NO. 82128-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALLAN PARMELEE,

Petitioner,

v.

ROBERT O'NEEL, et al.,

Respondents.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON CENTER FOR JUSTICE COLUMBIA LEGAL SERVICES NORTHWEST WOMEN'S LAW CENTER UNIVERSITY LEGAL ASSISTANCE IN SUPPORT OF PETITION FOR REVIEW

Daniel G. Ford, WSBA #10903
Columbia Legal Services
101 Yesler Way, Suite 300
Seattle, WA 98104
(206) 464-1122

Sarah A. Dunne, WSBA #34869
Nancy L. Talner, WSBA #11196
ACLU of WA Foundation
705 Second Ave., Suite 300
Seattle, WA 98104
(206) 624-2184

Roger A. Leishman, WSBA #19971
Dustin E. Buehler, WSBA #39843
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, Washington 98101
(206) 622-3150

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI

A description of each amicus and its interest is attached hereto in the Appendix.

INTRODUCTION

Petitioner Parmelee's appeal produced a clearly successful result: the Court of Appeals reversed the trial court and vacated his unconstitutional infraction. Yet the Court of Appeals, without explaining its reasoning, refused to award attorney fees under 42 U.S.C. § 1988. *Parmelee v. O'Neel*, 145 Wn. App. 223, 249, 186 P.3d 1094 (2008).

The Court should accept review of the lower court's decision for three reasons. First, the Court of Appeals' refusal to award attorney fees without explanation to a prevailing civil rights plaintiff on appeal diverged from controlling decisions of this Court, which enforce the established presumption that civil rights plaintiffs are entitled to attorney fees absent special circumstances. Second, the Court of Appeals' opinion conflicts with equally well-settled precedent authorizing an interim attorney fees award to civil rights plaintiffs who prevail on appeal on a significant issue in the case. Third, the Supreme Court's guidance is needed in order to prevent undermining important policies embodied in the statutes granting attorney fees in civil rights cases. If the Court of Appeals' ruling is

allowed to stand, it will significantly harm the public interest and deter civil rights litigants from pursuing meritorious constitutional claims.

ARGUMENT

A. The Court of Appeals' Decision Conflicts With The Established Presumption That Civil Rights Plaintiffs Are Entitled To Attorney Fees Absent Special Circumstances, Authorizing Review Under RAP 13.4(b)(1) and (b)(2).

The Court of Appeals' decision conflicts with well-settled case law because the appellate court failed to identify any "special circumstances" justifying its denial of Mr. Parmelee's fee request. This Court has held that a prevailing civil rights plaintiff "should ordinarily be awarded attorney's fees unless special circumstances would make an award unjust." *Ermine v. City of Spokane*, 143 Wn.2d 636, 642, 23 P.3d 492 (2001) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 429-30, 103 S.Ct. 1933, 76 L. Ed. 2d 40 (1983)). Other courts similarly have held that there is a ***presumption*** that a successful civil rights plaintiff will be awarded attorney fees under § 1988.[1]

Because civil rights plaintiffs are presumptively entitled to attorney fees under § 1988, it is reversible error for a court to deny attorney fees without identifying special circumstances. *See, e.g., Torres-Rivera v.*

---

[1] *E.g., American Broadcasting Companies, Inc. v. Miller*, __ F.3d __ (9th Cir. 2008); *N.Y. State Nat'l Org. for Women v. Terry*, 159 F.3d 86, 97 (2d Cir. 1998); *Williams v. Hanover Housing Auth.*, 113 F.3d 1294, 1300-01 (1st Cir. 1997).

O'Neill-Cancel, 524 F.3d 331, 341 (1st Cir. 2008) (finding that without reasoning for the denial of attorney fees "there is no principled way in which we can uphold the outright denial of the supplemental motion."). Indeed, the Ninth Circuit has recognized that "[t]he presumption in favor of an award of fees to prevailing plaintiffs in private attorney general lawsuits is, in fact, so strong that a denial of fees on the basis of 'special circumstances' is extremely rare." *Borunda v. Richmond*, 885 F.2d 1384, 1392 (9th Cir. 1988).

In this case, the Court of Appeals' decision turns this well-established presumption on its head. The Court's cursory two-sentence denial of Mr. Parmelee's request identifies no special circumstances that would make awarding attorney fees unjust. *See Parmelee*, 145 Wn. App. at 249. The opinion does not cite any authority for the denial of fees. Furthermore, the absence of any explanation prevents meaningful appellate review of the denial of attorney fees. In short, the Court of Appeals plainly erred and this Court should grant review of that decision.

B. The Court Of Appeals' Decision Conflicts With Controlling Authority Regarding The Important Role Of Attorney Fees Awards On Appeal.

After vacating Mr. Parmelee's infraction on First Amendment overbreadth and vagueness grounds, the Court of Appeals denied his request for § 1988 attorney fees, saying only:

> Parmelee seeks attorney fees for the first time on appeal, under 42 U.S.C. § 1988, which authorizes an award of attorney fees to the prevailing party in proceedings in vindication of civil rights. Parmelee is not entitled to attorney fees on appeal. He will only be entitled to attorney fees under 42 U.S.C. § 1988 if on remand, his attorney successfully litigates the retaliation claim under 42 U.S.C. § 1983.

145 Wn. App. at 249 (footnote quoting 42 U.S.C. § 1988(b) omitted).

While the Court's holding is not entirely clear, it indicates that (1) interim attorney fee awards are not available on appeal; and (2) attorney fees for the successful appeal of a civil rights claim are ***contingent*** upon the successful litigation of ***all other claims***. These rulings flatly contradict well-settled U.S. Supreme Court authority and clear expressions of Congressional intent. The Court of Appeals' decision will unnecessarily prolong litigation, discourage civil rights plaintiffs from obtaining counsel, and will disserve the courts, litigants, counsel and the public interest.

1. A Plaintiff Who Obtains Injunctive Relief Has Prevailed On Appeal And Is Entitled To Attorney Fees Under § 1988.

The Supreme Court has repeatedly held that a civil rights plaintiff is entitled to an interim fee award on appeal after achieving success on ***any*** significant issue – even if the court remands other claims. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (Congress intended for "the interim award of counsel fees");

Missouri v. Jenkins, 491 U.S. 274, 283 n.6, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989) (interim fee awards are available "when a litigant becomes a prevailing party on one issue in the course of the litigation"); *Hanrahan v. Hampton*, 446 U.S. 754, 757, 100 S. Ct. 1987, 64 L. Ed. 2d 670 (1980) (an "interlocutory award" of attorney fees is appropriate when a party establishes "entitlement to some relief on the merits of his claims, either in the trial court or on appeal").

The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 likewise confirms that plaintiffs are entitled to attorney fees after successfully appealing any significant issue, ***even when litigation is not complete***. *See* H.R. Rep. No. 94-1558, at 8 (1976) ("[T]he word 'prevailing' is not intended to require the entry of a *final* order before fees may be recovered." (emphasis added)); S. Rep. No. 94-1101, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 ("In appropriate circumstances, counsel fees under [§ 1988] may be awarded pendente lite. . . . Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues."). *See also Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790-91, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989) ("Congress clearly contemplated that interim fee awards would be available where a party has prevailed on an important

matter in the course of litigation," even when there are "other issues remanded for further proceedings" (quotation marks, citations omitted)).

Respondents argue that Mr. Parmelee was not a "prevailing party" because "the Court of Appeals did not make any determination regarding the merits of Mr. Parmelee's case." Respondents' Answer at 9, 13. However, Respondents ignore a key part of the decision below: in addition to invalidating Washington's criminal libel statute, the Court of Appeals provided important relief to Mr. Parmelee by *vacating his infraction.* 145 Wn. App. at 249 ("We vacate the infraction based on the unconstitutional statute"). This enforceable judgment "materially alters the legal relationship between the parties." *See Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 664, 935 P.2d 555 (1997); Respondent's Answer at 8.[2]

Additionally, Respondents argue that courts cannot award attorney fees until a final determination on *all* of Mr. Parmelee's claims. *See, e.g.*, Respondents' Answer at 12-15, 17. They claim that fees should not be

---

[2] Respondents also argue that Mr. Parmelee was not a prevailing party under *Hewitt v. Helms*, 482 U.S. 755, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987) and *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992). However, *Hewitt* is inapposite because there the plaintiff merely obtained an interlocutory ruling that his complaint should not have been dismissed for failure to state a claim. *See* 482 U.S. at 760. And in *Farrar*, the plaintiff obtained nominal damages and no actual relief. *See* 506 U.S. at 112. In contrast, here Mr. Parmelee obtained substantial relief including vacating his infraction and a holding that the criminal libel statute is unconstitutional. *See Parmelee*, 145 Wn. App. at 249.

awarded on the grounds that they might prevail on their qualified immunity defense. *Id.* at 14. However, qualified immunity does not apply to claims for injunctive relief. *See, e.g.*, *Wood* v. *Strickland*, 420 U.S. 308, 314-15 n.6, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975). Respondents do not and cannot claim that they can raise qualified immunity or any other defense to the Court of Appeals' vacation of the infraction. The vacation of the infraction is a final determination for which the court should award attorney fees under § 1988.

2. The Court Of Appeals' Ruling That A Plaintiff Who Prevailed On Appeal Must Win On Separate Claims Is Plain Error.

In addition to denying Mr. Parmelee's request for attorney fees on appeal for prevailing on his claim for injunctive relief, the Court of Appeals also ruled that he could not obtain any attorney fees on remand unless he prevailed on the merits of his separate claim seeking damages on a retaliation theory. 145 Wn. App. at 249. The Court of Appeals did not cite to any authorities supporting its holding that a plaintiff may be required to pursue particular legal theories to judgment before he or she will be permitted to seek attorney fees under § 1988 for prevailing on other claims.[3] *Id.* To the contrary, civil rights plaintiffs are entitled to an

[3] Tellingly, Respondents' Answer to the Petition for Review does not address the Court of Appeals' clear error in making the availability of any fee award in this case contingent on Mr. Parmelee's retaliation claim.

interim fee award on appeal after achieving success on any significant issue – even when litigation is ongoing. *See, e.g.*, *Texas State Teachers Ass'n*, 489 U.S. at 790-91. A prevailing plaintiff's entitlement to attorney fees under § 1988 is not dependent on the outcome of other claims. Indeed a plaintiff who prevails on appeal may decide the victory is sufficient and forego pursuing other claims on remand, thereby preventing unnecessary litigation pursued solely so the attorney can recover some compensation, and thus serving the interests of judicial economy.

3. Attorney Fees Awards On Appeal Are Essential To The Administration Of Justice.

As this Court is aware, when a case presents important constitutional questions – such as the scope of First Amendment protection and the validity of unconstitutional disciplinary actions – competent legal representation on appeal benefits both the litigants and the courts. Without the availability of interim fee awards on appeal, many plaintiffs with limited resources simply will choose not to appeal erroneous trial court decisions that affect the civil rights of many Washingtonians, or will present arguments on appeal without the benefit of counsel, failing to make clear to the court the important constitutional issues involved. The Court of Appeals' overly restrictive approach to § 1988 attorney fee awards will discourage attorneys from representing

civil rights plaintiffs on appeal, silencing advocacy on vital constitutional issues. *See* ANTHONY LEWIS, GIDEON'S TRUMPET (1964) (explaining the vital role that compensated counsel play in enforcing the Constitution).

C. The Court Of Appeals' Failure To Award Attorney Fees To A Prevailing Plaintiff Undermines The Purpose Of § 1988.

Section 1988 is a vital guarantor of civil rights and civil liberties. When a civil rights plaintiff cannot afford an attorney, "his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation . . . suffers." *Ermine*, 143 Wn.2d at 648-49. Section 1988 provides "a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory." *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring).

After obtaining counsel, Mr. Parmelee prevailed on appeal: the Court of Appeals vacated Mr. Parmelee's infraction, and confirmed the important constitutional principle that Washington's criminal libel statute violates the First Amendment. *Parmelee*, 145 Wn. App. at 249. This had the far-reaching effect of providing notice to all that the statute should not be used, whether to support a criminal prosecution or as the basis for a prison infraction as in Mr. Parmelee's case. Nevertheless, the Court of Appeals refused to award attorney fees under § 1988. *Id.*

This published opinion, if allowed to stand, will affect not just the Petitioner in this case, but ***all*** civil rights litigants and ***all*** Washington residents by discouraging the vindication of important civil rights. As Congress observed when it enacted § 1988, "[i]f the cost of private enforcement actions becomes too great, there will be no private enforcement." S. Rep. No. 94-1101, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913. This effect would be particularly harsh in the context of prisoner civil rights cases, where the vast majority of cases "are filed by indigent, often uneducated, prisoners without the assistance of counsel." Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L. J. 417, 420 (1993). This Court should grant review to ensure that our civil rights laws do not become "mere hollow pronouncements which the average citizen cannot enforce." S. Rep. No. 94-1011, at 6.

CONCLUSION

Attorney fees awards under § 1988 – including awards to plaintiffs who prevail on appeal – are essential to the protection of civil rights and civil liberties. The Court of Appeals' decision conflicts with rulings by this Court and by the U.S. Supreme Court, and presents substantial questions of public interest. The *Amici* respectfully request that this Court grant review.

RESPECTFULLY SUBMITTED this 5th day of January 2009.

By _____

Roger A. Leishman, WSBA #19971
Dustin E. Buehler, WSBA #39843
DAVIS WRIGHT TREMAINE LLP

Sarah A. Dunne, WSBA #34869
Nancy L. Talner, WSBA #11196
ACLU OF WASHINGTON FOUNDATION

Daniel G. Ford, WSBA #10903
COLUMBIA LEGAL SERVICES

Attorneys for *Amici Curiae*

APPENDIX

A. The American Civil Liberties Union of Washington

The American Civil Liberties Union of Washington (ACLU) is a statewide, nonpartisan, nonprofit organization with over 24,000 members, dedicated to the preservation and defense of constitutional and civil liberties. The ACLU frequently appears as a party, as counsel to a party, or as an amicus in Washington courts in cases involving constitutional liberties. Many of these cases are brought by civil rights plaintiffs who do not have the resources to pay for legal counsel. The ACLU believes that the availability of attorney fee awards under § 1988 is essential to its ability to assist litigants in the protection of civil rights and civil liberties.

B. The Center for Justice

The Center for Justice (the Center) is a nonprofit law firm that is dedicated to creating the experience of justice for those of limited or no means. The Center litigates dozens of cases each year under statutory claims that provide fee shifting for successful plaintiffs. Most cases involve misconduct by government and other institutions that have sufficient financial resources to litigate cases for extensive periods of time. Very few of the Center's cases involve significant monetary damages, therefore the possibility of a fee award at the end of the case is often the only incentive for a defendant to cease its misconduct. The Center is

supported by donations, grants and fee awards in fee shifting cases. Therefore, any arbitrary limitation on fee awards would significantly limit the Center's ability to vindicate important public interests in cases that involve the poor, prisoners or other people who are often shut out of the legal system. Similarly, any delay in recovering fees that have already been earned by prevailing on a fee shifting claim will limit the number of cases taken and the effectiveness of the litigation in ending misconduct.

C. Columbia Legal Services

Columbia Legal Services (CLS) is a nonprofit law firm that protects and defends the legal and human rights of low-income people. CLS represents people and organizations in Washington State with critical legal needs who have no other legal assistance available to them. CLS regularly undertakes civil rights litigation on behalf of indigent prisoners and other low-income people and requests attorney fees under § 1988 where such fees are available. CLS does not charge its clients for its services.

The demand for CLS's services, like the demand for legal services from all nonprofit organizations that represent low-income people, far exceeds the capacity to meet that demand. One way in which CLS has been successful in expanding available resources for low-income people is through recruiting private lawyers and law firms to assist in civil rights

cases. The potential availability of attorneys' fees under the civil rights statutes is an important incentive for these lawyers to become involved with CLS as co-counsel.

In addition, because CLS's resources are so limited, CLS refers those meritorious civil rights cases that private lawyers or firms are willing and able to prosecute on their own. In these cases as well, the potential availability of attorney fees and costs is a crucial incentive.

CLS's ability to refer civil rights cases to private counsel and to recruit private counsel to work with us as co-counsel in civil rights cases, and CLS's own ability to represent low-income people, would be seriously diminished if Washington courts were to place a restrictive interpretation on entitlement to fees under § 1988.

D. The Northwest Women's Law Center

The Northwest Women's Law Center (the Law Center) is a nonprofit public interest organization dedicated to protecting the rights of women through litigation, education, legislation, and the provision of legal information and referral services. Since its founding in 1978, the Law Center has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country, and is currently involved in numerous legislative and litigation efforts. The Law Center has worked in all areas of the law pertaining to women's rights, including advocating for

laws and policies that ensure that women have access to the legal justice system.

E. University Legal Assistance

University Legal Assistance (ULA), is a nonprofit public interest legal clinic associated with Gonzaga University School of Law. The clinic's mission is to represent the legal needs of low-income clients while providing law students with experiential learning opportunities. ULA represents clients in consumer protection, civil rights, family, housing, and public benefits disputes, among others. Because ULA clients are generally not able to pay a fee for services, ULA relies in part upon fee shifting statutes to fund its ongoing legal services work. ULA therefore has an interest in ensuring that Washington courts support the important public policy goals of § 1988. These goals include the vindication of civil rights and civil liberties by making attorney's fees available to prevailing plaintiffs.