15-127-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Sarah Husain, Devon Blinth, Colleen McGraham, Jeff McGraham, Kathleen McHugh, Marc J. Peseau, Neil Schuldiner, and William Wharton,

Plaintiffs-Appellants,

v.

Marlene Springer,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AMICUS CURIAE OF THE STUDENT PRESS LAW CENTER IN SUPPORT OF APPELLANTS' BRIEF

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Pursuant to Fed. App. P. Rule 26.1, *amicus curiae* Student Press Law Center discloses that it is a non-profit organization. The Student Press Law Center has no parent corporation and no stock, and thus, no publicly-held corporation owns 10 percent or more of its stock.

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INTEREST OF THE AMICUS CURIAE

The Student Press Law Center[1] is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the free expression rights of student journalists. As the only national organization devoted exclusively to defending the legal rights of the student press, the Center has collected information on student press cases nationwide and has submitted various *amicus* briefs, including to the Supreme Court of the United States and many federal courts of appeal. As a group concerned with the ability of journalists to publish free from unnecessary government interference or intimidation, *amicus* is well-suited to present these questions to this court.

All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The District court's ruling presents a grave threat to the ability to find attorneys to defend the civil rights of students in this circuit. By disincentivizing the correction of civil rights violations, this judgment penalizes students for the

[1] Pursuant to Local Rule 29.1: (1) no party's counsel authored this brief in whole or in part; (2) no party's counsel contributed money intended to fund the preparation of this brief; and (3) no person contributed money intended to fund preparing or submitting this brief.

stubborn unwillingness of state actors to admit wrongdoing. As a matter of law and policy, the ruling is incorrect, and should be reversed.

The District court's ruling relies on a summary opinion from this court that relied on an overruled case, and for that additional reason alone, should also be reversed.

ARGUMENT

I. The District Court's formula results in an unprecedented reduction of fees by 93.75 percent, an amount well beyond what could be considered reasonable.

In reducing Mr. McGuire's attorney fees, the District Court reduced his fee twice: once, in reducing the hours by 75%, and again, in reducing the recovery by 75% to match what this Court's panel termed his "limited success." By these multiplicative reductions, the court awarded plaintiffs only 6.25% of the lodestar. Such an award frustrates the purpose of including attorney's fees as a remedy under 42 U.S.C. § 1988, which was "in part to secure legal representation for plaintiffs whose constitutional injury was too small, in terms of expected monetary recovery, to create an incentive for attorneys to take the case under conventional fee arrangements."[2]

As the Senate explained in its statement of intent accompanying the enactment of Section 1988:

[2] *Kassim v. City of Schenectady*, 415 F.3d 246 (2d. Cir. 2005).

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court.[3]

The District Court's opinion offers no rationale for why such a breathtaking reduction should be warranted. In fact, the opinion itself notes that its decision to impose a 75% reduction in hours for excessiveness was based on no new analysis or calculation and only the reversal of its earlier decision to reduce fees by 50%.[4] Such an unreasoned reduction of a total of 93.75 percent in the lodestar is logically and equitably insupportable.

II. The Second Circuit panel decision erred in using the quantity of claims as a measure of a lack of success on the merits.

The Distict Court's order relies, in substantial part, on the erroneous prior decision of this Court that the plaintiffs' voluntary withdrawal of claims equates to

[3] S. Rep. No. 94-1011, p. 2 (1976).

[4] *Husain v. Springer*, 97-CV-2982 (E.D.N.Y. Dec. 9, 2014), *slip op.* at 2, *also at* JA 1384 ("Although the reasons given by the Court of Appeals for this conclusion were essentially the same reasons I had relied upon, it is clear that the Court of Appeals concluded that my reduction of the hours expended by 50% for excessiveness was not sufficient").

a limitation of success for the lodestar calculation. As the District Court lacked the discretion to do so, this Court should correct its error.[5]

As quoted its judgment, the District Court observed that the panel:

> emphasized that plaintiffs did not obtain punitive damages, 'lost or abandoned every claim against twenty-five of the twenty-six defendants originally sued in this case,' and ultimately obtained judgment against only one defendant on a single count, of eight alleged.[6]

In *Hensley v. Eckerhart*, the Supreme Court explicitly rejected "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon."[7] That is not the correct measure of the degree of success obtained, the Supreme Court wrote, because "litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee."[8] Indeed, this Court's own precedents recognize that the degree of success – not the

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[5] While the "law of the case" doctrine traditionally limits the occasions a Court will reconsider its prior decisions in a matter, the summary panel's reliance on clearly discredited principles of law constitutes a "cogent reason" to reconsider. *See Johnson v. Cadillac Motor Car Co*., 261 F. 878 (2d Cir. 1919).

[6] *Husain*, 97-CV-2982 (E.D.N.Y. Dec. 9, 2014), *slip op.* at 1-2, *also at* JA 1383-84 (*citing Husain v. Springer*, 579 F. App'x 3 (2d Cir. 2014), *slip op.* at 6, *also at* JA 1305.

[7] *Hensley v. Eckerhart*, 461 U.S. 424 (1983) at n. 11, *citing* District Court opinion in case record.

[8] *Id.* at 435.

quantity of claims won – is the appropriate measure of lodestar damages.[9]

Plaintiff's attorney was clear from the outset of this litigation that the purpose was to vindicate a principle of constitutional law, including directly stating so, repeatedly.[10] It is also clear that this Court did, in fact, in its 2007 ruling, recognize Plaintiff's attorney succeeded in establishing that the rights of his clients were violated.[11] That decision remains the most authoritative precedent in the country for the principle that retaliation for student speech need not be directed at the student speaker to create a chilling effect.[12] This is hardly an insignificant legal proposition. All across the country, even as this appeal is being heard, college journalists are being subjected to retaliatory acts, comparable to those at issue in

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[9] *See, e.g., Kassim v. City of Schenectady*, 415 F.3d 246, 253 (2d Cir. 2005) (citing *Hensley*, 461 U.S. 424, for the principle that "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit").

[10] *Husain v. Springer*, No. 97-CV-2982 (E.D.N.Y. Aug. 13, 1998) (Document #73 in E.D.N.Y.'s ECF File) (Transcript of Status Conference Before The Honorable Cheryl L. Pollack), p. 19, lines 4-7 ("But beyond that, **the question is simply a matter of law. And that's really what this case is about.** These [student government] students are being sued for $2 each--$1 in compensatory damages and $1 in punitive damages. **This is not about a lot of money. This is about principle of Constitutional law.**") (emphasis added).

[11] *Husain v. Springer*, 494 F.3d 108, 136 (2d Cir. 2007).

[12] *Moore v. Watson*, 838 F. Supp. 2d 735, 756 (N.D. Ill. 2012), (citing *Husain*, 494 F.3d 108, as source for the principle that the First Amendment prohibits indirect retaliation).

the underlying litigation here, that (if not for the precedent that Plaintiff-Appellants' counsel helped establish) would be difficult to challenge because they do not fit the classic description of a "prior restraint" on speech, yet have the same purpose and effect.[13] The rights vindicated by Plaintiff-Appellants and their counsel in this case will benefit countless students who follow. That is essence of successful civil-rights litigation, and most especially of successful civil-rights litigation that involves plaintiffs who (like students) are on a limited lifetime clock to exercise their legally protected rights. It is thus especially inapt in cases involving student plaintiffs to measure the degree of success by a defendant's cessation of unlawful conduct against one group of students on one occasion.

The District Court was compelled to follow the panel's mandate that this outcome represented a "significant lack of success."[14] As that is both contrary to controlling precedent and objectively untrue, it constitutes a cogent reason to reconsider the panel opinion.[15]

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[13] *See, e.g.*, David Jesse, "NMU student newspaper adviser sues to get job back," *Detroit Free Press*, April 16, 2015 (describing lawsuit alleging university indirectly retaliated against student journalists through harassment that culminated in firing their faculty adviser); Jeff Amy, "College Board votes to cut Delta State journalism program," *The Associated Press*, April 16, 2015.

[14] *Husain*, 97-CV-2982 (E.D.N.Y. Dec. 9, 2014), *slip op.* at 1, *also at* JA 1383 (*citing Husain v. Springer*, 579 F. App'x 3 (2d Cir. 2014), *slip op.* at 6, *also at* JA 1305, *citing Carroll*, 105 F.3d at 82.

[15] *See supra* note 5.

III. The Second Circuit panel erred in relying on the overruled *Carroll v. Blinken* as a limitation on the lodestar calculation.

In determining that the fees awarded under the lodestar calculation were excessive, this Circuit's panel opinion relied on the "practical effect" test set forth in *Carroll v. Blinken*, 105 F.3d 79 (2d Cir. 1997).[16] But this court has previously recognized that *Carroll* is no longer the controlling law of this Circuit, having been "impaired" by the Supreme Court's decision in *Perdue v. Kenny A. ex rel Winn*, 599 U.S. 542 (2010).[17] The panel's reliance on this no-longer-applicable precedent is itself ample grounds for reconsideration and reversal.

IV. The District Court erred in finding a voluntary withdrawal of rules equivalent to a court order as a primary goal of the litigation.

The District Court stated that "plaintiffs achieved a primary goal of the litigation… nine years before final judgment was entered," referring to the Defendants' voluntary withdrawal of its unconstitutional policy.[18] But the primary

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[16] *Husain*, 579 F. App'x 3, (2d Cir. 2014), *slip op.* at 5, *also at* JA 1305.

[17] *Millea v. Metro-North R.R.*, 658 F.3d 154, 167 (2d Cir. 2011) (also noting that departures from the lodestar are "appropriate only in 'rare circumstances') (*citing Perdue*, 599 U.S. at 552).

[18] *Husain v. Springer*, 97-CV-2982 (E.D.N.Y. Dec. 9, 2014), *slip op.* at 1, *also at* JA 1383.

goal of the litigation was for Defendants to acknowledge the policy *was* unconstitutional, which they declined to do.[19]

Nor was the voluntary withdrawal any promise that this fact pattern would not repeat, as the pattern had already repeated at a different CUNY school.[20] Obtaining lasting, applicable relief from a metastasizing constitutional violation is a vastly different goal than seeking to avoid one instance of punishment. Nor does a Court's – or a panel's – diminishment of the value of this goal make it either less primary or less successful.[21]

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[19] *See, e.g., Husain v. Springer*, 97-CV-2982, (E.D.N.Y. Feb. 10 2000), Transcript of Conference before the Honorable Nina Gershon, *also at* JA 405 ("She [Defendant Springer] is entitled to summary judgment in her favor.") Cf. *Husain*, 494 F.3d 108 (2d Cir. 2007) (denying qualified immunity).

[20] *See Sigal v. Moses*, 98 Civ. 3940 (S.D.N.Y. Nov. 21, 2008), *also at* JA 724. Note the facts of *Sigal* arose in Spring of 1998, a year after the facts in *Husain*.

[21] *Husain*, 579 F. App'x 3, *slip op.* at note 2, *also at* JA 1305-06 ("We are skeptical as to whether much if any fee award is merited for the work of eliciting an opinion to bless a result already achieved"). By that reasoning, if civil rights protestors sue for nominal damages after being hit with water from a fire hose, their claim lasts only as long as the fire hose is turned on – otherwise, the result of the litigation would be "already achieved" by the tap. If this Circuit intended to express a new mootness doctrine that extinguishes any claim the instant someone stops actively violating a civil right, it has not clearly done so in its prior precedents.

These are precisely the circumstances that this Court recognized in *Kassim* can inflate the amount of time it takes for a competent attorney to litigate a civil rights case: "the conduct of opposing counsel and of the court."[22]

The ruling below flies in the face of a century of Supreme Court precedent establishing that the violation of a plaintiff's rights is not mooted by the defendant's voluntary cessation of unlawful conduct, since (as here) the lawlessness can always be resumed. *See, e.g.*, *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944) ("Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power"); *accord United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). As a practical matter, it is now the law of the Second Circuit that voluntary cessation *does* cut off a plaintiff's entitlement to relief, since – knowing that attorney fees will effectively cease accruing at the point of voluntary cessation – it will be the most rare, if any, plaintiff's counsel who will continue pursuing a case thereafter.

V. The District Court's decision incentivizes State Actors to prolong the duration of litigation to make defending civil rights too expensive for pro bono attorneys.

Students seeking to vindicate their legal rights against their institutions already face formidable obstacles. Few can afford counsel. The timeline of litigation rarely will offer meaningful relief during a time when the student is in a

[22] *Kassim*, 415 F.3d at 252.

position to benefit personally from it. Graduation may result in contentions of claims being mooted. The intimidating power dynamic between student and institution deters all but a determined few from bringing suit.

The decision below, if not reversed, will worsen the burden from "formidable" to "practically impossible." The net result of the District Court's opinion is to put all potential attorneys who would defend student civil rights on notice: you won't be able to recover the money you spend doing the right thing.

The State will always have a "get-out-of-fees-free" card by following a simple process: (1) do whatever you want no matter what rights you violate; (2) stop violating rights after the lawsuit starts; (3) repeat, forever. This is not only against all precedent and common sense; it is against public policy, and imposes on students the insurmountable burden of having no way of defending their rights against violators. It undermines the very purpose of § 1983. It must be corrected.

While the primary purpose of an award of meaningful attorney fees is to compensate successful plaintiffs and their counsel, an important secondary purpose is to make the defendant feel the sting of deterrence. *See, e.g., Diamond v. Am-Law Pub. Corp.*, 745 F. 2d 142, 148 (2d Cir. 1984) (recognizing in Copyright Act claims that the purpose of awarding attorney fees to a prevailing plaintiff is both "to encourage the assertion of colorable copyright claims and to deter infringement"). If not for attorney fees – if the *only* penalty for violating

constitutional rights were an order saying "stop doing that" – the deterrent aspect of fee awards would be eviscerated.

A penalty of $56,000 absorbed by the state of New York is an inconsequential amount for deterrent purposes. It devalues students' First Amendment rights to the point of mockery. Imagine telling a future college president who is tempted to violate students' First Amendment rights that the realistically worst thing that could happen is that she would get away with the violation unpunished for a decade, after which time, if the plaintiffs have not given up hope, the state, not even her institution (at that point almost assuredly run by a successor), might be required to pay $56,000. This is not a *deterrent* to future violations.

While it so happens that counsel in this case agreed (at great personal sacrifice) to represent the plaintiffs pro-bono, consider the disastrous result if that were not the case. Only 6.25% of Mr. McGuire's fees would be covered due to the actions by the *at-fault* defendant, the former president of a large public university, and 93.75% would be absorbed by the eight *blameless* plaintiffs who were, at the time, college students. The message to future plaintiffs in civil-rights cases is obvious: If you run up against a stubbornly litigious government defendant, be prepared to impoverish yourself to vindicate a right from which, thanks to the

wrongdoer's litigiousness, you will be in a position to derive no personal benefit. This result is, simply put, intolerable in a civilized society.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' appeal.

Respectfully submitted,

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