant the Writ.

Respectfully submitted,
this 18th day of September, 2012

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