No. 07-1089

In The
Supreme Court of the United States

DR. HERMAN SMITH,

Petitioner,

v.

KAREN JO BARROW,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Did this Court err when it denied Petitioner's writ of certiorari seeking review of the substantive decision in *Barrow I*?

2. Did the Fifth Circuit err in upholding its qualified immunity ruling in *Barrow I*, which was based solely on precedent clearly established in the circuit for twenty-five years?

3. Did the District Court abuse its discretion in holding "the value of the judgment Barrow obtained, plus the value of Barrow's pre-offer court costs and attorney's fees, exceeded $100,000" and thus Petitioner's "Rule 68 offer of judgment does not entitle him to relief"?

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STATEMENT

Petitioner seeks review from this Court, for the second time in this case, of whether the courts below erred when they denied Petitioner qualified immunity after extensive discovery and over fifty volumes of record in *Barrow I* and after a two week jury trial and seventy-four volumes of record in *Barrow III*.

I. Factual Background

In July of 1998, Karen Jo Barrow's (hereinafter "Barrow") children were enrolled at the Greenville Christian School, a private religious school. Mrs. Barrow applied for the Assistant Principal position at the Greenville Middle School which was open and to be filled in July of 1998. (R.,Vol. 17, docket item 167 at 918-32, 937-42, ¶¶ 49-60). In May of 1998, at the direction of Petitioner,[1] Joan Graves, a senior school official, approached Mrs. Barrow and asked her if she would consider moving her children to the public schools so that she could be "considered" as an applicant for the assistant principal position. (R.,Vol. 14 at 88-141; Vol. 17 at 918-38). Mrs. Barrow told Mrs. Graves that she definitely wanted the position but would not sacrifice her boys' religious education to get the job. *Id.*

Mrs. Barrow's name was placed in the pool as an applicant during a superintendent's council meeting on July 13, 1998. (R.,Vol. 16 at 574-641). Petitioner

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[1] Petitioner, Smith, was the school district superintendent.

directed the Assistant Superintendent for personnel, William Smith, to talk to Mrs. Barrow about where she chose to educate her children and to see if she would be willing to move her children to the public schools so she could be considered for the position. (R.,Vol. 15 at 306-416). Petitioner later admitted to Susan Crow, the teacher who was hired to fill the position instead of Mrs. Barrow, that Mrs. Barrow was not hired because of "where she educated her children." (R.,Vol. 16 at 538-60). Petitioner told Mrs. Barrow and her husband at a personal meeting on July 30, 1998, that the only reason he did not recommend Mrs. Barrow for the assistant principal position was because of where she chose to educate her children and that she had "no future" at the Greenville Independent School District ("GISD") as long as she chose to educate her children at the Greenville Christian School (R.,Vol. 17 at 924). GISD admitted in its EEOC response to Mrs. Barrow's Title VII claim that Petitioner refused to consider Mrs. Barrow because of where she "[chose] to educate her children" and that it would be a "factor" if she interviewed for a promotion. (Barrow's R.E. 2; R.,Vol. 17 at 850-54). At trial, the jury found that a motivating factor in Petitioner's decision to refuse to recommend Mrs. Barrow for the promotion was where Mrs. Barrow educated her children. (R.E. 9 at 11).

Mrs. Barrow obtained a Judgment against Petitioner for $15,455.00 in compensatory damages and $20,000.00 in punitive damages and prejudgment interest. Upon her application for attorney fees, the district court awarded Mrs. Barrow some of her fees and taxable court costs. (R.E. 14).

II. Proceedings Below

Upon Petitioner's refusal to recommend Mrs. Barrow for the promotion because she failed to comply with a "public school only" patronage employment condition, Mrs. Barrow filed suit against GISD and Petitioner alleging, *inter alia*, that Petitioner violated Mrs. Barrow's constitutional right as a parent to choose private education for her children by denying her a recommendation for a promotion because she refused to comply with the "public school only" employment condition. (R.,Vol. 1 at 1-19).

The district court's summary judgment for Petitioner on qualified immunity was reversed by the Fifth Circuit in *Barrow I.* This court denied cert. *Smith v. Barrow*, 540 U.S. 1005 (2003). The claims against Petitioner were tried to a jury. The jury rendered a verdict against Petitioner. (R.E. 9; R. 4635). The district court entered Judgment for Mrs. Barrow against Petitioner. (R.E. 511). All parties filed post-judgment motions. (R. 5103). The district court denied the motions. (R.E. 12). The court awarded Mrs. Barrow some of the attorneys fees she sought and denied others. (R.E. 14).

Petitioner filed a timely Notice of Appeal and Mrs. Barrow filed a timely cross Notice of Appeal. (Barrow's R.E. 1). The Fifth Circuit Court of Appeals in a unanimous unpublished opinion affirmed the judgment of the district court. Pet. App. 24.

ARGUMENT

The petition seeks review of a fact-bound case that consists of over seventy-four volumes of record and almost ten years of litigation. The case's central issue, and that of the petition – whether it is clearly established law that a government official may not deny a job applicant a promotion because she chooses private education for her children – already has been litigated in this case once before this Court, twice before the Fifth Circuit and at least nine times in the District Court in separate motions and filings. *See* Record Vol. 57, pp. 3552, 3556-61 and court order at 3587 (instructing Petitioner to stop raising the issue of qualified immunity); Vol. 59, pp. 4061-7; Vol. 61, pp. 4544, 4563-66; Vol. 60, pp. 4240-41; Vol. 62, pp. 4715-19; Vol. 60, pp. 4202-09; Vol. 62, pp. 4730, 4740-45; Vol. 63, pp. 4747, 4758-75 and pp. 5118-21.

There has never been a single appellate judge in this case who expressed an opinion that Petitioner should prevail. *Barrow I* and *Barrow III* were unanimous and after both Fifth Circuit decisions, Petitioner sought *en banc* review. No judge on the Fifth Circuit ever requested that the court even be *polled* on rehearing *en banc* in either appeal. This Court denied Petitioner's petition after *Barrow I*. The current petition, which seeks a review of an **unpublished** decision with no precedential value, is nothing more than an attempt to re-litigate the qualified immunity question once again and this petition should also be denied. Not surprisingly, Petitioner's alleged split is illusory. And the petition itself only

rehashes, with no relevant change in fact or law, substantially the same claims and arguments which Petitioner presented to this Court four years ago in unsuccessfully seeking review of *Barrow I*. In addition, Petitioner has requested this Court correct alleged error in the district court's calculation and award of attorney fees. It is not this Court's practice to reconsider the same claims and issues in the same case on the same record, nor is this Court one of error correction. Petitioner, nonetheless, seeks this Court's review.

I. The Petition Does Not Present an Important Legal Issue on Which There Is Conflicting Authority

Other than a rather odd claim that *Barrow I* conflicts with precedent established by this Court,[2] and presumably this Court erred by not reviewing *Barrow I*, the only conflict analysis arguing a circuit split is contained in the brief assertions on pages 16 and 17. In these two pages, Petitioner cites to a string citation of cases, with only three or four cases post-*Troxel*. This is not much "confusion" and certainly

[2] The right of a parent to choose private or public education for her children has been a "fundamental right" for over eighty years, and fundamental rights require strict scrutiny. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (scrutiny for "fundamental" rights is strict scrutiny); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (the right of a parent to control the education of her child is a "fundamental right"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

this scant analysis is not indicative of a major split on an important and discrete area of the law. Petitioner's main argument for a split appears to rest on the premise that the Fifth Circuit is split within itself, yet no judge on the Fifth Circuit thought the holding in *Barrow I* or *Barrow III* was worthy of reconsideration or review.[3]

A. There Is No Division in the Law nor Split Among the Circuit Courts of Appeals

Petitioner presents no credible division in the law. Petitioner's primary argument for a split among the Circuit Courts of Appeals appears to consist of a largely undeveloped and conclusory statement that Fifth Circuit "decisions" have created "conflict with the precedents of numerous other courts of appeals" combined with a lengthy string cite reduced to a footnote. Pet. 16 & 16 n.2. Not a single case included in the string cite is even remotely on point. Each of the cases concern parents' and students' dissatisfaction either with the educational requirements and administration of public education, statewide education standards, the availability of public education services or complaints about uniforms or student clothing. None deal directly or indirectly with a parent's right to choose for her children a particular

[3] Petitioner's complaint that *Littlefield* and *Barrow* conflict, even if true, is simply more incentive for this Court to deny review. The Court should deny review and wait until the Fifth Circuit has resolved this alleged conflict within its own circuit.

means of education, here private school over public school, much less the application of that right in a public education employment context. They concern, instead, parents claiming the "rights" for their children to avoid health class and mandatory community service and to play interscholastic sports. *See, e.g., Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338 (3d Cir. 2004). Interestingly, at least two of the cases cited expressly recognize the difference between the administration of public education and a parent's right to decide whether to use public education at all. *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533-34 (1st Cir. 1995) (finding it "fundamentally different," in the court's discussion of *Meyer* and *Pierce*, "for the state to say to a parent, 'You can't teach your child German or send him to a parochial school,' than for the parent to say to the state, 'You can't teach my child subjects that are morally offensive to me.'"); *Angstadt*, 377 F.3d at 344 (differentiating between regulations governing interscholastic sports and parents' "ability to educate their daughter in the manner they choose.").

Petitioner fails to cite the only cases from the other Circuit Courts of Appeals that *are* directly on point. There are only two. In *Barrett v. Steubenville City Schs.*, 388 F.3d 967 (6th Cir. 2004), *cert. denied*, 546 U.S. 813 (2005), a school superintendent refused to hire a teacher unless the teacher removed his child from private school and enrolled him in public school. The Sixth Circuit found this violated the teacher's

constitutional right to direct the upbringing of his child and affirmed the order denying the superintendent qualified immunity.[4] In *Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479 (11th Cir. 1984), a patronage policy adopted by the county school board prohibited its teachers from enrolling their children in private schools on penalty of termination. The Eleventh Circuit affirmed the judgment in favor of the teachers, finding that the policy impermissibly interfered with the teachers' constitutional right to control the education of their children.

In sum, an assertion that there exists a division in the law is difficult to support when all of the cases purportedly demonstrating the division fail even to address the issue in question. As for the cases that are on point, arrival at the same conclusion for the same issue on virtually identical facts hardly denotes a split in the circuits. Even had the cases on point arrived at separate conclusions, as only two other circuits have even broached the issue with only one case in each circuit, the law could hardly be considered developed to the point where it is ripe for review

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[4] The Sixth Circuit, like the Fifth Circuit, did not find it necessary to articulate a level of scrutiny because if the "motivation for a public official in taking some adverse employment action against a public employee is the public employee's protected activity, then regardless of the level of scrutiny applied, such action is unconstitutional." *Steubenville*, 388 F.3d at 973 (quoting *Montgomery v. Carr*, 101 F.3d 1117, 1127 (6th Cir. 1996)).

by this Court. This case presents no division or split in the law for this court to review.

B. There Has Been No Change in Fact or Law Relevant to This Petition Since the Court Denied Review of *Barrow I*

There has been no relevant change to the record since the Court denied review of *Barrow I*.[5] Petitioner does, however, attempt to create such a change. Petitioner failed to plead and produce through discovery a number of the "facts" he proffers to this Court. *See* Pet. 19-20. The District Court held, just before trial, that he was thus precluded from offering these "facts" at trial to support a claim that Mrs. Barrow's choice of private education "impedes the operation or effectiveness of the state's educational program." Pet. App. 238-41. In fact, the school district admitted that Mrs. Barrow's exercise of her right to choose private education for her children did not impede the operation or effectiveness of the state's educational program in its answer and first amended answer. Pet. App. 240.

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[5] *Barrow I* relied upon *Brantley* and *Fyfe* and as the *Barrow III* court noted, neither of those cases involved a "religious element." Pet. App. 20. Petitioner argues that the absence of a religious claim at this point in the case somehow should change the analysis of *Barrow I*. However, the clearly established law upon which *Barrow I* was based contained NO religious claims but purely parental rights claims. *Barrow III* agreed that no religious component was necessary.

This means that Petitioner's factual position from *Barrow I* to *Barrow III* never changed. In *Barrow I*, after extensive discovery and voluminous filings, the Fifth Circuit noted that Petitioner had no evidence of any disruption at all – and that was in 2003. Pet. App. 277-78. In 2005, on the eve of trial, Petitioner sought to present the "facts" he now relies upon in his petition to this Court before the jury. The district court, in its discretion, denied his request.[6]

There are, however, two intervening events worthy of consideration. The first is that a duly empanelled jury, led by a school board member of a nearby school district as foreman, awarded Mrs. Barrow compensatory and *punitive* damages against Petitioner, finding that he denied Mrs. Barrow the promotion because she educated her children in private school and that he knew he could be violating the law by doing so. Trial Testimony V.4, p. 197-98. The second is the Court's denial of certiorari in *Barrett v. Steubenville City Schs.*, 388 F.3d 967 (6th Cir. 2004), *cert. denied*, 546 U.S. 813 (2005), a case virtually identical to *Barrow* in fact, issue and outcome. *See* Section I-A, *supra*.

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[6] This case is thus not an appropriate vehicle for deciding any of these fact issues raised because it is factbound and procedurally entangled. It was well within the district court's discretion to deny Petitioner leave to amend his Answer after years of litigation and appeals. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Ellis v. Liberty Life Assurance Co.*, 394 F.3d 262, 268 (5th Cir. 2004).

The substance of the present petition is remarkably similar to Petitioner's original petition for certiorari in *Barrow I*, which this Court declined to review. *Smith v. Barrow*, 540 U.S. 1005 (2003). In his original petition, Petitioner argued that the relevant law was "not clearly established." *Barrow I* Pet. 5-6, 8-21. In the present petition he argues that the relevant law is not clearly established. Pet. 22-26. In his original petition he claimed there was a circuit split. *Barrow I* Pet. 6, 25-26. In this petition he claims there is a circuit split. Pet. 16-17. In his original petition he claimed that Fifth Circuit precedent conflicts with that of this Court. *Barrow I* Pet. 6-7. In this petition he claims that Fifth Circuit precedent conflicts with that of this Court. Pet. 12-14.

Even the questions presented cover the same ground. In his original petition the substance of the two questions presented was, respectively, the fact-bound analysis of parental rights versus a public school's right to regulate its employees, and whether Petitioner was wrongly denied qualified immunity. *Barrow I* Pet. i. In this petition the substance of the first two questions presented are, respectively, the fact-bound analysis of parental rights versus a public school's right to regulate its employees, and whether Petitioner was wrongly denied qualified immunity. Pet. i. The only substantial difference between the petition for certiorari in *Barrow I* and the present petition is that Petitioner now wants this Court to correct alleged error in the district court's calculation and award of attorney fees, as well.

Petitioner fails to include even one intervening development in law or fact between *Barrow I* and *Barrow III* that justifies this Court's review of *Barrow III*. Review of *Barrow III* would be identical to a review of *Barrow I*, which, again, was denied by this Court in 2003. Considering the jury's factual findings, the substantially identical nature of this petition to the petition this Court denied review in *Barrow I* and this Court's refusal to review a case from a sister circuit almost identical in fact, issue and outcome, there appears little incentive to grant review in this the Petitioner's second request based on any development in law or fact.

II. *Saucier*'s "Rigid Order Of Battle" Was Irrelevant to the Outcome of This Case

Application of the *Saucier v. Katz*, 533 U.S. 194 (2001), "rigid order of battle" was a nonfactor both in *Barrow I* and *Barrow III*. In both instances, the Fifth Circuit relied solely upon *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), and *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990), unanimous Fifth Circuit cases directly on point and covering twenty-five years of jurisprudence, to determine whether a constitutional violation had been clearly established. The analysis in *Barrow I* merely summarized this Fifth Circuit precedent to affirm a constitutional violation had been alleged, withholding its substantive analysis for determining whether that right was clearly established at the time Petitioner denied Mrs. Barrow her promotion. Pet. App. 274-78. *Barrow III* affirmed, similarly relying solely on

that same precedent and the findings of *Barrow I* to quickly dispense with whether a constitutional violation had been alleged and spend its substantive analysis on other issues. Pet. App. 11-13. In neither case was any substantive analysis spent on whether violation of a constitutional issue had been alleged. Instead, both in *Barrow I* and *Barrow III*, the Fifth Circuit made this determination solely by relying upon clearly established Fifth Circuit precedent involving the exact discrete issue presented. Pet. App. 6 ("In reaching our decision to reverse in *Barrow I*, we relied heavily on two of this court's previous opinions: *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), and *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990).").

Petitioner tries to argue that the lack of success on a religious claim should change the result in this case. But the decisions cementing the clearly established law had nothing to do with religion. In *Brantley*, "there was no suggestion that the plaintiff's decision to send her son to private school was based on religion." Pet. App. 7. The court in *Brantley*, twenty-five years ago, held that in the public school environment, school officials could not take adverse employment actions against public school employees because of where the employee chooses to educate her children. Similarly in *Fyfe*, the plaintiff's "reasons for selecting a private education for her child were unrelated to religion." Pet. App. 8. Petitioner's attempt to avoid the jury verdict and the clearly established law of the Fifth Circuit for twenty-five years is not credible.

Because there was direct precedent within the Fifth Circuit, *Barrow I* was an easy call for the court. The law was clearly established for decades, as was also confirmed in *Barrow I* and *Barrow III*. There is no "two step" *Saucier* issue in this case. There was a violation, as found by the jury, and the law on point was clearly established by cases within the circuit for twenty-five years. Additionally, this case is a procedurally-tangled vehicle involving an extremely fact-bound application of the law-of-the-case doctrine, with no broader legal significance. *Barrow III* is presumably unpublished for that very reason. This Court has already denied review once in this case on the substantive issue and indeed has since denied review on an identical issue in *Steubenville*.

The *Saucier* "order of battle" played no role in the outcome of either *Barrow I* or *Barrow III*. As such, *Barrow III* should not be held for any determination of that issue.

III. The Petition Seeks Review of the Fact-Bound Application of Settled Legal Principles and the Fifth Circuit Applied the Law-of-the-Case Doctrine in a Factually Limited Manner

The unpublished decision of *Barrow III* applies the law-of-the-case doctrine in a factually limited manner. *Barrow I* relied upon *Brantley* and *Fyfe* and as the *Barrow III* court noted, neither of those cases involved a "religious element." Pet. App. 20. It was well settled law at all times relevant to this case that

a school employee's decision to educate her children in private school, whatever the motivation, was a protected right that could only be interfered with upon a showing by the school officials that the exercise of that right caused a material and substantial disruption. *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983); *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990). Given the longstanding history of the articulation of that right and the burden of proof, Petitioner still failed to plead and provide evidence during the discovery period to support a finding of material and substantial disruption. When Petitioner sought to amend his pleadings on the eve of trial, the district court denied him leave to do so and procedurally denied Petitioner the ability to present evidence of a disruption, which is why Petitioner cites to his Bill of Exception for outlandish "facts." Petitioner has not even preserved his Bill of Exception at this stage. The "facts" Petitioner relies on were not admitted at trial because Petitioner failed to plead disruption as a defense in a timely fashion.

The main thrust of Petitioner is a re-argument of *Barrow I* and his dissatisfaction with this Court's denying review of his original petition for certiorari. The unpublished decision of *Barrow III* applies the law-of-the-case doctrine in a factually limited manner. *Barrow I* relied upon clear Fifth Circuit precedent that has been established for over twenty-five years and was well settled law at all times relevant to this case. *See* Section II, *supra*. And as *Barrow III* noted, Petitioner's claims on appeal did not affect or change the relevant analysis and conclusions of

Barrow I. Pet. App. 20. As such, the Fifth Circuit's discretionary and reasonable application of the law-of-the-case doctrine, affirming the analysis of *Barrow I*, should not be reopened, now ***after*** a jury trial, as it was not "clearly erroneous" nor did it "work a manifest injustice." *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). Any disturbance in *Barrow III* of the earlier qualified immunity question would have required the Fifth Circuit to ignore the factual findings of the jury and twenty-five years of clearly established precedent.

The only essential facts of this case presumed in *Barrow I* was that Petitioner considered Mrs. Barrow's educational choice for her children when denying her a promotion. Petitioner maintained at trial that he never considered Mrs. Barrow's educational choice for her children when denying her a promotion, despite the overwhelming evidence and testimony from various school officials to the contrary. Trial Transcript V.4, p. 217-18, 219-20; V.1, p. 223-24; V.2, p. 185-86, 188. As of *Barrow III*, a jury had decided that Petitioner had indeed rejected Mrs. Barrow for a promotion because she educated her children in private school and that Petitioner "acted although he perceived a risk that his actions would violate Barrow's rights." Pet. App. 228-29.

Petitioner also claimed at trial that he thought he was not violating the law. Trial Transcript V.4, p. 193-94. Indeed, in *Barrow I*, the Fifth Circuit had the benefit of several affidavits from professional educators saying they did not think it was a violation of the

law. Pet. App. 280 n.19. The Fifth Circuit denied Petitioner qualified immunity and this Court denied review. However, a subsequent jury found that Petitioner denied Mrs. Barrow a promotion even though he subjectively perceived a risk that his actions would violate Mrs. Barrow's rights. Pet. App. 229. As a result, the jury awarded punitive damages for Petitioner's reckless decisions. Petitioner's position weakened after the jury trial.

An independent problem rendering this case yet a more problematic vehicle for deciding issues is the jury finding that Petitioner "acted although he perceived a risk that his acts would violate Barrow's rights," Pet. App. 228-29, and assessing punitive damages against him. This jury finding cuts against any claim of qualified immunity as the standard for punitive damages in a civil rights case is higher than that required to deny qualified immunity. Petitioner, however, has failed to challenge this finding. Therefore, the Fifth Circuit's discretionary and reasonable application of the law-of-the-case doctrine was appropriate as no new facts helpful to Petitioner were found by the jury and no new case law emerged from this Court or any other court, save this Court's denial of review in *Steubenville*.

IV. The District Court Did Not Abuse Its Discretion in Awarding Fees

In yet another attempt to manufacture a reason for review, it is disappointing that Petitioner's desperation led him to cite, quote and provide in the

appendix a confidential ADR proceeding, voluntarily submitted to by all parties, for the purpose of trying to settle the case. According to The Civil Justice Expense and Delay Reduction Plan (the "Plan") "[a]ll communications made during ADR procedures are confidential and protected from disclosure . . . " Misc. Order 46, Civil Justice Expense and Delay Reduction Plan, U.S. District Court for the Northern District of Texas, at 6 (rev. May 2002). The settlement conference ordered by the district court was under the authority of the ADR procedures and the Plan, ¶¶ (III)(C) and (IV). Thus, the settlement "report" by Judge Sanders is confidential. In addition, the federal Alternative Dispute Resolution Act of 1998 makes it clear that the Sanders settlement "Report" should not have been disclosed. 28 U.S.C. § 652(d). Furthermore, even if a neutral (Sanders) or party violates this prohibition, the disclosed dispute resolution communication – the Report – "shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made." 5 U.S.C. § 574(c).

Petitioner's attempt to create a certworthy issue by breaching confidentiality ultimately fares no better than his attempt to create a circuit split that does not exist. Damaging to this institution and the practice of law, such a breach further underscores the tenacious battle of this almost decade old case, the lengths to which Petitioner will go to manufacture a rationale for review, and why review should be denied. This would include Petitioner's mysterious reference to Judge Lindsay who has never been a

judge on this case merely as a way to attack one of the attorneys for Mrs. Barrow. Pet. 36. Petitioner's "scorched earth" defense strategy over nine years to cause Mrs. Barrow to quit did not work and the jury ruled against him. Now, he wishes to avoid all of the consequences of his approach and thus seeks review over fees.

With respect to attorney fees, "whether the reported hourly rate is reasonable and whether the reported tasks are duplicative or unrelated to the purposes of the law suit" is a factual question for the district court. *Associated Builders & Contractors of La., Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 379 (5th Cir. 1990). Such "[u]nderlying questions of fact are reviewed for clear error." *Adams v. Unione Mediterranea di Sicurta*, 364 F.3d 646, 656 (5th Cir. 2004); *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983). The "concept that a district court has broad discretion in determining the amount of a fee award" cannot be "overemphasize[d]." *Associated Builders*, 919 F.2d at 379. As "[a]ppellate courts have only limited opportunity to appreciate the complexity of trying any given case" such discretion is appropriate. *Hopwood v. Texas*, 236 F.3d 256, 277 (5th Cir. 2000). The Fifth Circuit relied upon Judge Fitzwater's thorough analysis of the record and found he did not abuse his discretion. Petitioner, likewise, has failed to present evidence of clear error.

Like attorney fees, a "district court's findings regarding the factual circumstances under which Rule 68 offers and judgments are made . . . are reviewed

under the clear error standard." *Basha v. Mitsubishi Motor Credit of Am., Inc.*, 336 F.3d 451, 453 (5th Cir. 2003). Petitioner claims that the district court "refused to apply" Rule 68. Pet. 40. What the district court found, however, was that Petitioner's offers of judgment were ineffective. Pet. App. 24. Petitioner includes only his $100,000.00 offer of judgment for review. The Fifth Circuit was correct that it was not clear error or abuse of discretion for the district court to refuse substantially to reduce Barrow's applicable attorney fees at the time of this offer. Pet. App. 24. Petitioner offers no substantial evidence to the contrary, and certainly none that demonstrates clear error.

This petition is all about attorney fees, which are decided under the abuse of discretion standard by the judge most intimately familiar with the attorneys and the case. No split of authority is alleged concerning the rejection of Petitioner's Rule 68 offer of judgment both by the district court and the Fifth Circuit. This is nothing more than a petition for error correction.

CONCLUSION

This petition for a writ of certiorari for *Barrow III* is substantially the same as the petition for *Barrow I*, which this court denied review. This petition should be denied as well.

Respectfully submitted,

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