

NO. 82128-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALLAN PARMELEE,

Petitioner,

v.

ROBERT O'NEEL, et al.,

Respondents.

SUPPLEMENTAL BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
CENTER FOR JUSTICE
COLUMBIA LEGAL SERVICES
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INTEREST OF AMICI

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

INTRODUCTION

Under both 42 U.S.C. § 1988 and the Prison Litigation Reform Act, a prisoner who prevails on appeal on a meritorious civil rights claim is presumptively entitled to an interim fee award. In this case, Petitioner Parmelee's complaint asserted various claims, including a claim that the infraction imposed by the Department of Corrections (DOC) violated 42 U.S.C. § 1983 by infringing on his First Amendment rights under color of state law. The Court of Appeals ordered the injunctive relief Mr. Parmelee sought on this claim, and vacated the DOC infraction. *Parmelee v. O'Neel*, 145 Wn. App. 223, 249, 186 P.3d 1094 (2008). Mr. Parmelee obtained this injunctive relief by prevailing on his facial First Amendment challenge to Washington's criminal libel statute. *Id.* at 237. Nevertheless, the Court of Appeals, without explanation, refused to award attorney fees under 42 U.S.C. § 1988. *Id.* at 249.

The availability of attorney fees on appeal is essential to protecting the civil rights of all Washington residents. In their brief supporting the Petition for Review, *Amici* argued that the Court of Appeals's decision

diverged from established precedent regarding awards of interim fees to prevailing parties on appeal, and would undermine the purpose of § 1988. *Amici* will not repeat these arguments, which continue to warrant reversal of the decision below. Instead, in this brief *Amici* will focus on an additional question not addressed by the Court of Appeals, but identified by this Court's order granting review: the applicability of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e.

The PLRA does not bar Mr. Parmelee's claim for an interim attorney fees award under § 1988. First, he proved an actual violation of his rights when the Court of Appeals vacated the unconstitutional DOC infraction. Second, plaintiffs may prove a First Amendment violation by establishing *facial* rather than as-applied unconstitutionality. Third, the PLRA does not limit attorney fees when prisoners bring meritorious claims for injunctive relief. Finally, the award of interim attorney fees is essential to the administration of justice.

ARGUMENT

A. The Prison Litigation Reform Act Does Not Bar Attorney Fees Because Mr. Parmelee Proved An "Actual Violation" Of His Rights.

Respondents contend that the PLRA bars attorney fees in this case because Mr. Parmelee somehow did not prove an "actual violation" of his

rights under 42 U.S.C. § 1997e(d)(1)(A)¹ when he prevailed on his facial First Amendment claim and obtained injunctive relief vacating the DOC infraction. Resp. Supp. Br. 13–14. Respondents misapprehend both the record in this case and the plain language of the PLRA.

1. Respondents’ Infraction Violated Mr. Parmelee’s Civil Rights.

An actual violation of the First Amendment occurs the moment officials enforce a law that unconstitutionally infringes on free speech. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); *Shaheed-Muhammad v. Dipaolo*, 138 F. Supp. 2d 99, 101, 108 (D. Mass. 2001) (noting that First Amendment rights “are abridged *the moment a state silences free speech* or prevents a citizen from following the precepts of his religion” (emphasis added)). Mr. Parmelee demonstrated that prison officials issued an infraction to him under an unconstitutional law—thus violating his First Amendment rights. 145 Wn. App. at 237.

¹ The PLRA provides in part: “In any action brought by a prisoner . . . in which attorney’s fees are authorized under [42 U.S.C. § 1988], such fees shall not be awarded, except to the extent that . . . the fee was directly and reasonably incurred in proving an *actual violation* of the plaintiff’s rights . . .” 42 U.S.C. § 1997e(d)(1)(A) (emphasis added).

2. For Purposes Of The PLRA, Mr. Parmelee Proved An “Actual Violation” When The Court Of Appeals Vacated The DOC Infraction.

Respondents label the decision below as “procedural” and assert that Mr. Parmelee merely “won a remand of his civil rights case.” Resp. Supp. Br. 6. This is incorrect. Mr. Parmelee obtained significant injunctive relief in this case: the Court of Appeals vacated the DOC infraction. *Parmelee*, 145 Wn. App. at 249 (“We vacate the infraction based on the unconstitutional statute.”). In doing so, the court granted relief requested in Mr. Parmelee’s complaint. *See* Compl. ¶ 102 (request for injunctive relief); *id.* ¶ 32 (arguing that “the infraction is unconstitutional”). This final and binding order vacating Mr. Parmelee’s infraction will not be affected by any other claims adjudicated on remand.

Mr. Parmelee’s own complaint explains the significance of this particular relief. A prison infraction “has infinite damaging repercussions.” *Id.* ¶ 37. In particular, Mr. Parmelee alleged that in the absence of judicial relief, the infraction would have been used against him “relating to his present incarceration and even post-release supervision affecting his ‘LSI’ threat assessment and security risk analysis.” *Id.*; *see also* Petitioner’s Supp. Br. 11-12 (identifying consequences of infraction). The Court of Appeals’s order vacating the infraction “materially alters the legal relationship between the parties,” and Mr. Parmelee is entitled to an

interim award of attorney fees. *See Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 664, 935 P.2d 555 (1997).

The Court should reject Respondents' additional arguments against an interim fee award. For example, Respondents assert that the decision below is not final because the trial court has yet to consider their qualified immunity defense. Resp. Supp. Br. 6, 10–11. Qualified immunity does not apply to claims for injunctive relief, however. *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 also argue that *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), preclude an award of fees. Resp. Supp. Br. 7–11. These cases are inapposite, however, because neither involved a fee request based on an actual award of relief. *See Farrar*, 506 U.S. at 112 (plaintiff obtained only nominal damages); *Hewitt*, 482 U.S. at 760 (plaintiff obtained only a ruling that his complaint should not have been dismissed for failure to state a claim).

Courts have repeatedly awarded attorney fees after prisoners obtained expungement of infractions—even when those prisoners had not yet prevailed on all claims. *See Dannenberg v. Valdez*, 338 F.3d 1070, 1073–75 (9th Cir. 2003) (attorney fees not barred by PLRA when prisoner obtained injunctive relief ordering “that the lieutenant’s report be

expunged from his prison record,” even though prisoner “did not prevail on all of his claims”); *Watts v. Dir. of Corr.*, No. CV F-03-5365 OWW, 2007 WL 1100611, at *3 (E.D. Cal. Apr. 11, 2007) (prisoner who succeeded in “having his disciplinary record removed from his central file” entitled to attorney fees, even though he did not prevail on all claims); *Chatin v. New York*, No. 96 Civ. 420(DLC), 1998 WL 293992, at *1–2 (S.D.N.Y. June 4, 1998) (awarding attorney fees under the PLRA after invalidating prison rule and ordering expungement of prisoner’s record, notwithstanding the fact that “plaintiff did not prevail on every claim”), *aff’d sub nom. Chatin v. Coombe*, 186 F.3d 82 (2d Cir. 1999).

No court has adopted Respondents’ overly restrictive interpretation of an “actual violation” of rights under the PLRA. Indeed, the only case cited by Respondents in support of this interpretation, *Siripongs v. Davis*, 282 F.3d 755 (9th Cir. 2002), has no bearing on this case. *Siripongs* stands for the unexceptional proposition that issuance of a *temporary restraining order* does not prove an “actual violation” of rights under the PLRA. *Id.* at 758. Here, Mr. Parmelee obtained *permanent* injunctive relief, not a temporary restraining order. Respondents do not challenge the Court of Appeals’s ruling granting the permanent injunction. The court’s order vacating the infraction is enforceable. *See, e.g., RCW*

7.21.020. Having proven an actual violation of his civil rights, Mr.

Parmelee is entitled to an interim fee award under § 1988 and the PLRA.

B. Mr. Parmelee Proved An Actual Violation By Prevailing On His *Facial* First Amendment Challenge To Washington’s Criminal Libel Statute.

Mr. Parmelee asserted both facial and as-applied claims under the First Amendment. *Parmelee*, 145 Wn. App. at 232, 242. There is no question that Mr. Parmelee prevailed on his *facial* claim. *Id.* at 237 (holding that the criminal libel statute is facially unconstitutional).

Nevertheless, Respondents make the bizarre argument that because it was unnecessary for the court below to reach Mr. Parmelee’s *as-applied* challenge, he did not prove an “actual violation” of his First Amendment rights for purposes of the PLRA—even though the court invalidated the statute as facially unconstitutional. *See* Resp. Supp. Br. 6, 13.

This argument is based on a fundamental misunderstanding of the manner in which courts analyze First Amendment claims. As the Court of Appeals noted, “when a statute is facially unconstitutional, it follows that *no set of circumstances exist* in which the statute, as currently written, can be constitutionally applied.” *Parmelee*, 145 Wn. App. at 242 (emphasis added); *see also Young v. City of Simi Valley*, 216 F.3d 807, 814 (9th Cir. 2000) (“Since we conclude that the ordinance is facially invalid, however, we need not reach the issue of whether the statute is unconstitutional as

applied to [plaintiff].”); *Brown v. City of Pittsburgh*, 543 F. Supp. 2d 448, 467 (W.D. Pa. 2008) (“The Court will first address the facial constitutionality of the Ordinance because if the regulation is found to be facially invalid, we need not address [plaintiff’s] as applied arguments.”).

This Court should reject Respondents’ contention that Mr. Parmelee did not prevail because the underlying statute was invalidated as facially unconstitutional, rather than as applied.² Denying Mr. Parmelee an interim attorney fee award would set a dangerous precedent, deterring other civil rights litigants from pursuing meritorious facial claims.

C. The PLRA Bars Attorney Fees For Frivolous Litigation, Not Meritorious Claims.

Respondents’ interpretation of the PLRA contradicts the express intent of Congress. The legislative history of the PLRA shows a clear congressional intent to deny fees only for *frivolous* claims. *E.g.*, 141 CONG. REC. S14,317 (1995) (statement of Sen. Abraham). Congress did *not* intend to deny attorney fees for *meritorious* claims. H.R. REP. NO. 104-21, at 28 (1995), *reprinted in* 1 BERNARD D. REAMS, JR. & WILLIAM

² Respondents’ argument is based on a selective quotation of dicta from the decision below, in which the Court of Appeals noted that “even if we wanted to address whether the statutes are unconstitutional as applied to Parmelee, the record is insufficient to properly decide this issue.” Resp. Supp. Br. at 6 (quoting 145 Wn. App. at 246). Respondents omit the sentence immediately preceding this quotation, in which the Court of Appeals held that “we *need not determine* whether Washington’s statutory scheme is unconstitutional as applied to Parmelee *because the statutory scheme is facially unconstitutional.*” 145 Wn. App. at 246 (emphasis added).

H. MANZ, A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, PUB.L. NO. 104-134 STAT. 1321 (1997); *see also Hernandez v. Kalinowski*, 146 F.3d 196, 200 (3d Cir. 1998) (“Nothing in the legislative history suggests that Congress intended to deter meritorious claims.”).

Indeed, proponents of the PLRA recognized that prisoners “must be accorded their constitutional rights,” and insisted that the law would “help protect” those rights. 141 CONG. REC. S14,316–17 (1995) (statement of Sen. Abraham). During debate on the PLRA, proponents cited examples of truly frivolous litigation that would be curbed by the PLRA—lawsuits arising from bad haircuts, food temperature, being served chunky instead of creamy peanut butter, and deprivation of access to Gameboy video games. *E.g.*, 141 CONG. REC. S14,316 (1995) (statement of Sen. Abraham); 141 CONG. REC. S14,418 (1995) (statement of Sen. Kyl). It would set a dangerous precedent by equating these types of frivolous claims with the successful result obtained by Mr. Parmelee in the Court of Appeals on his First Amendment claim.

D. Interim Attorney Fee Awards In Cases Vindicating Important Constitutional Rights Are Essential To The Administration Of Justice And Serve Crucial Public Interests.

Because he obtained significant injunctive relief, Mr. Parmelee is entitled to an interim fee award under § 1988. As noted previously by

amici curiae, 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 Br. of *Amici Curiae* in Supp. of Pet. for Review 4–7; 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).

Attorney fee awards under § 1988 are essential to the protection of civil liberties. Without the availability of interim fee awards on appeal, many civil rights plaintiffs with limited resources simply will choose not to appeal erroneous trial court decisions that affect important civil rights. See Br. of *Amici Curiae* in Supp. of Pet. for Review 8–9. Nothing in the PLRA prohibits interim fee awards for these types of meritorious claims.

Moreover, nothing in the PLRA changes the important reasons why attorney fees should be presumptively awarded to successful litigants who vindicate the constitutional rights of all Washingtonians by bringing meritorious actions. See *id.* at 8–10. Enforcement of the fundamental liberties enshrined in the First Amendment are at stake in this and many other cases involving attorney fee awards under § 1988. For example, in *Southworth v. Board of Regents*, 376 F.3d 757 (7th Cir. 2004), students represented by the nonprofit Alliance Defense Fund sought attorney fees under § 1988 after successfully challenging a state university’s use of mandatory student fees to support political organizations those students


opposed. *Id.* at 761. The court awarded fees even though the students had been only partially successful in their effort to change university policies. *Id.* at 773. Similarly, attorney fee awards under § 1988 are essential for the enforcement of other fundamental constitutional rights. *See, e.g., Inmates of the R.I. Training School v. Martinez*, 465 F. Supp. 2d 131, 142 (D.R.I. 2006) (awarding attorney fees to nonprofit American Civil Liberties Union Foundation for its representation of juvenile inmates in an action challenging unconstitutional conditions of confinement). Cases involving § 1988 fee awards often are lawsuits brought by individuals of limited means represented by attorneys in solo practice or nonprofit organizations, against large governmental entities.

In this case, the plaintiff is a prison inmate, but in the next case it may be anti-tax or peace activists who call upon the courts to protect their First Amendment rights or to vindicate other constitutional liberties. Both the administration of justice and crucial public interests will be harmed if fees are denied to the attorneys who work to defend these vital constitutional protections. That is precisely why Congress enacted § 1988. *See Br. of Amici Curiae* in Supp. of Pet. for Review 9–10. To ensure proper enforcement of constitutional rights, this Court should reverse the Court of Appeals’s denial of Mr. Parmelee’s attorney fee request.

CONCLUSION

For the reasons set forth above and in their brief in support of the Petition for Review, *Amici* request that this Court reverse the Court of Appeals's ruling on Mr. Parmelee's request for attorney fees under § 1988.

RESPECTFULLY SUBMITTED this 8th day of October 2009.

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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 20,000 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. Legal Voice

Legal Voice (formerly the Northwest Women's 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 organization 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. Legal Voice 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.