20-4202-cv(L)

21-56-cv(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

TREVOR MURRAY,

Plaintiff-Appellee-Cross-Appellant,

v.

UBS SECURITIES LLC and UBS AG,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/NEW YORK IN SUPPORT OF PLAINTIFF-APPELLEE-CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Rules

Other Authorities

INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association ("NELA") is a national bar association dedicated to the vindication of the rights of individual employees.[1] It is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 4,000 member attorneys and 69 state and local affiliates focusing their expertise on employment discrimination, employee compensation and benefits, and other issues arising out of the employment relationship.

National Employment Lawyers Association/New York ("NELA/NY"), one of NELA's largest affiliates, has more than 300 members. NELA/NY is dedicated to advancing the rights of individual employees to work in an environment that is free of discrimination, harassment, and retaliation. Its members advance these goals by providing legal representation, as well as filing amicus briefs, in cases that raise important questions related to employment law. The organization aims to highlight the practical effects of legal decisions on the lives and rights of working people.

This case is important to NELA/NY's members and their clients. The

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amicus curiae*, its members, and its counsel—contributed money that was intended to fund preparing and submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

rationale the district court applied in substantially cutting fees and costs, plaintiff's success notwithstanding, *Murray v. UBS Securities, LLC*, No. 14 Civ. 927 (KPF), 2020 WL 7384722 (S.D.N.Y. Dec. 16, 2020), would discourage counsel from representing plaintiffs in anti-discrimination, whistleblower, and other employment claims. Courts, including the district court in this matter, often apply fee-shifting precedent in ways that are not consonant with the realities of civil rights and employment law practice. Such decisions undermine the policy objectives animating congressional fee-shifting mandates by undercompensating plaintiff's counsel and disincentivizing attorneys from undertaking these matters. NELA/NY has a direct interest in ensuring that courts charged with fee-shifting in civil rights and public interest cases consider the congressionally mandated policy goals and apply the law to vindicate them.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress embedded fee-shifting provisions into civil rights and other public interest laws to ensure that competent counsel in the private bar would bring cases to enforce these laws. Over time, however, judicial decisions have eroded this mandate. Courts have instead employed multifactorial, discretionary tests that have had the effect of undercompensating counsel, thus frustrating the original purposes of laws providing for fee-shifting.

Vindicating these principles necessitates that this Court's attorney's fees

jurisprudence: (1) reaffirm a liberal construction of what constitutes "success"; (2) reject proportionality concerns and *ex post* assessments of litigation strategy; and (3) recognize the practical and financial litigation realities of the civil rights bar, which is comprised primarily of small firms who must often collaborate to share expertise and work.

Proper application of the fee-shifting provisions obligates courts to account for the historical objective of ensuring that competent attorneys will undertake cases valuable to society because they will receive reasonable compensation for doing so. Fee awards should be designed to encourage counsel to undertake meritorious cases, big and small, so that counsel can pursue these cases vigorously knowing that they will receive full compensation for their work. The Court's fee award jurisprudence should also encourage the partnering between small firms that is essential to ensuring both the best possible representation of clients and their access to justice.

ARGUMENT

I. Congress Created Fee-Shifting to Incentivize Attorneys to Undertake Cases Big and Small.

Courts and Congress fashioned fee-shifting to ensure the enforcement of the nation's civil rights laws.

A. Fee-Shifting for Prevailing Plaintiffs Was Not the Historic Norm.

The road to congressionally sanctioned fee-shifting underscores Congress's desire that attorneys be compensated to ensure enforcement of the nation's civil rights laws. Initially, under the "American Rule," U.S. federal courts did not award attorney's fees to prevailing litigants. *See Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126 (2015). The Civil Rights Act of 1964 marked a change in this practice. *E.g.*, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k). Courts, over time, expanded fee-shifting from the Civil Rights Act to cover claims brought under statutes that lacked comparable provisions. The rationale for this expansion was that counsel were acting as "private attorneys general" by advancing public interests and thus vindicating congressional policies. *See* Kathy Laughter Laizure, *Civil Rights*—Kay v. Ehrler*: The Eligibility of the* Pro Se *Attorney Litigant for Award of Attorney's Fees under 42 U.S.C. § 1988*, 21 Mem. St. U.L. Rev. 575, 578 (1991). But the Supreme Court put a stop to this trend in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

The *Alyeska* ruling was widely criticized because it chilled the private enforcement of civil rights laws. "Academic commentators almost unanimously condemned the *Alyeska* decision, warning that it effectively stifled the private enforcement of civil rights." Mark D. Boveri, Note, *Surveying the Law of Fee Awards under the Attorney's Fees Awards Act of 1976*, 59 Notre Dame L. Rev. 1293,

1294 (1984). "[P]rivate lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so." H.R. Rep. No. 94-1558, at 3 (1976).

B. Legislation Enshrined the "Private Attorney General" Concept.

In the wake of *Alyeska*, Congress swiftly intervened through the enactment of the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified at 42 U.S.C. § 1988(b)). This legislation granted courts discretion to award fees to victorious litigants in actions involving Reconstruction Era and other civil rights claims. *See id.*

Congress was clear in its intent: vindicating civil rights laws' policy goals hinges on enforcement by private citizens. S. Rep. No. 94-1011, at 2 (1976); H.R. Rep. No. 94-1558, at 1; *see also Fox v. Vice*, 563 U.S. 826, 833 (2011) ("When a plaintiff succeeds in remedying a civil rights violation, we have stated, he serves 'as a "private attorney general," vindicating a policy that Congress considered of the highest priority.'" (internal citation omitted)). Because individuals often cannot pay to finance civil rights litigation, "[n]ot to award counsel fees . . . would be tantamount to repealing [civil rights laws themselves] by frustrating [their] basic purpose." S. Rep. No. 94-1011, at 3 (internal citation omitted); *see also N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1538–39 (2020) (Alito, J., dissenting) ("Section 1988 attorney's fees are an important component of civil rights

enforcement. . . . The prospect of an award of attorney's fees ensures that 'private attorneys general' can enforce the civil rights laws through civil litigation even if they 'cannot afford legal counsel.'" (internal citations omitted)).

The sensible premise took hold that attorneys engaged in important work enforcing employee rights, when successful, should be paid regardless of their clients' economic means. Congress added further exceptions to the American Rule by enacting civil rights and other public interest legislation that expressly provided recovery for attorney's fees and costs[2] upon success. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 & nn.3–5 (1983) (citing statutes with fee-shifting provisions for successful parties, such as the Right to Financial Privacy Act, 12 U.S.C. § 3417(a)(4), and the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1)).

This brief legislative history evinces clear congressional intent to encourage attorneys to pursue civil rights and other public interest cases. *See also* S. Rep. No. 94-1011, at 2 ("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."); H.R. Rep. No. 94-1558, at 1 ("In many instances where [civil rights] laws are violated, it is necessary for the citizen to initiate court action

[2] This brief's references to attorney's fees encompass references to costs as well.

to correct the illegality."). In practice, however, courts have sometimes strayed from Congress's foundational principles. *See* Section II *infra*.

II. The Second Circuit Should Ensure that Fee Awards Vindicate the Congressional Purposes of Fee-Shifting in Civil Rights and Public Interest Litigation.

To effectuate the ideals animating fee-shifting provisions, courts must recognize the economic and practical realities of civil rights practice. Incentivizing counsel to undertake socially valuable civil rights cases requires compensation in *all* successful cases, whether large or small, complex or rote, long-running or speedy. The economics of civil rights practice already tilt heavily in favor of defendants—in part because it is defendants who benefit from delays and protracted battles, while plaintiff's counsel must await recovery to be compensated. The under-compensation of plaintiff's counsel who *do* nevertheless prevail augments this dynamic and undermines enforcement of civil rights laws. The Court should therefore ensure that counsel representing civil rights plaintiffs are compensated in line with the market for their work where they best defendants.

A. Courts Should Ensure that "Success" Is Construed to Incentivize Attorneys to Undertake Civil Rights and Public Interest Cases.

Courts deem a plaintiff's degree of success the most important factor in fee-shifting analyses. *See, e.g.*, *Fisher v. SD Prot. Inc.*, 948 F.3d 593, 606 (2d Cir. 2020). Courts too often fail, however, to view success in the manner necessary to

effectuate congressional intent.

1. "Success" should be understood without reference to the amount of damages awarded.

The policy aims of civil rights and other public interest laws demand adopting an expansive concept of *what* merits fee awards. Congress sought, through fee-shifting provisions, to incentivize lawyers to take on not only representations raising novel and complex legal questions, but also those seeking to right commonplace violations, where damages may be low. *See, e.g.*, *id.* at 603 (recognizing that Congress intended to encourage attorneys to take "'run of the mill' . . . cases where the potential damages are low and the risk of protracted litigation high").

Success ought not, therefore, depend on the size of a monetary recovery. Proportionality analyses run counter to Congress's broadly remedial aim of vindicating all rights—not just those based on novel theories—and rooting out common *and* extraordinary, isolated *and* pervasive harmful conduct. *See id.* at 604 (rejecting lower courts' reliance on proportionality because "[w]ithout fee-shifting provisions providing compensation for counsel," "no rational attorney would take on" so-called "run of the mill" cases, except on a pro bono basis, and plaintiffs "would be left with little legal recourse"); *Millea v. Metro-N. R.R. Co.*, 658 F.3d 154, 169 (2d Cir. 2011) ("The whole purpose of fee-shifting statutes is to generate attorneys' fees that are *disproportionate* to the plaintiff's recovery."); *see also City*

of Riverside v. Rivera, 477 U.S. 561, 576 (1986) ("A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting § 1988. Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process.").[3] This Circuit must therefore affirm that a plaintiff's "win" need not entail a gigantic recovery; even "run of the mill" cases, and cases that recover only part of what was sought, should receive their entire lodestar.

2. Fee awards must account for the realities and risks of modern litigation, which heavily favor defendants and their counsel.

Winning a civil rights trial, and thereby attaining eligibility for a fee award, is an exceedingly difficult accomplishment. Most cases settle well before trial and at a substantial discount. *See, e.g.*, Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 Wash. & Lee L.

[3] The Supreme Court previously held that a fee award *may* be limited when a prevailing party recovers only nominal damages. *Farrar v. Hobby*, 506 U.S. 103, 115–16 (1992). Such circumstances are inapplicable in the case at hand, where the plaintiff received over $900,000 in economic and noneconomic damages. *Murray*, 2020 WL 7384722, at *6–*7. That such limitations are permissible, however, does not mean that courts should impose them. Moreover, recent precedent recognizing the importance of nominal damages hints at the potential precariousness of *Farrar*'s holding. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (concluding that nominal damages can provide "necessary redress for a completed violation of a legal right," such that they sustain litigation as a matter of Article III standing); *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1538–39 (Alito, J., dissenting).

Rev. 111, 151 (2007) ("[T]he median settlement [for employment discrimination cases] . . . is perhaps one-quarter of median verdicts."). For those who do not settle, federal civil rights plaintiffs prevail at trial 1% of the time. *See* Stephen Rynkiewicz, *Workplace Plaintiffs Face Long Odds at Trial, Analytics Data Indicates*, ABA J. (July 17, 2017), https://www.abajournal.com/news/article/workplace_trial_analytics_lex_machina.

These figures do not reflect a lack of meritorious cases or competent attorneys, but rather the realities of modern civil rights and public interest litigation. Defendants and their lawyers undoubtedly understand that plaintiffs rarely prevail at trial, that the length of litigation has increased over time, and that even a plaintiff who does receive a favorable verdict rarely recoups the entirety of their counsel's lodestar. Defense attorneys, on the other hand, bill by the hour, generally recouping 100% of time billed and costs incurred.[4] By contrast, three-quarters of plaintiff's lawyers operate on a contingent fee basis. *See, e.g.*, *ABA Civil Practice Survey*, *supra*, at 10. Far from reflecting attorney preference, plaintiff's attorneys' contingency-based business models are derived from the fact that most civil rights

[4] Because 98% of defense counsel charge by the hour, they recoup their lodestar regardless of case outcome. *See ABA Section of Litigation Member Survey on Civil Practice: Detailed Report* 10 (Dec. 11, 2009), https://www.uscourts.gov/sites/default/files/aba_section_of_litigation_survey_on_civil_practice_0.pdf [hereinafter *ABA Civil Practice Survey*].

plaintiffs cannot afford to finance litigation. *See* Rebecca M. Hamburg & Matthew C. Koski, *Summary of Results of Federal Judicial Center Survey of NELA Members, Fall 2009*, Nat'l Emp't Lawyers Ass'n 62 (2010) [hereinafter *NELA Survey*] ("Plaintiff's counsel who practice wholly in [the employment discrimination] area also generally take nearly all work on a contingent fee basis, as almost no clients can afford to pay attorney's fees, and therefore are already extraordinarily careful in case selection."). Contingency arrangements thus play an indispensable role in providing access to justice.

Yet contingency-based representation carries significant risks, which grow as litigation advances and lawyers dedicate further resources to a matter. In a not insignificant number of civil rights and public interest cases, counsel recover little or none of their lodestar. *See* Jean R. Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. Rev. L. & Soc. Change 535, 584 (1989–90) ("[F]rom the perspective of the plaintiffs' civil rights attorney, the lodestar is both insufficient and unobtainable."). Courts should avoid the disastrous (dis)incentives created when successful plaintiff's lawyers are denied fair compensation even when they win.

3. Lodestar reductions put an additional thumb on the scale for defendants.

The foregoing financial considerations create perverse incentives for defendants to stake out egregiously litigious positions that prolong even plainly

meritorious cases. *See* Emery G. Lee III & Thomas E. Willging, *Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* 71–72 (2009) (in which over 60% of primarily-plaintiff's attorneys, but less than 35% of primarily-defense attorneys, agreed or strongly agreed that their opponents "increase the cost and burden of discovery in federal court through delay and avoidance tactics"); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 Mich. L. Rev. 319, 343 (1991) ("[D]efendants' refusal to bargain in these cases is not a forecast of their prospects at trial, but an attempt to influence the behavior of their opponents."). The result is that defense counsel rack up significant hourly bills—generally recouping 100 cents on the dollar—while civil rights plaintiffs and their counsel may wait years to see any compensation and may receive only a fraction of their expenditures when they do.

Such dilatory actions by defendants depress settlement amounts. *See* Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. Cal. L. Rev. 571, 575 (2013) ("[D]elay in resolution of a case might provide a strategic advantage to one party or the other. For example, a wealthy defendant may use the threat of delay to persuade an indigent plaintiff to accept a lower settlement in exchange for certain immediate payment. This means that some plaintiffs might recover less than they should . . . ."); *see also* H. Laurence Ross, *Settled Out of Court:*

The Social Process of Insurance Claims Adjustment 85 (rev. 2d ed. 1980) ("[I]n selected cases delay may well be a tool of considerable power, and on occasions it may well be used consciously to lower the settlement . . . ."). Plaintiffs, beleaguered by years of litigation, may take a discount on their claims to pocket some recovery, undercompensating both themselves and their counsel.

The remedy, therefore, is to ensure that those plaintiffs who prevail at trial are fully compensated and that defendants are forced to pay the price of any overly litigious behavior. *See HomeAway.com, Inc. v. City of New York*, _ F. Supp. 3d _, 2021 WL 791232, at *12 (S.D.N.Y. Mar. 1, 2021) ("The Court will not penalize [plaintiff] for meeting the demands required by the [defendant's] aggressive litigation decisions."); *Hack v. Stang*, No. 13-cv-5713 (AJN), 2015 WL 5139128, at *9 (S.D.N.Y. Sept. 1, 2015) ("It is well recognized that a party 'cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.'" (internal citation omitted)); *cf. Murray*, 2020 WL 7384722, at *8 ("UBS took every opportunity to bring motions to reduce and/or eliminate Plaintiff's claims, even as such motions proved only partially effective.").[5] Where

[5] To the extent defendants offer inconsistent assertions about a case's complexity and worth depending on context, this runs little ultimate risk for defense counsel. *See, e.g.*, *Bleecker Charles Co. v. 350 Bleecker St. Apartment Corp.*, 212 F. Supp. 2d 226, 229 (S.D.N.Y. 2002) ("It ill behooves the [defendant] to minimize the complexity and difficulty of what it now suggests was a simple case for the

plaintiffs prevail, fee-shifting should recognize the extraordinary effort that successful litigation requires of plaintiffs and their counsel.

* * *

When courts slash attorney's fees, they inadvertently discourage contingency practice and encourage dilatory defense tactics.[6] Such reductions hurt all civil rights plaintiffs, few of whom can afford to finance cases through trial, and hardest hit low-income and indigent clients. *See* Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 Cardozo L. Rev. 1599, 1624–25 (2016) ("Higher legal costs prevailing at the top of the market and longer delays of court proceedings involving wealthy litigants can hinder justice at the bottom of the economic scale. . . . In consequence, people who need counsel no less—and often more so—than those able to pay the going rate for lawyers, are priced out of the legal services market. For those individuals, access to justice and related choices implicating fundamental rights and basic human needs are substantially narrowed."). And they erect additional barriers

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[plaintiff], when it vigorously contested the [plaintiff's] arguments in this litigation, and indeed, continues to press a contrary view on appeal.").

[6] Although courts may not enhance awards for contingency risks, *see City of Burlington v. Dague*, 505 U.S. 557, 567 (1992); *Fresno Cnty. Emps.' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63, 68 (2d Cir. 2019), *reducing* a plaintiff's counsel's lodestar tilts the pendulum too far in the opposite direction. *Cf. Knox v. John Varvatos Enters. Inc.*, _ F. Supp. 3d _, 2021 WL 608345, at *14–*15 (S.D.N.Y. Feb. 17, 2021) (awarding additional attorney's fees from a common fund where "the case presented an uncommon level of risk both on the merits and in terms of collection").

to counsel undertaking litigation involving complex and/or novel legal questions. *See* Sections II.B and II.D *infra*. All of this takes us far away from Congress's intent: to provide "fee awards" so that "private citizens . . . have a meaningful opportunity to vindicate the important Congressional policies which [civil rights] laws contain." *See* S. Rep. No. 94-1011, at 2; *accord* H.R. Rep. No. 94-1558, at 1–3.[7]

B. Courts Should Understand "Prevailing" in a Way that Does Not Penalize Attorneys Who Pursue Comprehensive and Novel Legal Strategies.

Courts should not treat unsuccessful or abandoned legal strategies as *ex ante* wasteful (as opposed to simply reflecting litigation reality), because such an approach strays from congressional intent. Plaintiffs must often pursue a range of legal claims and theories in parallel to increase the likelihood of obtaining relief and to develop novel, good faith legal strategies alongside more conventional paths to relief. *Cf. Prout v. Vladeck*, 319 F. Supp. 3d 741, 746 (S.D.N.Y. 2018) (holding that plaintiff "would have been better off if he had pursued all four of his claims, rather than pursuing only two," including both novel whistleblower claims and FMLA

[7] Lawyers have been deterred from handling cases in areas of law with caps on attorney's fees or no fee-shifting entirely, "thus in effect denying claimants legal representation." *See, e.g.*, Henry Cohen, Cong. Rsch. Serv., No. 94-970, *Awards of Attorneys' Fees by Federal Courts and Federal Agencies* 58–59 (2008). And even with fee-shifting provisions, Americans' legal needs go largely unmet. *See, e.g.*, Rebecca Buckwalter-Poza, *Making Justice Equal*, Ctr. for Am. Progress (Dec. 8, 2016), https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal.

claims).

"[C]ourts should recognize that reasonable counsel in a civil rights case, as in much litigation, must often advance a number of related legal claims in order to give plaintiffs the best possible chance of obtaining significant relief." *Hensley v. Eckerhart*, 461 U.S. 424, 448 (1983) (Brennan J., concurring in part and dissenting in part). It is typically difficult at the onset of litigation to ascertain which claims will give a plaintiff the best recovery.[8]

Accordingly, the Supreme Court has held that "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Hensley*, 461 U.S. at 440. The Second Circuit has upheld this directive, instructing that "when a plaintiff fails to prove one of two overlapping claims—e.g. a discriminatory discharge—but prevails on the other—e.g. retaliation for complaining of discrimination—the plaintiff may recover fees for all the legal work." *Wilson v. Nomura Sec. Int'l, Inc*., 361 F.3d 86, 90–91 (2d Cir. 2004). Indeed, as long as a plaintiff's unsuccessful claims are not completely unrelated to the successful ones, counsel's work on the unsuccessful claims should be compensable.

[8] An approach that is less narrowly tailored also provides a plaintiff additional leverage in negotiations, increasing the likelihood of a successful settlement. To be sure, some cases take an imprudent "kitchen sink approach," but such matters typically do not succeed for other reasons.

See, e.g., *Dominic v. Consol. Edison Co. of N.Y., Inc.*, 822 F.2d 1249, 1260 (2d Cir. 1987) (upholding district court's award of full fees for successful retaliation claim and unsuccessful discrimination claim, reasoning that the plaintiff "could recover on his retaliation claim only if his complaints of . . . discrimination had a reasonable foundation"); *Parrish v. Sollecito*, 280 F. Supp. 2d 145, 172 (S.D.N.Y. 2003) (concluding that "the facts underlying [the plaintiff's] sexual harassment claim were sufficiently related to the facts underlying her retaliation claim to justify an award of fees for her attorneys' work on both these claims," in part because of her retaliation claim doctrinally required her to "assert that she was subjected to discriminatory conduct by Defendants—and that her complaints concerning this alleged incident were the trigger for retaliation"). *Hensley* thus instructs that a plaintiff can achieve a high "degree of success" without complete recovery on every claim pursued. *See, e.g.*, *Knox*, 2021 WL 608345, at *2, *3 (even with remittitur reducing the jury verdict by half, describing the obtainment of "the largest possible compensatory award they could have achieved" and a "significant" punitive damages award as "reflect[ing] *astounding* success" (emphasis added)).

An alternative view could incentivize counsel to bring only a limited subset of claims—potentially of lesser value—or to avoid novel claims and arguments altogether. Such a standard would undercut congressional intent and should be avoided. *See Fox*, 563 U.S. at 834 ("[T]he presence of . . . unsuccessful claims does

not immunize a defendant against paying for the attorney's fees that the plaintiff reasonably incurred in remedying a breach of his civil rights."). Although attorneys decide *ex ante* whether to accept a case and how to litigate it, "judges set fees ex post," once "everything is known." Lynn A. Baker et al., *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 Colum. L. Rev. 1371, 1441 (2015) [hereinafter Baker et al., *Is the Price Right*]. That is, courts know when deciding a fee petition which motions succeeded, what verdict the jury rendered, and the size of its damages award. "This creates significant potential for the hindsight bias to poison judges' assessments of litigation risks." *Id.*

Inadvertent hindsight and confirmation bias can "distort judges' estimates of ex ante odds," often leading to an "overestimat[ion of] the lawyers' likelihood of success" and an underappreciation of the rare prevailing civil rights plaintiff who overcomes the odds. *Id.* at 1443; *see also* Lynn A. Baker et al., *Setting Attorneys' Fees in Securities Class Actions: An Empirical Assessment*, 66 Vand. L. Rev. 1677, 1715–16 (2013); Section II.A.2 *supra*. Skilled trial counsel typically distill complex and sprawling cases into simple and digestible themes for a jury, thereby enhancing the risks of hindsight and confirmation bias for judges. Moreover, refining a case to its core elements often hides the important, but burdensome, work of doing so, thus further enhancing these risks. Conflating *ex post* and *ex ante* assessments can "exert downward pressure" on judicial assessments of appropriate rates and hours. Baker

et al., *Is the Price Right*, *supra*, at 1443; *cf. Knox*, 2021 WL 608345, at *8 (rejecting "whether hindsight vindicates an attorney's time expenditures" as the relevant inquiry (internal citation omitted)).

C. Courts Considering Hours Expended and Related Staffing Concerns Must Consider the Realities of the Civil Rights Bar.

Most civil rights lawyers practice in small firms, which, by necessity, influences the staffing available for cases. Unlike "Big Law" firms, there is rarely, if ever, a reservoir of associate labor from which to draw, nor a bench of trial specialists on call should the need arise. Civil rights firms must instead staff cases with the attorneys they have and team up to ensure the necessary resources and expertise. Cutting hours because they were expended by senior attorneys or because of some duplication of tasks ignores these realities and undercuts the goals of fee-shifting. *See, e.g.*, *Murray*, 2020 WL 7384722, at *20–*22, *24–*25.

1. Courts must recognize that staffing arrangements differ according to firm type and size.

Over 89% of NELA members practice in firms of 10 or fewer attorneys; many are solo practitioners. *NELA Survey*, *supra*, at 19. As a result, they often co-counsel with other firms and nonprofit organizations to spread risk, *see* Section II.A.2 *supra*, and share expertise.[9] Staffing in these situations can involve a greater proportion of

[9] In many instances, such arrangements can produce superior quality work with greater efficiencies. *See, e.g.*, *HomeAway.com*, 2021 WL 791232, at *19 (noting that

seasoned attorneys. And where firms do have additional junior lawyers, they are often pulled in many directions to support numerous practices.

Vindicating the congressional mandate to incentivize attorneys to undertake civil rights cases requires recognition of this reality. Any rule that reduces fee awards for civil rights attorneys based on staffing cases with more senior lawyers would operate, *de facto*, as a disincentive to undertake these cases altogether. Such an outcome undercuts both congressional intent and the Supreme Court and Second Circuit's interpretations thereof.

2. Collaborative staffing furthers the expressed policy goals of courts and the legal industry.

Just as courts ought not apply fee-shifting principles in a way that effectively ensures under-compensation of the vast majority of civil rights firms based on the seniority of the attorneys, they also ought not discourage collaboration that ensures cases are adequately staffed, including with trial counsel. The dearth of jury trials poses a particular challenge to small firms, who must often co-counsel to guarantee adequate jury trial experience is coupled with subject matter expertise and institutional knowledge of a litigation. Such collaboration provides clients the best possible representation while conferring the added benefit of allowing lawyers to

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"[u]sing experienced counsel familiar with the [plaintiff] and [the issues in the litigation], in fact, assuredly promoted efficiency").

gain stand-up and jury-trial experience.

Many judges have recognized that between the decline in oral arguments and trials[10] and Big Law firms' up-and-out structures,[11] opportunities have dwindled for attorneys—even partners—to accrue civil litigation experience and thus advance their careers. District courts have laudably taken steps to encourage such skills-development, even offering to hold or split oral argument where such a request would not otherwise be granted in order to provide junior lawyers with experience—and thus requiring additional efforts even by opposing counsel.[12] *See, e.g.*, U.S.

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[10] *See, e.g.*, Debra Cassens Weiss, *Oral Arguments Are Losing Ground in Federal Appeals Courts; Would 'Hot-Court Culture' Reverse Trend?*, ABA J. (June 1, 2018), https://www.abajournal.com/news/article/oral_arguments_are_losing_popularity_in_federal_appeals_courts_is_a_hot_cou; John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L.J. 522 (2012).

[11] *See, e.g.*, Joshua Libling, *Up or Out: Why Litigation Associates Need to Make a Decision by Their Fourth Year*, Law.com (June 29, 2020), https://www.law.com/americanlawyer/2020/06/29/up-or-out-why-litigation-associates-need-to-make-a-decision-by-their-fourth-year; Veronica Root, *Retaining Color*, 47 U. Mich. J.L. Reform 575, 580–81 (2014).

[12] For example, 21 judges in the Southern and Eastern Districts of New York alone (and 38 across the Second Circuit) have adopted individual rules that favor, and at times create, stand-up opportunities for lawyers to gain new experiences. *See, e.g.*, *Individual Rules and Practices of Judge Richard J. Sullivan when Sitting by Designation in the United States District Court*, § 2(F) (May 2021), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/RJS%20Sullivan%20Individual%20Practices%20-%20Judge%20Richard%20J.%20Sullivan.pdf; U.S. District Judge Alison J. Nathan, *Individual Practices in Civil Cases*, § 8 (May 1, 2021), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AJN%20Nat

District Judge Jesse M. Furman, *Individual Rules and Practices in Civil Cases* § 2(D) (Feb. 3, 2020), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/JMF%20Furman%20Civil%20Individual%20Practices%20%282.3.2020%29_0.pdf; *Individual Practices of Judge Brian M. Cogan*, §§ III(D), IV(B) (Sept. 2019), https://www.nyed.uscourts.gov/pub/rules/BMC-MLR.pdf. The recognition of the need for these efforts, however, has broader implications: An overly broad view of duplication of efforts when it comes to fee awards would effectively, retroactively penalize the same partnership and collaboration that courts understand to be necessary when it comes to stand-up and trial experience. Collaboration inevitably necessitates a degree of overlap in the work performed, but this duplication, alone, ought not serve as a basis to reduce fee awards—particularly as courts are encouraging just such efforts.

Reducing fee awards where counsel work together to ensure sufficient expertise, including and particularly jury trial expertise, would also create access to justice issues. If collaboration serves as grounds to cut attorney's fees, attorneys may hesitate to involve trial specialists or subject matter experts. The result would inhere to the detriment of civil rights litigants, who would, in essence, be denied their choice

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han%20Individual%20Rules%20of%20Practice%20in%20Civil%20Cases%205.1.21.pdf.

of counsel. Moreover, it might chill attorneys (especially those practicing in small firms) from undertaking representations that might ultimately require co-counseling under *any* circumstances, such as in the statistically unlikely eventuality of a trial. Such a state of affairs limits the pool of potential counsel for would-be plaintiffs, further exacerbating our country's access to civil justice problem in departure from Congress's articulated intent.

D. Rates for Civil Rights Lawyers Must Rise to Reflect the Rising Costs of Legal Services.

"Congress made clear that it 'intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases . . . .'" *See Rivera*, 477 U.S. at 575 (internal citation omitted); *see also Hensley*, 461 U.S. at 430 n.4 (citing S. Rep. No. 94-1011, at 6, for the proposition that the fee standard should be comparable to that in antitrust cases, which are "equally complex" and similarly involve "rights [that] . . . may be nonpecuniary in nature"). Indeed, public interest cases regularly entail complex legal doctrines and require creativity to zealously litigate, often with limited resources. In addition, they demand significant skill with respect to client counseling, because clients often have less experience with civil litigation, are in more financially precarious situations, and have suffered disturbing and at times

traumatic events.[13]

The hourly rates awarded to counsel should thus reflect the rising costs of pursuing cases and rising rates in the private bar. As U.S. District Judge Victor Marrero observed,

> During the period between 1985 and 2012, the fees lawyers charged for their services increased significantly. . . . In New York, for example, a sample of large law firms found that the average hourly billing rate for partners in 2013 was $882 and for associates $520. These figures represent a jump of nearly 382% over the $183 average billing rate for partners prevailing in New York in the mid-1980s, a cumulative growth which, averaged out, would amount to about 3.9% per year. By contrast, the cumulative rise in the national inflation rate recorded during the 1985 to 2012 timeframe was 113.4%, or on average about 2.8% per year.

Marrero, *supra*, at 1612–13. These increasing rates—now nearly a decade old—reflect "the increasing cost of maintaining a practice." *Parker v. Vulcan Materials Co. Long Term Disability Plan*, No. EDCV 07-1512 ABC (OPx), 2012 WL 843623, at *7 (C.D. Cal. Feb. 16, 2012) (approving a rate growth of over 10% in one year).

[13] Unfortunately, district courts have often undervalued the difficulty inherent in civil rights and public interest work. *See, e.g.*, *HomeAway.com*, 2021 WL 791232, at *16 ("[T]he legal and factual issues on which this case pivoted . . . make it more closely akin to civil rights cases under the Fourth Amendment than the sophisticated, complex, and often expert-laden controversies for which leading firms charge corporate clients top dollar."). Such reasoning accords with neither congressional intent nor judicial precedent nor common sense. *See, e.g.*, *Restivo v. Hessemann*, 846 F.3d 547, 591 (2d Cir. 2017).

Real estate prices in particular have skyrocketed in recent years,[14] pandemic notwithstanding.

Some courts in recent years have, fortunately, "recognize[d] that fee rates increase over time based on a variety of factors." *Charlebois v. Angels Baseball LP*, 993 F. Supp. 3d 1109, 1122 (C.D. Cal. 2012). Courts in other top legal markets have recently condoned hourly rates near and even in excess of $1,000—more akin to those of large law firms. *See, e.g.*, *Chen v. W. Digit. Corp.*, No. 8:19-cv-909, Dkt. 90 at 16–17 (C.D. Cal. Jan. 5, 2021) (approving rates up to $1,200); *Frias v. City of Los Angeles*, No. CV 16-4626 PSG (SKx), 2020 WL 4001620, at *3 (C.D. Cal. Apr. 23, 2020) (awarding an hourly rate of $1,100 in a police excessive force case); *Jane*

[14] The jurisdictions in the Second Circuit have experienced rapidly inflating real estate prices—particularly in New York City ("NYC"). *See, e.g.*, Newmark, *1Q21 – New York City: Office Market Overview* 14, 16 (2021), https://f.tlcollect.com/fr2/221/40552/1Q21_Office_Market_Overview.pdf (the net per square footage cost of Midtown Manhattan real estate has risen from roughly $50 to over $77 in the past decade). These prices are nearly unparalleled. *See, e.g.*, Lucian Alixandrescu, *The Most Expensive U.S. Office Space Submarkets in 2019*, Property Shark (Mar. 16, 2020), https://www.propertyshark.com/Real-Estate-Reports/2020/03/16/most-expensive-office-submarkets-2019 (noting that three of the top 10 U.S. real estate submarkets are located in NYC). For example, the District of Columbia, a rare locality with a higher per capita concentration of attorneys than NYC, charges over 20% less per square foot of real estate. *See* Am. Bar Ass'n, *ABA Profile of the Legal Profession* 2, 31 (2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf; Newmark, *Research 1Q21: Washington Metro Area Market Overview* 5 (2021), https://www.nmrk.com/storage-nmrk/uploads/fields/pdf-market-reports/1Q21-Washington-Metro-Area-Economy-Office-Market-Report.pdf.

Doe 2 v. The Georgetown Synagogue—Kesher Isr. Congregation, Case Nos. 2014 CA 007644 B, 2014 CA 008073 B, 2015 CA 007814 B, at 13 (D.C. Super. Ct. Oct. 25, 2018) (concluding that partner rates of $850–$1,200 were "reasonable" and "in line with" the rates that would be charged by "attorneys of comparable skill, experience, and reputation"); *Wellens v. Daiichi Sankyo*, No. C 13-00581WHO (DMR), 2016 WL 8115715, at *3 (N.D. Cal. Feb. 11, 2016) (approving partner rates of $850–$1,050); *see also Robles v. Saul*, 831 F. App'x 272, 273 (9th Cir. 2020) (upholding "lodestar rate of $1,145"); *Spangler v. Nat'l Coll. of Tech. Instruction*, No. 14-cv-3005 DMS (RBB), 2018 WL 846930, at *2 (S.D. Cal. Jan. 5, 2018) (granting partner rates up to $825).

Courts in the Second Circuit, however, have lagged those in sister circuits in adjusting rates upward to account for these rising costs of practice. *See, e.g.*, *Murray*, 2020 WL 7384722, at *12–*16 (setting partner rates at $600–650). They have also failed to affirm that the work of prosecuting allegations of civil rights violations is no less valuable or complex than the work of defending against those allegations. The Court should take this opportunity to address these issues.

CONCLUSION

For the above reasons, the district court's decision with respect to attorney's fees and costs should be reversed. The Court should seize this opportunity to provide additional guidance on such questions across the Circuit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rules 28.1.1(b) and 29.1(c) because it contains 6,299 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2021, I filed and served the foregoing amicus brief on all counsel via the Court's ECF system.

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