
Nos. 20-8000 & 20-8021

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM FREY,

Plaintiff-Appellant

v.

TOWN OF JACKSON, WYOMING, TETON COUNTY, JACKSON HOLE AIRPORT, JACKSON HOLE AIRPORT BOARD, NATHAN KARNES, and JAMES WHALEN,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING - CASPER
The Honorable Nancy D. Freudenthal, District Judge
District Court No. 1:19-CV-00050-NDF

Brief of *Amici Curiae* Institute for Justice, Cato Institute, Competitive Enterprise Institute, and Rutherford Institute

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Pursuant to Fed. R. App. P. 26.1, amici curiae the Institute for Justice, the Cato Institute, the Competitive Enterprise Institute, and the Rutherford Institute are nonprofit § 501(c)(3) organizations. They have no parent corporation and no publicly traded stock. No publicly held corporation owns any part of them.

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RULE 29(a) STATEMENT OF CONSENT

Pursuant to Fed. R. App. P. 29(a), amici curiae the Institute for Justice, the Cato Institute, the Competitive Enterprise Institute, and the Rutherford Institute state that all parties have consented to the filing of this brief.

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Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, IJ has litigated cases against state and local governments around the country. Although some of these cases assert claims exclusively under state constitutions or, more rarely, statutes, most of these cases are brought to vindicate federal constitutional rights under 28 U.S.C. § 1983. IJ has an interest in this case because the district court's incorrect approach to awarding attorney's fees poses a significant threat to constitutional public interest litigation.

The Cato Institute is a nonpartisan, public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Cato's Project on Criminal Justice focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. To those ends, Cato holds conferences; publishes books, studies, and the annual Cato Supreme Court Review; and files amicus briefs.

The Competitive Enterprise Institute ("CEI") is a nonprofit 501(c)(3) organization dedicated to promoting the principles of free enterprise, limited government, and individual liberty. CEI frequently participates in litigation, as both a party and an amicus curiae, in challenging government conduct which expands the powers of government or is harmful to individual liberty. In CEI's view, individual liberty is threatened when merely declining to consent to a search and challenging the government's authority in court leads to ruinous fines.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute's mission is to provide legal representation without charge to individuals whose civil liberties have been violated and to educate the public about constitutional and human rights issues. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by the Constitution and laws of the United States.

Introduction

The standard for awarding fees to a prevailing defendant in a § 1983 suit is daunting, and rightly so. Congress sought to encourage the vindication of constitutional rights by providing the means for plaintiffs to press their suits. Fees are only to be awarded to prevailing government defendants when the plaintiff's

suit is truly frivolous. Any lower standard would deter potentially meritorious lawsuits because few plaintiffs could afford to risk the potentially ruinous liability of a fee award.

The court below disregarded this well-established law, subjecting a civil rights plaintiff and his attorney to a fee award and sanctions totaling $55,340. But the plaintiff's claims in this case did not come anywhere near the standard for frivolity. Some were novel, but with a reasoned basis in existing caselaw. Other claims were for blatant constitutional violations, where the only question was whether the plaintiff had sufficiently alleged municipal liability. This Court should reverse the fee award and sanctions in their entirety.

Background

As this case was dismissed at the pleading stage, the following facts are drawn exclusively from the Plaintiff's complaint and amended complaint. This case began when Plaintiff William Frey was traveling through the Jackson airport. As Frey passed through a TSA checkpoint, he triggered a body scanning machine. Doc. 54 at ¶ 31. A TSA agent then told him that (1) his belt buckle had caused the machine to trigger a false positive, and (2) he would now have to submit to a pat down procedure that included his groin. *Id.* at ¶¶ 32–33. At this point, Mr. Frey asked why he could not simply be rescanned without his belt, but the TSA agent

told him that despite the acknowledged false positive, TSA policy required a pat down. *Id.* at ¶ 37.

Further discussion ensued, during which Mr. Frey repeatedly stated that he did not consent to a pat down, that he would prefer to leave the airport, and that if he was subjected to a pat down without his consent, he would sue. *Id.* at ¶ 44. Nothing in the complaint indicates that Mr. Frey raised his voice, attempted to address the public or anyone other than the officers who were speaking to him, or indicated that he would physically resist a search. Nevertheless, Mr. Frey was arrested and booked.

At the Teton County jail, Mr. Frey repeatedly requested an attorney over the course of three hours. *Id.* at ¶ 51. He was verbally berated for his request by three different officers. *Id.* at ¶ 53. At one point, another officer explicitly told his wife (who was waiting in the lobby) that he was being detained in retaliation for his request for an attorney. *Id.* at 52. Finally, Mr. Frey was released, though he was later criminally charged with interfering with airport security. (Those charges were dismissed, and the dismissal was affirmed on appeal.)

Mr. Frey brought suit under 28 U.S.C. § 1983 against the Town of Jackson, Teton County, Jackson Hole Airport, the Jackson police officers who arrested him, and several unidentified airport personnel, alleging violations of the First, Fourth, and Fourteenth Amendments. The district court dismissed the initial complaint in

its entirety, though allowing Mr. Frey to replead some claims. After Mr. Frey filed an amended complaint, the district court dismissed all claims with prejudice. The court then awarded the municipal defendants fees and sanctioned Mr. Frey and his attorney for pursuing a "frivolous" case.

A full discussion of all of Mr. Frey's claims and each of the district court's rulings is beyond the scope of this brief, but some aspects of the court's decisions deserve to be highlighted here:

- The court held that the arrest at the airport did not violate either the First or Fourth Amendment because there was probable cause to arrest Mr. Frey "for attempting to circumvent the security procedure implemented at the airport." Doc. 51 at 13. But the district court never explained how Mr. Frey attempted to "circumvent" airport security other than through consistent verbal objections and the threat of litigation.

- The court stated that Mr. Frey "refused [Officer Karnes'] commands" and that his "conduct rendered him a threat to the safety of Officer Karnes (if not also others at the airport)," Doc. 51 at 17. But it is unclear on what basis the district court construed Frey's complaint to imply that Frey was dangerous or that he refused lawful commands (other than commands to consent to a search).

- The court held that Mr. Frey's complaint was "completely devoid of allegations to suggest a causal connection between any of his speech and the arrest" and stated that "Frey admits" that he was arrested "for violation of the Town of Jackson Municipal Code." Doc. 51 at 20. Yet the complaint does not contain any allegations that Mr. Frey did anything to violate the code other than engage in protected speech. And nothing in the complaint indicates that by identifying the legal basis that the defendants had invoked for the arrest, Frey was conceding that the arrest was legal. Doc. 1 at ¶ 76 ("The Plaintiff was arrested and charged based on an 'attempt to circumvent'

airport procedures because he threatened to file a lawsuit against Officer Karnes and/or because he requested less invasive search procedures.").

- In dismissing Frey's claim that he was held for hours in county jail in retaliation for his request for an attorney, the court held that caselaw had not established that prolonged detention would "chill a person of ordinary firmness from requesting an attorney." Doc. 89 at 16.

- In dismissing Frey's Fourth Amendment claim with regard to airport screening procedures, the court broadly held that it is well established that airport screening is constitutional, which Frey never disputed. Yet the court did not analyze the specific procedures Frey was challenging. The court went on to hold that this claim, which was novel and not foreclosed by any caselaw, was frivolous. Doc. 89 at 25-27.

- After granting Mr. Frey leave to amend his complaint so as to further substantiate his *Monell* claims for municipal liability, and acknowledging that he had added further factual allegations, the court held that the new allegations were still insufficient, dismissed the remaining claims, *and then* sanctioned Mr. Frey and his attorney and awarded fees to the municipal defendants.

Argument

The court below misapplied well-established law governing the availability of attorney's fees for prevailing defendants. In the sections below, *amici* will explain the proper standard and how it applies to several of Appellant's claims. Appellant sufficiently alleged that he was arrested in retaliation for protected speech and that his detention was prolonged in retaliation for other protected speech. Appellant also plausibly alleged municipal liability for these violations. Finally, defendant raised a novel Fourth Amendment claim regarding airport

search procedures. That claim had a legitimate basis in existing caselaw. None of these claims are close to being frivolous. The district court's fee award, if approved, would have a significant chilling effect on civil rights litigation.

I. The lower court misapplied the standard for awarding defendants fees under § 1988.

A. The standard for awarding defendants attorney's fees under § 1988 is rarely met.

When private plaintiffs succeed in vindicating their constitutional rights, they also "vindicat[e] a policy that Congress considered of the highest priority." *Fox v. Vice*, 563 U.S. 826, 832–33 (2011) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). Such plaintiffs are "ordinarily" entitled to attorney's fees under 42 U.S.C. § 1988. *Id.* These fees provide an incentive for lawyers to represent plaintiffs whose cases may be "unpopular" or for only minor damages. *City of Riverside v. Rivera*, 477 U.S. 561, 586 (1986) (Powell, J., concurring in the judgment). Fees also provide an additional deterrent and punishment for violations of constitutional rights. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978). And without the prospect of adverse fee awards, government actors could safely disregard "small" violations of constitutional rights. *See Newman*, 390 U.S. at 402.

None of these justifications, however, support providing fees to prevailing *defendants*. If plaintiffs bore any significant risk of being liable for defendants'

fees, it would "chill civil rights litigation" because the average civil rights plaintiff would be financially ruined by an adverse fee award. *Lamboy-Ortiz v. Ortiz-Velez*, 630 F.3d 228, 236 (1st Cir. 2010). Indeed, the prospect of such liability, even coupled with the plaintiff's opportunity to obtain fees, would likely lead to fewer 1983 suits than if courts simply followed the American rule.

Accordingly, while defendants can sometimes obtain attorney's fees under § 1988, they carry a heavy burden justified by "different equitable considerations." *Christiansburg*, 434 U.S. at 419. Specifically, defendants may obtain attorney's fees only if the plaintiff's claims were "frivolous," *id.* at 421, a demanding standard met only where claims are "clearly baseless," "fanciful," "fantastic," or "delusional." *Denton v. Hernandez*, 504 U.S. 25, 32–33 (1992); *Clajon Production Corp v. Petera*, 70 F.3d 1566, 1581 (10th Cir. 1995) (noting that only "rare circumstances in which a suit is truly frivolous . . . warrant an award of attorneys' fees to the defendant."). A claim is not frivolous just because it ultimately fails. *Christiansburg*, 434 U.S. at 421–22. And crucially for this case, "question[s]...of first impression" are rarely frivolous. *Barnes Found.* v. *Twp. of Lower Merion*, 242 F.3d 151, 158 (3d Cir. 2001); *accord Tarter v. Raybuck*, 742 F.2d 977, 988 (6th Cir. 1984) (Fourth Amendment claim not frivolous where the existing cases provided "no definitive standard"). A fee award against a plaintiff is "an extreme

sanction, and must be limited to truly egregious cases of misconduct" *Riddle v. Egensperger*, 266 F.3d 542, 547 (6th Cir. 2001).

B. Appellant's First Amendment retaliation claims were not frivolous.

Frey's allegations—*if accepted as true*—demonstrate two separate and blatant First Amendment violations. First, he alleges that he was arrested at the airport in retaliation for his protected speech. Specifically, he objected to the search procedure, he requested permission to leave the screening area, and he told the defendants that he would sue if they proceeded with the search. Doc. 54 at ¶ 44. None of these statements provided a valid basis for arresting him.

The district court somehow concluded that this conduct (no other conduct is alleged in the complaint) constituted an illegal attempt to "circumvent" TSA screening procedures. Doc. 54-1 at 2. That conclusion flies in the face of Supreme Court precedent, which recognizes that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 463 (1987) (citation omitted). Accordingly, vague statutory prohibitions on actions like "circumvention" cannot be interpreted to prohibit such protected speech. *Id.* (holding unconstitutional a statute that criminalized speech that "interrupt[s] any policeman in the execution of his duty").

And the district court, of course, did not hold that Frey's speech fell into a constitutionally unprotected category of speech such as "fighting words."

It is also well established that Frey's refusal to consent to a search was not a valid basis for arresting him. *See United States v. Dozal*, 173 F.3d 787, 792–93 (10th Cir. 1999) ("[P]robable cause is lacking when an officer arrests a person for refusing to consent to a warrantless search or seizure."). To be sure, if the defendants possessed an independent right to search Frey, they could do so without his consent. And if he threatened to physically resist an otherwise lawful search, that threat could be punished. But notwithstanding the district court's bizarre conclusion that "Frey's conduct rendered him a threat to the safety of Officer Karnes," (Doc. 51 at 17), nothing in the complaint demonstrates any such threat of physical resistance, only a threat of subsequent legal action.

Frey also pressed a retaliation claim based on his detention at the county jail, where he alleges he was detained for three hours in retaliation for his requests for an attorney. This district court accepted his allegations but rejected his claim on qualified immunity grounds: No caselaw established that prolonged detention would "chill a person of ordinary firmness" from requesting an attorney. Doc. 89 at 16-17. This was simply wrong. A prolonged detention in a jail is more than enough to chill a person of ordinary firmness from exercising speech rights. *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 822 (6th Cir. 2007)

(holding that a 2.5 hour detention would "silence a person of ordinary firmness"). Indeed, the cases in which the retaliatory conduct was insufficient to establish a First Amendment violation have typically involved inconsequential or *de minimis* actions. *See id.* ("[d]eprivation of one's liberty of movement can hardly be classed 'inconsequential'"); *Bennett v. Hendrix*, 423 F.3d 1247, 1253 (11th Cir. 2005) (collecting cases and concluding that the "ordinary firmness" inquiry is intended to "weed[] out...injuries" that are "trivial" or "*de minimis*.").

And in any event, a plaintiff is not required to cite a case with *precisely* the same facts to overcome qualified immunity. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) ("[T]his Court's caselaw does not require a case directly on point for a right to be clearly established"); *Lawmaster v. Ward*, 125 F.3d 1341, 1351 (10th Cir. 1997). The district court's approach to qualified immunity illustrates why the doctrine has been subjected to such withering critiques from across the ideological spectrum in recent years.[1] But in this case, we need not wade into those waters. No

[1] *E.g., Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (en banc) (Willett, J., dissenting) ("Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question 'beyond debate' to 'every' reasonable officer."); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 88 (2018) (claiming the doctrine "lacks legal justification, and the Court's justifications are unpersuasive"); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 70 (2017) (concluding that "the Court's efforts to advance its policy goals through qualified immunity doctrine has been an exercise in futility").

reasonable law enforcement officer could think that it is constitutional to detain someone for hours in retaliation for requesting an attorney.

C. Appellant's Monell *allegations were not frivolous.*

The district court dismissed Frey's claims against the municipal defendants not only on the ground that the underlying conduct did not constitute a violation, Doc. 89 at 24-28, which, as explained above, was error, but also on the ground that Frey had failed to sufficiently allege that the violations were pursuant to an official policy or custom, as required by *Monell*. Doc. 112 at 14.[2] This too was error, but regardless of whether the district court was correct, there is simply no way that any *Monell* pleading deficiencies in the complaint make Frey's claims "frivolous," "fanciful," or "delusional," such that an adverse fee award and sanctions would be appropriate.

Frey alleged that his retaliatory arrest and detention were the result of both "custom and usage" and a failure to train law enforcement officers. Doc. 54 at ¶¶ 69; 71; 91-93. Both are well established means of demonstrating *Monell* liability. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 690-91 (1978); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). The court, however, held that Frey had failed to

[2] The district court did not actually say anything about the sufficiency of the "policy or custom" allegations in its second dismissal, but the court explained in its sanctions and fees decision that this had been the basis for its dismissal. Doc. 112 at 9.

allege a policy or custom because the only incident he pointed to was his own retaliatory arrest and detention. Doc. 89 at 25. To be sure, a lone constitutional violation is not *ordinarily* enough to survive a motion to dismiss a *Monell* claim, but that is not all that Frey alleged.

First, with regard to his retaliatory arrest, Frey alleged that he was subsequently criminally prosecuted. That is significant. If the arrest were simply the actions of a rogue officer, the city's own attorney would not have backed the officer up with a vigorous criminal prosecution (including an appeal). Granted, that the city effectively ratified Frey's arrest by prosecuting him does not necessarily prove that city policy caused the arrest in the first place, but proof is not necessary at the pleading stage. The subsequent prosecution at least makes the policy or custom allegations plausible.

Second, with regard to the retaliatory detention, Frey did not merely allege that a single officer retaliated against him for requesting a lawyer; he alleged that three officers retaliated against him together and verbally berated him because of his request. Doc. 54 at ¶ 53. He also alleged that other deputies informed his wife that the reason he was being held was because he requested a lawyer. *Id.* at ¶ 52. Another officer also refused Frey's lawyer's attempt to speak to him. *Id.* So while his prolonged detention could be framed as a single act of retaliation, it was an act brazenly perpetrated by several law enforcement officers who were unconcerned

that an attorney was aware of their actions. Moreover, custodial interrogations are a core aspect of a law enforcement officer's job, and every law enforcement officer should know what to do when a detainee requests a lawyer. These facts strongly suggest a pattern that could support *Monell* liability. *See Haley v. City of Bos.*, 657 F.3d 39, 53 (1st Cir. 2011) (holding that a single constitutional violation, if serious and "wholly unexplained," can be sufficient to allege *Monell* liability).

The plausibility of *Monell* allegations is admittedly a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (quoting *Iqbal*). *Amici*'s primary concern here is not whether Frey sufficiently alleged *Monell* liability. The question is whether he failed so badly as to make his claim frivolous. The answer is obvious: These *Monell* allegations were nowhere near frivolous.[3]

D. Appellant's novel Fourth Amendment claim was not frivolous.

Frey also raised a novel Fourth Amendment claim regarding the search procedures at the airport. The district court dismissed this claim without serious analysis and later concluded that the claim was frivolous and deserving of

[3] That the district court granted leave to amend, acknowledged that Frey had added additional allegations, Doc. 89 at 4–5, and then held that his claim was frivolous is especially problematic. It is difficult to see how a claim that was not frivolous when dismissed without prejudice could become frivolous when refiled with additional factual allegations.

sanctions. This was error. Regardless of the ultimate merits of Frey's novel Fourth Amendment claim, Frey made a good faith argument that had a real basis in existing caselaw.

Frey's claim was narrowly focused on one aspect of the screening procedure he was subjected to. The crux of Frey's argument was that the TSA agents, after acknowledging that Frey's belt had triggered a false positive scan, should have used a less invasive search technique—such as allowing him to remove his belt and reenter the scanner—instead of resorting to an invasive physical pat-down. Doc. 54 at ¶ 67. Appellant also alleged that the Town was responsible for these procedures because it enforced them on behalf of the TSA.

This claim was a question of first impression, but Frey drew support from a pair of cases from the Ninth and Third Circuits. Frey cited *United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (en banc), for the proposition that airport screening is *only* constitutional if it is "no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives." Because rescanning him would have been effective and far less invasive, Frey argued, the procedures violated *Aukai*.

He also cited *United States v. Hartwell*, 436 F.3d 174, 180 (3d Cir. 2006), which upheld a specific airport search in part because the search at issue was "minimally intrusive" and "escalate[ed] in invasiveness only after a lower level of

screening disclosed a reason to conduct a more probing search." Frey argued that there was no reason to escalate the invasiveness of his search until the TSA had first attempted to rescan him without his belt. This Court may find those argument persuasive, or it may not. But the arguments were certainly reasonable and deserving of consideration.

The district court, however, dismissed this novel claim without any serious consideration of Frey's arguments, stating in broad terms that "[i]t is well-established that air travelers may be subject to searches, 'even in the absence of individualized suspicion of wrongdoing.'" Doc. 89, at 26 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000)), and stating that *Aukai* and *Hartwell* upheld "similar" searches. Doc. 89 at 26. But no case has ever held that airports are a Fourth Amendment free zone. Cases upholding airport searches, such as *Aukai* and *Hartwell*, have invariably given close attention to the specific circumstances and procedures employed. Frey was simply asking the district court to do the same with a set of procedures that has never been subjected to judicial scrutiny. The district court was wrong to hold, in awarding fees and sanctioning Frey, that his claim was "clearly contrary to established constitutional law." Doc. 112 at 14.

II. The lower court's holding could have serious chilling effects on future civil rights claims.

Although the district court paid lip service to the standards governing fee awards to government defendants under § 1988, its ruling in fact represents a radical departure from governing law. If affirmed, it would alter the landscape of civil rights litigation in this circuit. Non-profit organizations like amici rely to varying degrees on § 1988 fees to fund their litigation. But even if they don't rely on obtaining fees, they certainly rely on the fact that they will not be held liable for fees when they bring non-frivolous cases, in good faith.

Many of the cases that amici bring are cutting edge, designed to extend or develop the law in new directions. The process often involves a mix of litigation defeats and incremental victories. When amici first begin litigating under a novel constitutional theory, it is common to meet with judicial hostility, even if we ultimately prevail, either on appeal, or in subsequent cases, years later.

For instance, in *Edwards v. District of Columbia*, the Institute for Justice challenged Washington, DC's licensing scheme for tour guides, on First Amendment grounds. 943 F. Supp. 2d 109 (D.D.C. 2013). The district court found some of IJ's arguments "meritless" and "contrary to established First Amendment jurisprudence." *Id.* at 118. And before the appeal was decided, a Fifth Circuit panel rejected a similar First Amendment challenge (also brought by the Institute for Justice) in an eight-paragraph opinion that apparently found the plaintiffs' theory

baffling. *Kagan v. City of New Orleans, La.*, 753 F.3d 560, 562 (5th Cir. 2014) ("[T]he New Orleans law in its requirements for a license has no effect whatsoever on the content of what tour guides say.")

Yet the D.C. Circuit ultimately held that the licensing scheme violated the First Amendment, noting that the "District failed to present any evidence the problems it sought to thwart actually exist" or that the licensing scheme was "appropriately tailored" to address such speculative harms. 755 F.3d 996, 1009 (2014). Notably the court suggested that the regulations at issue would likely fail rational basis review, and the court declined to follow *Kagan* because that court "either did not discuss, or gave cursory treatment to, significant legal issues." *Id.* at 1001 n.3, 1009 n.15. And the Fourth Circuit has just recently followed the D.C. Circuit in striking down a tour guide licensing scheme. *See Billups v. City of Charleston, S.C.*, No. 19-1044, 2020 WL 3088108, at *12 (4th Cir. June 11, 2020).

The deep disagreement between these four courts illustrates the danger in the district court's approach to determining frivolity. A court may find an argument incorrect, ill-conceived, or even ridiculous, particularly if the argument is novel. Yet another court may ultimately find it persuasive. Plaintiffs are entitled to try to move the law. Under the district court's mistaken approach—which treated Frey's Fourth Amendment claim as frivolous simply because it was novel—every defeat could become twice as costly. *See Barnes Found. v. Twp. of Lower Merion*, 242

F.3d 151, 158 (3d Cir. 2001) (noting that "question[s]...of first impression" are rarely frivolous.). This mistaken approach would necessarily curtail the number of cases that amici are able to litigate.

The ruling also does violence to more run-of-the-mill civil rights litigation that is not necessarily designed to develop new law. *Monell* liability and qualified immunity are substantial barriers to recovery for many civil rights plaintiffs, including plaintiffs who have suffered acknowledged and severe constitutional injuries. If the ruling below is affirmed, then an attorney counseling the average civil rights plaintiff in the Tenth Circuit will have to warn the plaintiff that he or she bears a substantial risk of financial ruin unless there is a case with *exactly* the same facts and unless there is a smoking gun demonstrating an official policy. *Cf. Lamboy-Ortiz v. Ortiz-Velez*, 630 F.3d 228, 240 (1st Cir. 2010) ("it is rare that a 'smoking gun' will be found in a political discrimination case, and thus circumstantial evidence alone may support a finding of political discrimination").

Regardless of how this court ultimately resolves the merits of this case, it should reverse the district court's fee award and sanctions, and reaffirm that fee awards to prevailing defendants in § 1983 suits are only available when the claims are "clearly baseless," "fanciful," "fantastic," or "delusional." *Denton v. Hernandez*, 504 U.S. 25, 32–33 (1992).

Conclusion

The fee award and sanctions should be reversed.

Dated: July 2, 2020.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, {Bitdefender Endpoint Security Tools, version 6.6.19.274, and most recent update on July 2, 2020}, and according to the program are free of viruses.

Dated: July 2, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2020, I electronically filed a copy of the foregoing brief with the Clerk of the United States Court of Appeals for the Tenth Circuit using the Court's appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users who will be served by the appellate CM/ECF system.

Additionally, seven copies of the **Brief of *Amici Curiae*** will be mailed to the Court via commercial carrier within five business days of July 2, 2020.

Dated: July 2, 2020

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