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1 P R O C E E D I N G S

2 (11:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 10-114, Fox v. Vice.

5 Mr. Rosenkranz.

6 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

7 ON BEHALF OF THE PETITIONER

8 MR. ROSENKRANZ: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 Mr. Fox has rock-solid legal claims against
11 a police chief based upon facts that were strong enough
12 to send that police chief to prison. Yet he's been
13 ordered to pay all of the attorney's fees for an entire
14 2-year course of a litigation because his lawyers
15 decided to plead and then drop a single Federal theory.
16 That award is wrong and it's not what Congress intended.
17 Congress wanted to protect defendants from the lying or
18 the vexatious plaintiff who shouldn't be in court at
19 all.

20 JUSTICE KENNEDY: Did we take the case on
21 the assumption -- your -- your predecessor and you may
22 disagree -- but did we take the case on the assumption
23 that this was a frivolous cause of action?

24 MR. ROSENKRANZ: Your Honor, the Court took
25 the case on the assumption that the legal theory was

1 frivolous, but that the underlying cause of action,
2 which is to say the operative facts, were meritorious;
3 and in fact they are meritorious. They are going to
4 trial in 2 weeks. And so this is a wrongdoing defendant
5 against whom was pled a legal theory that we now assume
6 was frivolous.

7 JUSTICE SCALIA: Well, wait. I mean, my
8 goodness. You could say the same underlying facts
9 justify, you know, a suit for -- for libel, and also
10 justify a much -- a much greater suit. I'm not sure
11 that we look to simply the underlying facts. We look to
12 what kind of liability was sought to be imposed upon the
13 defendant. That's what determines how much money the
14 defendant is willing to pay for his lawyer, and how much
15 he has to expend in defending.

16 MR. ROSENKRANZ: Your Honor, in this case
17 the liability was far greater for the State court claims
18 than for the 1983 claims. But Congress was concerned --

19 JUSTICE KENNEDY: Well, that's not quite
20 right. To the extent they overlapped, even on the
21 theory the Federal claims were presented, the plaintiff
22 below was seeking attorney's fees --

23 MR. ROSENKRANZ: Yes, Your Honor.

24 JUSTICE KENNEDY: -- under 1983.

25 MR. ROSENKRANZ: That was --

1 JUSTICE KENNEDY: So the city's liability
2 would be greater.

3 MR. ROSENKRANZ: That was one incremental
4 increase. But the liability in this case on the
5 constitutional claim was for, and the reason it was
6 found to be frivolous, was that he was seeking liability
7 on a constitutional claim for being deprived of his
8 right to run for office when in fact he won the office.
9 The intentional infliction of emotional distress, the
10 reputational harm was far greater.

11 JUSTICE GINSBURG: Mr. Rosenkranz, you knew
12 that, though, from day one. This case is brought in
13 State court, it's removed to Federal court. Ultimately
14 the plaintiff says: I recognize that as a matter of law
15 my 1983 claim is no good. But the plaintiff didn't say
16 that until 18 months after the -- the transfer. So
17 doesn't the plaintiff have some responsibility for
18 running up all these costs in the Federal -- burdening
19 the Federal court, having discovery in Federal court,
20 instead of saying when defendant removed the case --
21 either dropping the Federal claim or conceding at that
22 point that it had no merit so it's only the State
23 claims.

24 I mean, doesn't -- doesn't the plaintiff
25 bear responsibility for keeping that case in Federal

1 court for 18 months?

2 MR. ROSENKRANZ: The answer is partial
3 responsibility, yes, Your Honor. But let's -- and I
4 think Your Honor is correct to be looking at the
5 burdens. The burdens of the discovery were all the
6 same. It was the same nucleus of operative facts. Now,
7 if this was indeed frivolous from inception, the
8 defendants could easily have filed a motion to dismiss.
9 It should have taken no time at all. And if there was
10 incremental increase in discovery with respect to the
11 Federal claims, then the defendants have only themselves
12 to blame for not having moved to dismiss early on.

13 JUSTICE ALITO: What if Mr. Fox had filed
14 two -- two actions, the Federal claim in Federal court,
15 the State claims in State court? Now, the Federal claim
16 is handled in the same way that it was here. It's found
17 to be frivolous. Would not the defendants be entitled
18 to all of the time that they spent preparing for the
19 Federal court case?

20 MR. ROSENKRANZ: And they're simultaneous,
21 simultaneous, Your Honor? I -- that's a much harder
22 question. I think the answer would be yes, they would
23 be entitled at least to those incremental increases in
24 the burden, but if -- if they're doing discovery on both
25 cases, they can't say: Oh, well this is the -- all of

1 the discovery was Federal discovery, none of it was
2 State discovery, when they were on the same facts.

3 It's the incremental burden when you've got
4 these, these intertwined --

5 JUSTICE ALITO: You're proceeding on the
6 assumption which I -- I think is certainly, based on
7 what I know of the record, true here, that the State
8 claims are far from frivolous. But how is -- let's take
9 another case, where it isn't clear whether the State
10 claims are any more meritorious than the Federal claim.
11 Then how is the Federal judge supposed to handle the --
12 the calculation of attorney's fees in the separate
13 Federal suit?

14 MR. ROSENKRANZ: So, your Honor, we're still
15 operating on the hypothetical that they're separate
16 cases --

17 JUSTICE ALITO: Yes. Yes.

18 MR. ROSENKRANZ: -- not intertwined?
19 Because my answer might be different.

20 JUSTICE ALITO: Well, the facts are -- the
21 facts are intertwined, but they're two separate cases.

22 MR. ROSENKRANZ: Yes.

23 JUSTICE ALITO: You have claims of unknown
24 merit in State court; you have a frivolous claim in
25 Federal court.

1 MR. ROSENKRANZ: My answer to that
2 hypothetical is the same as our point two, that if there
3 is -- if there are fees to be awarded at all, they have
4 to be fees that are tethered to the rationale for there
5 being a right to attorney's fees in the first place,
6 which is what was the incremental burden of the Federal,
7 of the Federal lawsuit? And a judge would say --

8 JUSTICE SCALIA: So how do you calculate
9 that? I mean that -- that's what the question was.

10 MR. ROSENKRANZ: Well, Your Honor, it would
11 be very easy in this case. What you do is you look for
12 entries or ask the defendant to come forward with
13 entries that say this was specific to the Federal
14 lawsuit; I had to -- I had to file a removal notice, I
15 had to litigate over --

16 CHIEF JUSTICE ROBERTS: That's an incredible
17 burden to impose on the district court. It's hard
18 enough for clients to read through these billing records
19 and figure out what's valid and what's not, but to ask
20 the district court to then go through and look at it,
21 and see -- and maybe it doesn't say, you know, "1983
22 suit," "State suit." Maybe it's just an entry. And
23 then you've got to go through entry by entry and say
24 well, now, was that for the 1983 action or was that for
25 the State court action?

1 MR. ROSENKRANZ: Your Honor --

2 CHIEF JUSTICE ROBERTS: And that seems --
3 just -- sorry, I don't mean to drone on, but that seems
4 to me to be an especially odd burden to impose when
5 you're dealing with an area where there is a heavy dose
6 of discretion to the district court in the first place.

7 MR. ROSENKRANZ: So, Your Honor, let me then
8 start -- move back to our overarching point, which is
9 that these are the sorts of incremental burdens that are
10 trivial, if they exist at all, and that shouldn't be
11 awarded attorney's fees at all.

12 CHIEF JUSTICE ROBERTS: Well, maybe in your
13 case, but there's no reason to suppose there won't be
14 cases where the things are flipped, and the Federal
15 claim, perhaps frivolous for a legal reason rather than
16 a factual one, is the dominant driving force in the
17 litigation and you've tagged on a few other State
18 claims.

19 MR. ROSENKRANZ: Your Honor, that's a key
20 point in our presentation. It actually doesn't matter
21 whether it's flipped or not. The factual foundations
22 are the same, by definition, for all of the legal
23 theories, so the factual --

24 JUSTICE GINSBURG: Mr. Rosenkranz, there --
25 there are distinct differences in the 1983 suit because,

1 first, the plaintiff has to show defendant acted under
2 cover of State law -- that's not going to be necessary
3 in the suit for extortion or defamation -- has to show
4 that Vice was an official policymaker for the city.
5 Those are discrete issues that relate to the 1983 claim
6 but have nothing to do with the extortion/defamation
7 claim.

8 MR. ROSENKRANZ: Indeed, Your Honor, and so
9 let me answer that question in two ways. First is, if
10 the defendants see a complaint, a 1983 theory, that is
11 flawed at the inception, they have no business incurring
12 costs with respect to color of State law or policymaker
13 or not. They should move to dismiss on the theory that
14 is presented on the face of the complaint.

15 CHIEF JUSTICE ROBERTS: But that's a pretty
16 audacious claim, that you filed such a frivolous cause
17 of action that they shouldn't have wasted so much time
18 responding to it.

19 MR. ROSENKRANZ: No, no, Your Honor. My
20 point is --

21 CHIEF JUSTICE ROBERTS: That's a lot of
22 chutzpah.

23 MR. ROSENKRANZ: You Honor, that's their
24 point. They're saying it was frivolous on the face of
25 the complaint. Well, if it was frivolous on the face

1 from inception, they should have moved to dismiss from
2 inception.

3 CHIEF JUSTICE ROBERTS: And you shouldn't
4 have filed it.

5 (Laughter.)

6 MR. ROSENKRANZ: I understand the argument,
7 Your Honor, but the Seventh Circuit has a very good
8 opinion that's cited in the brief that explains that
9 when the defendants are just racking up fees on a claim
10 that they claim is frivolous, that they could have filed
11 a motion to dismiss on, they shouldn't be racking up
12 fees on that claim.

13 JUSTICE SOTOMAYOR: Counsel, can I
14 understand what legal analysis you're proposing? Your
15 blue brief seems to suggest, as does your argument a few
16 minutes ago, that you want the Sixth Circuit's rule,
17 which is the only circuit that applies this rule, that
18 says when the facts are identical and intertwined, the
19 defendant gets no fees.

20 MR. ROSENKRANZ: Your Honor --

21 JUSTICE SOTOMAYOR: All of the other
22 circuits, as far as I can tell, don't go to that
23 extreme. They say something closer to what you started
24 with, and your yellow brief suggests, is a but-for
25 cause: The defendant is entitled to those costs related

1 to the defense of the frivolous claim. Which of the two
2 theories are you advocating?

3 And then a separate question, of what
4 standard of review should be imposed in those situations
5 in which the activities are so intertwined, but there is
6 still a core essence of defense of the Federal claim,
7 which is some of the hypotheticals my colleagues --

8 MR. ROSENKRANZ: Yes, Your Honor. Let me
9 begin by --

10 JUSTICE SOTOMAYOR: -- assume.

11 MR. ROSENKRANZ: -- correcting the premise,
12 if I may, Your Honor. The Sixth Circuit is an outlier,
13 but the Sixth Circuit is an outlier because it says if
14 you have got a lawsuit with related and completely
15 unrelated claims, no fees at all. The majority rule,
16 the clear majority rule, is the rule that says no fees
17 at all when you've got intertwined claims. That is the
18 Sixth -- which also has that other piece -- the Second,
19 the Ninth, and the Eleventh. And that is the rule --
20 that is the primary rule that we are advocating: No
21 fees if they're intertwined, because the burdens of
22 demonstrating that a legal theory is frivolous are
23 minimal. But we have a backup --

24 JUSTICE SOTOMAYOR: But there are difference
25 -- are differences in how we read those other circuits,

1 but I'll accept your proposition.

2 MR. ROSENKRANZ: And, Your Honor, I would
3 encourage the Court to look at the -- at the Schwartz
4 treatise, which says what I've just articulated is the
5 clear majority rule, not just among the circuits, but in
6 the district courts, where circuits haven't weighed in.

7 CHIEF JUSTICE ROBERTS: Can I clarify what
8 you mean by "completely intertwined"? You mean there is
9 no incremental work just on the Federal action?

10 MR. ROSENKRANZ: No, Your Honor. What I
11 mean by "completely intertwined" is that they arise from
12 the same core of operative facts.

13 CHIEF JUSTICE ROBERTS: So you -- you're
14 looking for fees -- your first argument -- even though
15 they can identify fees that were incurred solely on
16 defending the frivolous cause of action?

17 MR. ROSENKRANZ: I'm looking to block fees
18 even though they can, and the reason is Congress was
19 concerned about burdensome litigation, not about minor,
20 trivial increases in litigation to utter three sentences
21 about a legal claim and then say --

22 CHIEF JUSTICE ROBERTS: All right. That's
23 an easier case. What if it's 20 percent spent on the
24 Federal action? Do you still completely intertwine?

25 MR. ROSENKRANZ: Your Honor, the premise

1 here is that the Federal action is completely frivolous.
2 There shouldn't be 20 percent spent on the Federal
3 action if they're all -- if they're all intertwined, if
4 it's frivolous on its face.

5 CHIEF JUSTICE ROBERTS: What if it's not
6 completely frivolous, but frivolous enough to satisfy a
7 demand for fees? What if it does take them, you know,
8 40 hours to prepare the motion to dismiss it as
9 frivolous? Do they get those 40 hours?

10 MR. ROSENKRANZ: Your Honor, I guess I'm
11 having trouble accepting the premise. It shouldn't take
12 40 hours to tell a court, here's the claim and here's a
13 string cite of 17 cases that say it's wrong.

14 But let me then move to the --

15 CHIEF JUSTICE ROBERTS: Well, you've got to
16 find the 17 cases.

17 MR. ROSENKRANZ: Sure, but if it takes 40
18 hours to do it, then it's probably not frivolous.

19 But let me move into the --

20 CHIEF JUSTICE ROBERTS: You've got to look
21 carefully at the facts. They assume good faith on the
22 part of their adversary that would not file a frivolous
23 claim. The idea that it's going to be able to --
24 they're going to look at it and say, this is frivolous,
25 file a motion in Federal court, I think that's a --

1 doesn't reflect an adequate -- doesn't reflect a
2 realistic understanding of Federal litigation.

3 MR. ROSENKRANZ: I understand, Your Honor.
4 Let me just make one other point about our first rule,
5 and then move to the second rule.

6 The point that was made earlier, that Your
7 Honor made, Mr. Chief Justice, earlier about the burden
8 on the Court is yet another reason why we shouldn't open
9 up this new avenue of ancillary fee litigation. When
10 it's just that incremental burden, we now have not just
11 the burden of a frivolous claim, but the burden of
12 courts addressing attorney's fees applications and
13 the -- on the frivolous claim, and the burden of the
14 courts now of defendants playing the games of
15 withholding motions to dismiss that should have been
16 brought earlier --

17 JUSTICE KENNEDY: And I don't want to have
18 you adopt this phrase, but just to clarify, are you
19 saying that it's a but-for test, that you get only those
20 fees for time that was -- that would not have been
21 incurred but for the frivolous claim?

22 MR. ROSENKRANZ: So let me move now to the
23 second argument, Your Honor, and the answer to that is
24 yes. If there are going to be fees at all, the fees
25 should be tied to the basis on which Congress is

1 allowing defendants to get fees, and that is defendants
2 are suffering extra burdens; we want to protect them
3 from those burdens.

4 If that is the rationale, as everyone
5 agrees, then the only fees that should be covered are
6 fees that would not have been incurred but for the
7 existence of the Federal claim, and that is, to the
8 Chief Justice's question, actually not that hard to
9 demonstrate. If plaintiffs keep good, accurate records
10 and they know that they're going to be seeking or may
11 well be seeking fees on the Federal claim, identify the
12 few documents that are really --

13 CHIEF JUSTICE ROBERTS: No, that's not how
14 it works. You say they know they're going to be seeking
15 claims. They don't know in advance, this is going to be
16 a frivolous claim, the discovery is going to be
17 completely overlapping or it's not going to be
18 overlapping. And most lawyers do not keep detailed
19 accurate billing records. That's just an underlying
20 reality.

21 So I do think it's a significant burden on
22 the district court to say, go back and read these --
23 read these billing sheets, figure out which is which,
24 presumably have litigation over it. Someone is going to
25 file a motion for these fees; the other person is going

1 to say, no, no, it shouldn't be 20,000, it should be
2 15,000. And our precedent in this area gives a huge
3 amount of discretion to the district courts, just
4 reasonableness. And it seems to me you're buying into a
5 lot of litigation to decide whether it's 20,000 or
6 15,000.

7 MR. ROSENKRANZ: Which is one of my reasons
8 for our underlying --

9 CHIEF JUSTICE ROBERTS: I understand you go
10 back to the first point.

11 MR. ROSENKRANZ: But, Your Honor, let me --
12 let me just explain how I think this works. First of
13 all, a lawyer who is -- who has a Federal claim against
14 him is duty-bound to start keeping track of the Federal
15 issues early, just like the plaintiff who is going to
16 seek fees is as well. But it isn't that hard, because
17 the vast majority -- in an intertwined case like this,
18 the vast majority of expenditures will be overlapping
19 expenditures. All of the discovery, or most of it, will
20 be overlapping.

21 And the lawyer does have the obligation,
22 then, to say if there are separate things, it's the
23 burden on them -- that is, the defense lawyer -- to
24 point out those incremental burdens that would not have
25 been incurred but for --

1 JUSTICE GINSBURG: In other words, you're
2 saying that the lawyer has to keep account of -- now, if
3 I'm going to spend time on "under color of State law," I
4 have to label that and figure the hours for that
5 separately; similarly for whether Vice was an official
6 policymaker, those hours that you are requiring that --
7 instead of saying X number of hours for deposition of
8 witness A, you are requiring particularizing the issue?

9 MR. ROSENKRANZ: Yes, Your Honor, and that's
10 what Hensley says. Hensley says general litigation is
11 general litigation, and you don't try to parse it out,
12 but if there are -- in the case of plaintiffs, that
13 redounds to the benefit of plaintiffs, because the
14 entire case, all the general litigation, could have
15 contributed to the ultimate success.

16 When it comes to the defendants, though, the
17 general litigation costs could easily or almost
18 certainly were incurred in connection with the overall
19 defense, and so it makes perfect sense to say to them,
20 break out the pieces, the documents that were really
21 just about the Federal lawsuit.

22 JUSTICE KAGAN: And Mr. Rosenkranz, in this
23 case what's your understanding of the approximate
24 percentage of time that was spent on the Federal issues
25 that Justice Ginsburg was talking about?

1 MR. ROSENKRANZ: Minuscule, Your Honor, and
2 let me refer the Court to the supplemental appendix. If
3 you look, for example, on page 30, that's where Vice's
4 expenditures begin. It goes for 37 pages. There is but
5 one reference to Federal law. It's like looking for
6 Waldo, trying to find the theme that they claim was
7 dominating this case, which is on page 38, one
8 reference. And so I would say it's trivial. And
9 particularly, then, if we layer over this the
10 proposition that the district court --

11 JUSTICE KAGAN: So there was no significant
12 motions practice on these issues? There was no
13 particular discovery on issues of State action and so
14 forth?

15 MR. ROSENKRANZ: There was, and there was --
16 and that was done mostly by the city. So the city was
17 focused on -- there was motions practice about some of
18 the legal theories, very little about the one that was
19 purported to be frivolous. There was quite a bit about
20 color of State law, policymaker, which, as I said
21 earlier, certainly the district court should be --
22 should be encouraged to ask whether those should have
23 been incurred or whether there should have been a motion
24 first, and then there was the removal petition, and then
25 there were the arguments about whether it was frivolous

1 on the basis on which it was removed.

2 JUSTICE ALITO: What if the potential
3 liability on the frivolous claim is much greater than
4 the potential liability on the factually interrelated
5 non- frivolous claims, and the defense argues that we
6 spent a lot of time on -- a lot more time on these
7 interrelated factual issues because of our fear of the
8 greater liability on them than the frivolous claim?

9 MR. ROSENKRANZ: All right. Not this case,
10 of course, and you know this is a hypothetical. The
11 answer to that would be, I can imagine a district court
12 being allowed to carve out an exception where they can
13 say, well, we hired much more high-powered lawyers than
14 we would have otherwise, and that was the -- responsible
15 for an incremental increase.

16 JUSTICE SOTOMAYOR: Counsel, did the -- the
17 district court here said they're intertwined claims,
18 they all relate to the frivolous claim, they're entitled
19 to full fees. The Fifth Circuit seemed to do the
20 but-for test. Are you agreeing with that?

21 It's -- the language it uses sounds like a
22 but-for test: "A defendant is only entitled to
23 attorney's fees for work which can be distinctly traced
24 to frivolous claims. We are confident that the district
25 court can assess the amount of attorney's fees

1 attributable exclusively to a plaintiff's frivolous
2 claims." Is that correct?

3 MR. ROSENKRANZ: That is a correct quote, of
4 course, Your Honor.

5 JUSTICE SOTOMAYOR: You think they
6 misapplied that?

7 MR. ROSENKRANZ: What I would say, Your
8 Honor, is not that they misapplied it. They uttered one
9 sentence that was correct. And then --

10 JUSTICE SOTOMAYOR: Two.

11 MR. ROSENKRANZ: -then --

12 JUSTICE SOTOMAYOR: And they joined the
13 Ninth and the -- and the other circuits that have the
14 but-for. So it's three places. They said we're not
15 joining an exclusive fees entitlement either way, we're
16 joining what the majority of the circuits are doing.

17 MR. ROSENKRANZ: Yes, correct. So -- so
18 they uttered those sentences, those are correct. The --
19 the Fifth Circuit then applied a series of standards
20 that bear no relation to the but-for test. The Fifth
21 Circuit --

22 JUSTICE SCALIA: But that's not why we took
23 the case, to correct the factual application.

24 MR. ROSENKRANZ: Agreed, Your Honor. I'm
25 not saying it was a factual misapplication. I'm saying

1 every sentence after that is a direct contradiction of
2 the but-for test. I mean, for one thing, it cannot
3 possibly be true that you can apply a but-for test when
4 no one has ever looked at the underlying records. The
5 district court said it didn't have to.

6 The Fifth Circuit said that the reason the
7 district court was correct was because the main focus of
8 the parties, what they had in their heads, was the
9 Federal case.

10 Under a but-for test it doesn't matter what
11 they had in their heads. It matters whether the work is
12 wasted, whether it's transferrable --

13 JUSTICE SCALIA: So they messed up the
14 application of the but-for test. I thought the issue
15 before us whether -- was going to be whether the but-for
16 test is a proper test, not whether this particular
17 court, having expressed a proper rule, misapplied it. I
18 don't care about that.

19 MR. ROSENKRANZ: Your Honor, I -- I
20 understand your point. We're disagreeing about whether
21 this is simply a factual misapplication, which I believe
22 it was not, or a statement of a series of standards that
23 when district courts in the Fifth Circuit now apply
24 those standards we'll never get to the but-for test,
25 because they will always ask, well, what was on their

1 minds or what forum -- was the next sentence -- what
2 forum was this litigation in? Well, it was in the
3 Federal forum, therefore, they are just Federal fees.

4 CHIEF JUSTICE ROBERTS: Mr. Rosenkranz, I'm
5 looking at the billing sheet, August 14, 2007, 32 hours,
6 miscellaneous cost, online research. Is that for
7 Federal or State?

8 MR. ROSENKRANZ: Your Honor, it's general
9 research that I would say if the lawyers did not specify
10 that this was for specifically incremental increase in
11 the cost of the lawsuit on the Federal theory, then
12 they've lost the opportunity to try to make that case.

13 This is not a unique observation in civil
14 rights litigation. Plaintiffs lawyers have to do that
15 all the time. They --

16 JUSTICE SCALIA: I don't -- you -- you --
17 you've done this several times in the course of your
18 argument, sort of equating, you know, the attorney's
19 fees for frivolous suits with the normal attorney's fees
20 that the plaintiff gets when the plaintiff is
21 victorious. I'm not sure that we should treat the two
22 situations about the same, because the plaintiff gets
23 his attorney's fees whenever the plaintiff wins,
24 whenever the plaintiff wins, whereas the defendant gets
25 those fees only when the plaintiff has brought a

1 frivolous suit, which should not have been done, which
2 is wrongful, which is perhaps sanctionable under Rule
3 11. I'm not sure that we have to evenhandedly apply the
4 same kind of rules.

5 MR. ROSENKRANZ: Your Honor, I actually
6 believe that the Court should not be evenhandedly
7 applying the same set of rules, but we reached the
8 opposite conclusion about which side gets the benefit of
9 the burden. It is for plaintiff's benefit, for the most
10 part, that this fee shifting provision was in the
11 statute.

12 Now, this Court has so drastically narrowed
13 the range of cases within which a defendant is entitled
14 to fees, that all we're talking about now is whether the
15 Court is going to open up a new avenue of fee
16 litigation, and that is not for the frivolous lawsuits
17 but for the frivolous theory layered onto an otherwise
18 meritorious lawsuit. If I --

19 JUSTICE GINSBURG: Mr. Rosenkranz, one --
20 one piece of this you must know the answer, under the
21 Louisiana law we have the extortion, defamation, and
22 emotional distress going forward in Louisiana courts.
23 Does Louisiana follow the American rule so that
24 plaintiff even -- if the plaintiff prevails, there would
25 be no award of fees?

1 MR. ROSENKRANZ: My time is reserved for
2 rebuttal, but I will answer the question, Louisiana
3 follows the American rules, so no fees on the State
4 court claims. Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. Stancil.

7 ORAL ARGUMENT OF MARK T. STANCIL

8 ON BEHALF OF THE RESPONDENTS

9 MR. STANCIL: Mr. Chief Justice, and may it
10 please the Court:

11 I would like to focus first on the question
12 of eligibility, but I do want to return later to why
13 Hensley supplies the correct analysis for calculating
14 fee awards.

15 Much of Petitioner's eligibility argument
16 rests on the notion that frivolous section 1983 claims
17 imposed only modest or as he described them today,
18 trivial burdens on defendants. And that's simply not
19 the case. As amici who deal with these cases on a daily
20 basis have confirmed, inclusion of even a frivolous
21 section 1983 claim imposes significant additional
22 burdens as part of the litigation.

23 JUSTICE SOTOMAYOR: So why can't you prove
24 that?

25 MR. STANCIL: I'm sorry, Your Honor?

1 JUSTICE SOTOMAYOR: Why can't you prove that
2 in a but-for situation? Why don't you tell me what
3 you -- your proposed standard is. As I understand it,
4 you would say if the Federal claim is frivolous, then
5 you're entitled to all fees, even if the State law
6 claims overlap and have merit or potential merit. I
7 think -- is that your position?

8 MR. STANCIL: No, Your Honor. I would like
9 to clarify it. We are talking now about calculation of
10 the award, assuming eligibility aside for the moment.
11 And I'll come back --

12 JUSTICE SOTOMAYOR: Eligibility, it has to
13 be a frivolous claim, that's --

14 MR. STANCIL: Where eligible, the standard
15 is, as under Hensley, what is the degree of overall
16 success in proving that these claims are frivolous?
17 Simply put, how much of the action or proceeding to
18 enforce section 1983 was frivolous? And that's the
19 standard set forth in section 1988.

20 Section 1988 does not reference State law
21 claims that may be factually overlapping.

22 CHIEF JUSTICE ROBERTS: If the liability
23 under the State law claims is \$100,000 and the liability
24 under the Federal claims is the same, and you win on the
25 Federal claim and you lose on the State law claim, if I

1 were the client, I would say your degree of success was
2 zero. I still have to pay \$100,000.

3 The fact that you won on one claim but then
4 lost the whole issue -- the whole value on another, I
5 wouldn't call that a degree of success.

6 MR. STANCIL: Well, that would be something
7 that a district court would take into account as part of
8 its discretion, and that's exactly the point of Hensley.
9 Hensley says it's hard to pull some of these hours apart
10 in the ordinary case.

11 Now, this is not the ordinary case. I think
12 that's clear. Here the plaintiff did not even press his
13 State law claims in Federal court. Those claims, the
14 district court found, were so deeply buried in the
15 complaint that the plaintiffs were not even on notice
16 that a defense to them was required.

17 JUSTICE GINSBURG: I don't see how that --
18 one can say that looking at the complaint. It said
19 extortion, emotional distress -- where is the complaint?
20 Let's look at it.

21 MR. STANCIL: It's at pages 37 to 43 of the
22 joint appendix, Your Honor. And I would -- I direct the
23 Court to page -- specifically to pages 41 and 42 of the
24 joint appendix.

25 The only cause of action actually set out

1 here with any specificity is section 1983. If you look
2 at page 41, it says the rights, privileges and
3 immunities afforded by petitioner -- afforded petitioner
4 by our Constitution and laws that were violated
5 included -- include but are not limited to the
6 following, and then he lists the right to seek public
7 office, the right to be free from extortion, the right
8 to be protected --

9 JUSTICE GINSBURG: Right to be free from
10 extortion.

11 MR. STANCIL: Yes, Your Honor. And then --

12 JUSTICE GINSBURG: Is --

13 MR. STANCIL: Yes -- no, Your Honor.

14 That's -- that is what he said his right was denied as
15 part of his rights, privileges and immunities afforded
16 Petitioner by our Constitution and laws. He says on the
17 next page, on page 42, and this is a critical
18 distinction, and I think this was the premise of the
19 district court's finding: He says Petitioner has
20 suffered and is entitled to recover reasonable sums for
21 the following items of damage as a direct result of
22 actions of defendants; and that's where he lists past
23 and present -- past, present, and future emotional
24 distress, embarrassment, humiliation, reputation,
25 punitive damages, and other relief, and other damages to

1 be proven at the trial of this matter.

2 JUSTICE KENNEDY: Well, I'm -- I'm not
3 familiar with Louisiana standards of pleading.
4 Afforded -- under 16 at page 41, the rights, privileges
5 and immunities afforded Petitioner by our Constitution,
6 Federal, and laws, State and Federal.

7 MR. STANCIL: Well, Your Honor --

8 JUSTICE KENNEDY: It would seem to me
9 reading the complaint would permit that.

10 MR. STANCIL: I think that would be --

11 JUSTICE KENNEDY: I -- I don't know what
12 degree of specificity is required.

13 MR. STANCIL: Well, I think that would be
14 more than generous under the -- in the context, and then
15 you would do what the district court said and look how
16 the parties acted from this point forward. And the
17 district court found that the defendants, that these
18 claims were not sufficient reply pled -- this is on
19 pages, I believe, 20 -- pardon me, 32 and 33 of the
20 petition appendix: "Plaintiff made certain allegations"
21 -- this is the district court -- "that could be
22 characterized as State law tort law claims, but
23 Plaintiff did not plead -- did not make these
24 allegations separate from the section 1983" --

25 JUSTICE GINSBURG: I thought that the

1 Louisiana pleading rule were -- was that you state the
2 basis of your claim, and you do not have to plead legal
3 theories; and if that's so, then if this -- defendant
4 removed this case to Federal court; the plaintiff wanted
5 to keep it in State court; and in Louisiana, under the
6 Louisiana pleading rules, it would have been perfectly
7 appropriate.

8 The -- the claim alleged gave rise to
9 extortion claim, the defamation claim; so this complaint
10 was filed in Louisiana court that has a rule that says
11 tell us what happened, and then you can have whatever
12 legal theory you're entitled to.

13 MR. STANCIL: Yes, Your Honor, but it
14 included a Federal cause of action that allowed removal
15 to Federal court, and once it's in Federal court, it's
16 subject to the Federal rules for pleading a claim
17 adequately and in specificity, and here the district
18 court found these State law claims, there was not a
19 whiff of them until the very tail end, 18 months later,
20 when it was actually in response to the town of Vinton
21 saying, by the way, just to be clear, there are no State
22 law claims here.

23 JUSTICE GINSBURG: Isn't that implausible,
24 Mr. Stancil, when we consider that of all the claims
25 here, the one that would seem easiest to prove is

1 extortion, because Vice was convicted of extortion in a
2 criminal proceeding? So if you're looking look and you
3 say what is the outstanding claim here, I would assume
4 that it was the extortion.

5 MR. STANCIL: Well, Your Honor, again, look
6 at how the plaintiff used the fact of extortion. If you
7 go -- this is the correspondents -- pardon me, the
8 pleadings on summary judgment when plaintiff filed a
9 motion for summary judgment. The defendant said you've
10 said nothing about under color of law; this is an
11 anonymous claim. He says he -- he didn't say this was a
12 State law claim for extortion. He said, and this is a
13 quote, he says: "It is not necessary to show that Vice
14 was acting under color of law. The simple act of
15 extortion is sufficient." He picked the section 1983
16 horse. He rode it as far as he possibly could, and only
17 at the 11th hour, when the district court finally called
18 him on to the carpet, did he say, okay, I concede these
19 claims have no merit, and then he backed off and then he
20 wanted to go --

21 JUSTICE GINSBURG: The district court was
22 prompted to do that by your motion for summary judgment.

23 MR. STANCIL: Correct, Your Honor, and that
24 -- that's how --

25 JUSTICE GINSBURG: And you could have

1 brought that motion very early on. If this is a
2 frivolous claim on its face, then why didn't you move to
3 have it dismissed immediately?

4 MR. STANCIL: Well, that's a very important
5 point, Your Honor. It I think is a false assumption
6 that every claim or this claim or pieces of this claim
7 are frivolous on their face such that you can look at
8 the complaint and have it thrown out of court. I would
9 like to point, Your Honor, specifically to the
10 allegation -- this is on page 49 I believe of the
11 appendix -- in which -- this is an allegation of the
12 complaint where plaintiff says that Vice printed the
13 extortion letter at the police station. Presumably this
14 is in support of his under color of law theory.

15 He's deposed -- this is on page 330 and 332
16 of the joint appendix -- and Fox admits he had no basis
17 for that claim. We can't walk into Federal court and
18 say we know this is false, we know he didn't print this
19 at the -- at the police station, he didn't use police
20 resources to do it. We have to depose him, we have to
21 marshal the facts, and then we have to go in on summary
22 judgment and prove that.

23 JUSTICE KAGAN: Mr. Stancil, can I get you
24 to just think about a hypothetical with me? There's a
25 plaintiff and he files a suit and it has a State claim

1 and a Federal claim; and the Federal claim is a really
2 bad claim, it's frivolous; and it eventually gets tossed
3 out, and it's -- it's labeled frivolous. But the State
4 claim is a really good claim and it wins, all right?

5 The plaintiff has requested \$100,000 and the
6 plaintiff gets \$100,000 because he's won on the State
7 claim. Now, here are the legal fees. The legal fees
8 are 20 percent was incurred solely for the State claim,
9 20 percent was incurred solely for the Federal claim,
10 and 60 percent was incurred in both because there were
11 overlapping issues and it's just impossible to tear them
12 apart.

13 MR. STANCIL: Okay.

14 JUSTICE KAGAN: What are the fees in that
15 case according to you?

16 MR. STANCIL: It would be within the
17 district court's discretion. I think it's going to be
18 closer to 20 percent than to 80 percent. But again,
19 this is the central message of Hensley, and I think
20 it's --

21 JUSTICE KAGAN: Okay. So -- but -- so in
22 other words, you're saying he gets all the work, the
23 defendant gets the work done on the Federal claim
24 notwithstanding that the plaintiff has gotten his entire
25 relief; is that right?

1 MR. STANCIL: He gets -- yes.

2 JUSTICE KAGAN: All the work that is --

3 MR. STANCIL: At a -- at a minimum.

4 JUSTICE KAGAN: Even though the plaintiff
5 has, from the plaintiff's view has completely won the
6 lawsuit.

7 MR. STANCIL: Correct, he has -- yes.

8 JUSTICE KAGAN: Go --

9 MR. STANCIL: Is there a follow-up? I don't
10 want to interrupt the follow-up.

11 JUSTICE KAGAN: No. Go ahead.

12 MR. STANCIL: Okay. Yes, he gets the 20
13 percent at a minimum that are but-for attributable, but
14 it is within the district court's discretion to award
15 more, and here's why.

16 JUSTICE KAGAN: And -- and -- okay, go
17 ahead, I'm sorry.

18 MR. STANCIL: The burden -- the question is
19 what is -- what does section 1983 authorize? It
20 authorizes fees if you're a prevailing party entitled to
21 fees in an action or proceeding to enforce section 1983.
22 In Your Honor's hypothetical and in this case, there was
23 only frivolous section 1983 claims. So in terms of
24 fulfilling the -- the mission, the statutory purpose
25 underlying section 1988, I think it would be incumbent

1 upon the district court to say, you know what, this
2 entire -- you -- you triggered a fee-shifting statute,
3 the entire section 1983 action was frivolous. And so I
4 think it's within the district court's discretion to
5 give them something more, between 20 and 80 percent
6 under those -- under the hypothetical.

7 JUSTICE KAGAN: So but on that theory,
8 the -- the plaintiff would be paying the defendant's
9 fees for work done where the plaintiff won.

10 MR. STANCIL: Because the plaintiff levied a
11 frivolous -- not just a faulty or unsuccessful, a
12 frivolous cause of action under section 1983, and this
13 is the point of -- of why 1988 is different from, say,
14 rule 11 and other provisions that limit bad faith
15 actions. It's a policy choice by Congress. There are
16 burdens allocated to both sides, and there are
17 consequences or may be consequences within a district
18 court's discretion.

19 JUSTICE SOTOMAYOR: But I thought what
20 Congress said and what we've said in Hensley, that the
21 only thing that the defendant is entitled to fees for is
22 the burden of the frivolous Federal claim. Your -- your
23 answer to Justice Kagan is suggesting that even if the
24 plaintiff wins, wins everything they were seeking,
25 you're still entitled to 80 percent of your fees, even

1 though the Federal claim didn't add anything to your
2 work -- to your work, except 20 percent?

3 MR. STANCIL: To be clear, Your Honor, I'm
4 not saying we would be automatically entitled to 80
5 percent. I'm saying Hensley, under the principles of
6 Hensley, the district court would have discretion to
7 award more than 20 percent.

8 JUSTICE SOTOMAYOR: But tell me why we
9 would, given the differences that we've announced in
10 Hensley between prevailing plaintiffs and prevailing
11 defendants -- because you can only prevail as to a
12 frivolous fee. Why do we start with your entitlement to
13 your entire fee and deduct from it, instead of starting
14 the other way, which seems more logical, which is you're
15 entitled to the fees related to your frivolous claim, so
16 why don't you have to prove that first?

17 MR. STANCIL: Well, I don't think it would
18 matter to the outcome of this case, and I would like to
19 come back to that. But the reason for starting at what
20 does -- what is the 1983 fee in total, and working
21 backwards from there, is based on --

22 JUSTICE SOTOMAYOR: No. No, no, no. We're
23 assuming a lawsuit that has -- as this one, that has
24 both Federal and State claims and only one -- whether
25 it's one frivolous Federal claim or multiple Federal

1 claims and two are frivolous, one is not, and there is a
2 bunch of State court claims.

3 MR. STANCIL: Well --

4 JUSTICE SOTOMAYOR: So why do we start with
5 your total fee and deduct down, rather than start where
6 all the circuits are starting, which is to say, what can
7 be attributed to that frivolous claim, which is the only
8 thing you're entitled to fees from?

9 MR. STANCIL: Well, section 1988 is the
10 answer, Your Honor. It says you get your fees, and --
11 if you're a defendant and if it's frivolous. With
12 respect to an action or proceeding to enforce
13 section 1983, I think the but-for rule would make more
14 sense if we were talking about non-frivolous
15 section 1983 claims alongside frivolous section 1983
16 claims, because there the pie that section 1988 is
17 concerned about, the 1983 pie, is chopped up, but here
18 we have a State law pie and we have a 1983 pie, and all
19 of this pie, if you'll pardon the tortured metaphor, is
20 frivolous.

21 So you look at the terms of the statute.
22 What has Congress authorized? Your fee for a frivolous
23 section 1988 claim. We say, and for, I think, good
24 reason, that it's consistent with the congressional
25 purpose to consider whether to reduce that award. You

1 do not have to award them the entire pie, but I think it
2 is a faulty assumption. It doesn't fulfill the purposes
3 of section 1988 to say, well, if you invoke this
4 frivolous claim and you put this fee shifting on the
5 table, that you're immune from fee shifting as long as
6 these claims are -- certain fees are relevant to both.

7 But I do want to come back to why this makes
8 no difference to the outcome of this case. Not only is
9 that the standard that the Fifth Circuit announced and
10 applied, but it is also the case that the only claims
11 prosecuted in Federal Court were section 1983 claims.
12 And here, we have to come back to --

13 JUSTICE GINSBURG: Mr. Stancil, the first
14 magistrate to get this case said explicitly that the
15 discovery materials, the discovery in the Federal Court,
16 would be usable in State court proceedings where those
17 materials might aid in obtaining a judgment. So doesn't
18 that have to be taken into account, that the discovery
19 materials developed in Federal Court will now be used in
20 the State court proceeding?

21 MR. STANCIL: Well, Your Honor, there's a
22 difference between saying these depositions may be used
23 and saying they will be useful or finding that they
24 would be significant to the disposition of the State law
25 claims. The District Court said only -- the first

1 magistrate judge's opinion said only that these
2 depositions may be used. This is a simple way of
3 telling the parties, you know, don't come back to me and
4 argue about whether this deposition was properly noticed
5 and, you know, these questions and answers have been
6 asked.

7 But I think there's a more fundamental
8 point, Your Honor, which is the District Court, in
9 awarding fees, found there was no whiff of State law
10 claims until the very -- very much the 11th hour in this
11 claim. And this is precisely why, Justice Sotomayor,
12 back to your question, we really need district courts to
13 have discretion. If, as in this case -- we'll assume
14 there are State claims and Federal claims, but as the
15 District Court found, those State claims are deeply,
16 deeply buried in the weeds. That's precisely the case
17 in once -- in which the District Court needs to have
18 discretion to say --

19 CHIEF JUSTICE ROBERTS: And I assume you
20 agree that discretion can end up going either way? You
21 could submit time sheets that show 35 percent of our
22 time was spent on the Federal case, and the district
23 judge can say, you know, time sheets are subject to --
24 manipulation is too strong a word, but I'm just not
25 going to give you 35 percent; I'm going to give you 10

1 percent. That's a reasonable exercise of discretion.
2 The judge doesn't have to say a whole lot about it and
3 it's certainly going to be upheld on -- on appeal,
4 right?

5 MR. STANCIL: Correct, Your Honor, and this
6 goes to the question of whether these standards are
7 administrable. The abuse of discretion standard in fee
8 awards has worked and worked fairly well for the better
9 part of three decades. The surest way to invite
10 satellite litigation over fees is to -- is to announce a
11 rule in which you have to say, well, does it meet the
12 but-for test or does it not meet the but-for test? Or
13 with respect to even eligibility, to say, well, are they
14 related or are they unrelated?

15 JUSTICE SOTOMAYOR: Counsel, every other
16 circuit except for the Sixth has dealt with the but-for
17 test or some variant of it. Even the Fifth did it in
18 this case and ruled in your favor.

19 What you're asking for is, I think, very
20 akin to the opposite rule of saying if we dismiss the
21 Federal litigation, you're not entitled to any fees,
22 because this case was about -- is in Federal Court, so
23 that's the only thing that matters. That seems to be
24 your rule. Every other circuit has some variant of
25 but-for, and they seem to manage it just fine. Nobody

1 likes attorney's fees.

2 MR. STANCIL: Well, Your Honor, I think
3 the -- I think the statement of the but-for test in
4 application will become very -- will be very close to
5 the test that we're espousing here, and here's why.

6 JUSTICE SOTOMAYOR: Espouse your test for
7 me, because I still don't understand it except for
8 flipping through Hensley, but Hensley has a different
9 predicate, which is that plaintiffs are -- if they win,
10 they're entitled to fees.

11 MR. STANCIL: The district court has
12 discretion to award fees fairly attribute to the portion
13 of the lawsuit that is declared frivolous. That's the
14 test. And here's why, in many cases, that's going to be
15 similar to -- not identical, but similar to a but-for
16 test. Usually, you will push these claims
17 simultaneously, Federal claims and State claims
18 simultaneously, and so there will be a lot of things
19 that are -- that go in both directions.

20 But in this case, a special case where you
21 have -- Federal, Federal, Federal, that's all they said
22 in District Court, this is -- and this is all over the
23 record, where every time the case is described back and
24 forth between counsel, after the moment of filing of the
25 complaint until we get to the summary judgment

1 proceeding 18 months later, everybody calls this a
2 section 1983 suit. And then at the last second, there
3 is, oh, we have State law claims; let's go back to State
4 court and litigate those. And where the District Court
5 grants the Petitioner's -- the plaintiff's request to go
6 back to State court, that's the right time when you need
7 discretion to be able to award what just happened.

8 JUSTICE ALITO: How do you reconcile the
9 test that the Fifth Circuit said it was applying, which
10 is -- seems to be a but-for test, with the fees that
11 were actually awarded here?

12 MR. STANCIL: Because the only work done at
13 the time of the fee request was on a section 1983 claim,
14 because the State law claims were not pursued. And that
15 was the finding of the District Court that says, these
16 claims were so deeply buried, you weren't even on
17 notice. Now, there's a difference.

18 JUSTICE GINSBURG: Well, that certainly
19 conflicts with the first magistrate. The first
20 magistrate said use the material in the State for the
21 State court proceeding.

22 MR. STANCIL: Your Honor, I don't disagree
23 that there are questions and answers in these
24 depositions that will be used in State court,
25 absolutely. But there's a difference.

1 What matters when a District Court is
2 assessing fees and evaluating a fee request is, how was
3 the case litigated while it was an action or proceeding
4 to enforce section 1983? Not how could the case have
5 been litigated; not how if you had also pursued State
6 law claims, would these things have been relevant. And
7 once these section 1983 claims, all of them, are out and
8 declared frivolous, section 1988 ceases to operate in
9 the sense that it's no longer an action or proceeding to
10 enforce section 1983.

11 JUSTICE ALITO: Can I ask you a question I
12 asked Mr. Rosenkranz?

13 Here, the argument seems to proceed on the
14 assumption that the State law claims are not frivolous
15 and may well be meritorious, but suppose that the
16 Federal Court was in no position to make that
17 determination at the time of the remand. What is the
18 Federal Court to do then?

19 MR. STANCIL: Well, there are several
20 options, and I would be remiss if I didn't specify that
21 those State law claims will be hotly contested when they
22 go to trial next month, and I don't want to leave any
23 misimpression on that. But the District Court has a
24 series of options.

25 First of all, if the cases -- if the claims

1 are going back to State court, the party does have to
2 file the motion for attorney's fees under rule 54. You
3 have -- you have to go in and say, if you're -- if
4 there's a judgment being entered, we want our fees. The
5 District Court could stay the request, defer it until
6 the State court rules on the State law claims. Those
7 requests were not made here.

8 So the District Court has lots of options.
9 But where -- particularly where the plaintiff desires to
10 go back to State court and the Federal case is coming to
11 an end, the District Court must have the discretion to
12 enter a fee award at that time. And in fact, that has
13 been the case, and it's specifically mentioned in the
14 House report to section 1988. The interim fee awards,
15 where there's an order that disposes of substantial
16 rights, are permitted. And again, this is why you want
17 discretion in the hands of the District Court.

18 JUSTICE SCALIA: You want to us decide this
19 case on the basis that it was only -- it was only a 1983
20 claim for the entire time it was in Federal Court until
21 the -- until the very end, right?

22 MR. STANCIL: Correct, Your Honor, and that
23 it was not --

24 JUSTICE SCALIA: What -- what good does that
25 do? I mean, is that why we took this case?

1 MR. STANCIL: Well, Your Honor, we --

2 JUSTICE SCALIA: What principle of law
3 that's going to help the lower Federal courts would come
4 out of that holding?

5 MR. STANCIL: Well, I think --

6 JUSTICE SCALIA: Whenever you have nothing
7 but a 1983 case, you can give -- and it's frivolous, you
8 can give attorney's fees right up to the limit of the
9 fees expended, right?

10 MR. STANCIL: I think if the Court could
11 announce the principle, that would be helpful, which is, if
12 the fees are fairly attributable, within the District
13 Court's discretion, to the frivolous claim, they may be
14 awarded, and then say "in this case," because it was
15 only a 1983 --

16 JUSTICE SCALIA: Well, I think nobody doubts
17 that, do they?

18 MR. STANCIL: Well, Your Honor, the fees
19 fairly attributable to a 1983 claim, Petitioner says
20 they have to be only attributable to a 1983 claim.
21 That's very much in dispute.

22 JUSTICE SCALIA: Oh, no, but you're saying
23 they were only attributable to a 1983 claim during all
24 of this litigation except the very end.

25 MR. STANCIL: Correct, Your Honor, and we

1 would be happy to win on that basis. The Fifth Circuit
2 said it and there was a reason that it was not an abuse
3 of discretion, an abuse of discretion for the District
4 Court to award them under these circumstances.

5 CHIEF JUSTICE ROBERTS: So you disagree with
6 the statement in the -- in the Court of Appeals opinion
7 about, only for fees that can be distinctly traced?

8 MR. STANCIL: Yes, Your Honor. We think --

9 CHIEF JUSTICE ROBERTS: I understood your
10 adversary to agree with that position. You'll need to
11 switch sides, right?

12 MR. STANCIL: We almost did, Your Honor. It
13 would be -- it would be -- we win under either test,
14 Your Honor, but I don't think that section 1988 is fully
15 served by litigation over whether something is in the
16 but-for clause --

17 CHIEF JUSTICE ROBERTS: But your argument
18 has focused, in reference to the complaint and all that,
19 on the legal theories. Your friend has focused on the
20 underlying factual basis, and all the litigation -- all
21 the background work on the underlying factual basis, I
22 don't know why that can be fairly attributed only to the
23 1983 claim.

24 MR. STANCIL: Well, because only the 1983
25 claims were pressed. But -- but there's a -- I think, a

1 faulty premise in his position, which is that there are
2 facts over here and law over here. Questions that are
3 specific to section 1983, such as under color of law,
4 municipal policy or custom are highly specialized, fact
5 bound, mixed questions of law and fact.

6 The idea that when we're deposing somebody
7 on, say, Sheriff Vice or Chief Vice on his conduct in
8 office that we're just looking at what happened, and
9 that this is just a factual question, I think that's
10 inaccurate.

11 JUSTICE KAGAN: Well, what percentage of the
12 work done has actually been useful to you in defending
13 the State court claims, approximate?

14 MR. STANCIL: I'm not in a position to
15 answer that, Your Honor, because I'm not representing
16 these parties in the State court, but I'll concede for
17 purposes of today that some significant portion. I
18 wouldn't put a number on it, but certainly the who, I --
19 who, what, when, where, why is relevant to both, but
20 it's relevant to how it was prosecuted in front of the
21 district court.

22 And again, I think we have to put ourselves
23 back in the chair of the district court on the bench
24 when that fee request comes in. Under Petitioner's rule
25 if these claims had not been pressed in Federal court

1 and they're going to be remanded at the plaintiff's
2 request, the district court has to speculate, well, how
3 is this all going to go in State court, how is this
4 going to play out in practice? Are these claims going
5 to be meritorious? Are they not going to be
6 meritorious? Are they -- how much of this is going to
7 go to that, and I think that's, frankly, not the
8 burden --

9 JUSTICE GINSBURG: That's disembodifying
10 what -- we have a factual scenario here. Some of the
11 discovery was spent in determining what happened with
12 the alleged racial slur. Investigating the facts of
13 that claim are certainly relevant to the State court
14 proceeding.

15 MR. STANCIL: Yes, Your Honor, and we
16 don't -- we don't contest that investigating the facts
17 are relevant to both, but it has to be pressed in
18 Federal court. It has to be during the action or
19 proceeding to enforce section 1983.

20 JUSTICE SOTOMAYOR: I'm not sure what that
21 means, because if you're taking discovery on the State
22 law issues, defamation, extortion, et cetera, you're
23 pressing it. At the point that the Federal action is
24 dismissed you no longer can pursue that in Federal court
25 to its conclusion.

1 MR. STANCIL: Well, again, Your Honor --

2 JUSTICE SOTOMAYOR: Then why would -- if you
3 have a bunch of different claims and the facts support
4 some of the State court actions, why should you be
5 entitled to fees that you would have incurred in State
6 court no matter what?

7 MR. STANCIL: Because the district court
8 here, and in this case, and it may not be in many cases,
9 but in this case the district court found the complaint
10 did not sufficiently allege these State law causes of
11 action to put the defendants on notice that a defense
12 would be required.

13 JUSTICE SOTOMAYOR: Did you -- are you
14 seriously contending that the lawyer below didn't
15 understand that the defamation and the extortion claims
16 were part of this case? I'm hard pressed to believe
17 that reading that complaint would not doubt that --

18 MR. STANCIL: Your -- Your Honor, that is
19 precisely what the district court said.

20 JUSTICE SOTOMAYOR: Found?

21 MR. STANCIL: And again, it says, the court
22 finds that plaintiff failed to allege State tort law
23 violations in the complaint such that defendants were
24 adequately noticed, that a separate defense as to these
25 claims would need to be prepared at the beginning of the

1 litigation. The record -- this is on -- that's on 32A
2 of the petition appendix. It goes on to say, the record
3 reflects that throughout the litigation the focus of
4 both plaintiff and defendant was plaintiff's section
5 1983 claim. And if you look at the -- the
6 correspondence between the parties, the summary judgment
7 papers, it is 1983 from start to finish, until -- well,
8 until the 11th hour. And in fact there's even a
9 specific statement in which the city, in an abundance of
10 caution says, just to be clear, there are no State law
11 claims here; and I think the district court is within
12 its discretion. I would point the Court to the cases in
13 which this Court has examined the standard of review for
14 rule 11 decisions, and the Court has held in Cooter &
15 Gell and in Pierce that we give district courts very,
16 very wide berth on these questions, precisely because
17 they're on the ground, they recognize what the -- what
18 the standards are for pleading who is going to be on
19 notice as to what, and this is a funny case in that
20 regard. It's unusual in that these things were really
21 put to the side and parked until the 11th hour.

22 JUSTICE SOTOMAYOR: In answer to Justice
23 Scalia's question, basically the only difference you
24 have with the -- with the Fifth Circuit is that you
25 would say fees fairly attributable to Federal claims as

1 opposed to fees exclusively attributable to Federal
2 claims; is that correct?

3 MR. STANCIL: Yes, Your Honor.

4 JUSTICE SOTOMAYOR: So your presumption
5 would be that if the fees are -- support both State and
6 Federal claims, you're still entitled to fees?

7 MR. STANCIL: But they have to be judged,
8 and this is under the eighth of these Johnson factors,
9 they have to be judged in the context of the overall
10 suit or the overall action to enforce section 1983.

11 JUSTICE SOTOMAYOR: I still -- I don't
12 understand what that means.

13 MR. STANCIL: Well, if we were -- if we had
14 -- if as Petitioner suggests, this really was just an
15 add-on claim, that it was a section 1983 claim, and by
16 the way, you know, here are my breach of contract
17 claims, and, you know, it may also be a taking; and
18 nobody spent any time doing it and nobody spent a whole
19 of lot of -- you know, worried about the taking claim.

20 JUSTICE SOTOMAYOR: You want district courts
21 to determine how important the 1983 claim was in
22 relationship to the State claim?

23 MR. STANCIL: Correct, Your Honor; I think
24 -- I think that's correct. And I think that's precisely
25 the point of Hensley; and again as this case comes

1 before this Court, whether the district court abused its
2 discretion in calculating its fee award, I frankly -- we
3 submit that this -- the judgment should affirmed under
4 any of these tests.

5 If the Court has no more questions. Thank
6 you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Rosenkranz, you have 4 minutes remaining.

9 REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ

10 ON BEHALF OF THE PETITIONER

11 MR. ROSENKRANZ: Thank you, Your Honor.

12 I actually like Mr. Stancil's cake metaphor.
13 What matters is not how big -- how much of the cake was
14 devoted to one claim versus another. What matters is
15 how much more energy it takes to bake this particular
16 sliver of the cake. It is all the same energy. The
17 central piece of Mr. Stancil's argument is that the
18 district court found that the focus was only on the
19 Federal claims.

20 That is a misreading of that one sentence,
21 and Mr. Stancil keeps eliding the one critical word of
22 that sentence, which was the district court said that
23 they were not on notice that they needed to separately
24 defend the State law claims. Our whole point is they
25 did not need to separately defend the State law claims.

1 The district court was all turned around about the need
2 to do something separate.

3 And the reason we can be sure that Justice
4 Sotomayor's reading of the complaint is the same as
5 everyone else's is because the lawyers in this case, the
6 defense counsel, did realize that there were State law
7 claims. Their answers are rife with State law defenses,
8 and I refer the Court to pages 50, 56, and 66 of the
9 joint appendix. Each one of them has three separate
10 reference to -- references to, if we are found liable
11 under State law.

12 The summary judgment motion to which Mr.
13 Stancil refers has a response, an opposition by the --
14 by the defendants, in which they caption -- this is on
15 page 122B -- the caption is "State Law Claims Against
16 the Town of Vinton." Now, that's that earlier summary
17 judgment motion, that wasn't the 11th hour.

18 JUSTICE ALITO: If the Fifth's Circuit's
19 statement -- if the Fifth Circuit's statement of the
20 test it was applying is correct, would you say that that
21 is a discretionary determination? The district court
22 should have discretion in making the -- an
23 apportionment?

24 MR. ROSENKRANZ: Yes, Your Honor,
25 absolutely. There's a huge amount of discretion. Once

1 we set the rule, then the hours expended, were they
2 reasonable, the rates, were they reasonable. At what
3 point does the -- does the -- do the fees trigger,
4 because it was unreasonable to delay, all of that is --

5 JUSTICE ALITO: Would you agree an
6 assessment of the relative significance of the frivolous
7 and nonfrivolous claims would also be a factor that
8 would go into that?

9 MR. ROSENKRANZ: I do not agree, Your Honor,
10 because if you are -- if the defendant is properly in
11 court and properly being forced to do discovery, the
12 relative importance -- what was in their heads, what was
13 motivating them is irrelevant, unless of course apropos
14 of the earlier question, what was going on was they
15 really ratcheted up because they lose sleep over Federal
16 claims more than over State claims.

17 But, you know, a slip and fall, if you layer
18 on top of it a 1983 claim, no one's losing more sleep
19 over it.

20 JUSTICE ALITO: What if there's a cap on the
21 liability for the nonfrivolous claim but not -- maybe
22 treble damages on the frivolous claim?

23 MR. ROSENKRANZ: I think that would be
24 exceptional circumstance under which the district court
25 would be entitled to take into consideration something

1 that's quite a bit more extraordinary. And so I'm not
2 advocating an -- you know, hard and fast absolute rule,
3 just a guideline of the sort that this Court routinely
4 adopts. I mean, the notion that --

5 CHIEF JUSTICE ROBERTS: I was wondering kind
6 of as a starting point, and I don't know why you would
7 fight so vigorously against the verbal formulation
8 "fairly attributable." I assume most district courts,
9 when they get it, they're going to start by looking at
10 whatever his affidavit, this is how much our fees were,
11 and then if there's some reason, perhaps Mr. Stancil's
12 case, where everybody thinks it's a Federal that's all,
13 or maybe not, then they can just go "fairly
14 attributable" rather than but-for, which gives the
15 district court a lot more leeway and the sort of leeway
16 we have always held in this area they should have.

17 MR. ROSENKRANZ: Well, Your Honor, I -- I
18 actually believe -- if I may answer the question, it is
19 quite a bit easier to apply a but-for test and review it
20 on appeal than it is to apply a test that is just a
21 mishmash of factors over, if which the stakes are high
22 enough, and they will be under Mr. Stancil's rule, there
23 is an enormous incentive to litigate to death.

24 If there are no further questions -- I thank
25 the Court for its attention.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 The case is submitted.

3 (Whereupon, at 12:11 p.m., the case in the
4 above-entitled matter was submitted.)

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