No. _____ 071089 FEB 18 2008

In The

Supreme Court of the United States

DR. HERMAN SMITH,

Petitioner,

v.

KAREN JO BARROW,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a public school teacher, who is denied a promotion to an administrative position in the public school district because she chooses to educate her children in a competing private school, asserts a parental rights claim against the public school superintendent based on his failure to promote her, is that Fourteenth Amendment claim subject to rational basis scrutiny pursuant to *Wisconsin v. Yoder*, 406 U.S. 205 (1972), or is it subject to a heightened level of scrutiny as held by the Fifth Circuit?

2. Whether it is appropriate, within the current framework of qualified immunity, to apply the law of the case doctrine in such a way as to preclude a public school superintendent from asserting the defense of qualified immunity, when the "law of the case" was based on facts which were assumed prior to trial and the superintendent's qualified immunity defense is based on the actual facts which were found at trial.

3. Whether the Fifth Circuit's approach to Smith's Rule 68 offer of judgment and interrelated legal issues regarding attorney's fees improperly serves to encourage wasteful litigation instead of encouraging the "just, speedy and inexpensive resolution of civil disputes."

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties to the proceeding in the court whose judgment is sought to be reviewed are:

Dr. Herman Smith (Smith), an individual	Petitioner
Ms. Karen Jo Barrow (Barrow), an individual	Respondent
Greenville Independent School District (GISD), a governmental entity	Party to District Court Judgment Only

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INTRODUCTION

Education is "perhaps the most important function" of local governments. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1952). Parental rights are "perhaps the oldest of the fundamental liberty interests recognized by the Court." *Troxel v. Granville,* 530 U.S. 57, 66 (2000). This case involves a conflict between these two important and fundamental interests. It involves the intersection of the right of parents to direct the education of their children and the duty of public school administrators to provide efficient and effective educational services to the local community. It involves the discretion afforded to a public school superintendent to make reasonable decisions in furtherance of the school district's efforts to maintain the positive perception of its schools and the extent to which the Fourteenth Amendment limits that discretion. This case arises out of a public school superintendent's decision to impose a patronage requirement on public school administrators.

Public school administrators have a difficult and vitally important job. *Morse v. Frederick,* ___ U.S. ___, 127 S. Ct. 2618, 2629 (2007). They are role models whose words and actions are read by students, parents and the general public. *Bethel Sch. Dist. v. Fraser,* 478 U.S. 675, 683 (1986). In addition to their traditional role as educators, public school superintendents have, in recent years, been forced to assume a new role as CEO. With the enactment of the *No Child Left Behind Act* and various school choice initiatives, public school districts have been subjected

to competition and market forces in ways that might have seemed impossible a few years earlier. Modern public school superintendents are now expected to operate their school districts more like competitive businesses. Just as it should come as no surprise that General Motors might not be pleased if its CEO bought a Ford, it should come as no surprise that a patronage requirement for public school administrators might be considered appropriate in light of recent developments in the law.

When a parent, who is employed as a teacher in a public school district, seeks a promotion to become an administrator in the school district, that parent-employee must know that by accepting the benefits of the position she implicitly accepts the limitations of the position. *Garcetti v. Ceballos,* 547 U.S. 410, 126 S. Ct. 1951, 1958 (2006). She must know that her rights as a parent-employee are not greater than her rights as a parent alone.

Parental rights claims are subject to rational basis scrutiny unless they are combined with a Free Exercise claim. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). Despite this Court's holding in *Yoder,* the Fifth Circuit concluded that Barrow's parental rights claim, although unconnected from a Free Exercise claim, was subject to heightened scrutiny. The Fifth Circuit's decision conflicts with decisions of this Court as well as decisions of other United States Courts of Appeals and involves an important question of federal law which needs to be resolved because of its profound impact upon the management of public

schools in an increasingly competitive environment. The Court should grant Smith's petition in order to establish the appropriate level of scrutiny to apply to parental rights claims brought by public school employees.

This case also involves important questions regarding qualified immunity. The decision below undermines the promise of qualified immunity by declaring that Smith's conduct violated "clearly established law" even though the Fifth Circuit was unsure whether Smith's conduct violated the Constitution and even though a respected and experienced federal district court judge found that the law was not clear and that Smith's actions were objectively reasonable.

When the Fifth Circuit held "No reasonable official could conclude that the application of the school district's public-school patronage policy to Barrow was *constitutional*," App. 280, it ignored the fact that a respected federal district judge, in a thorough opinion, had upheld Smith's actions as proper. The Fifth Circuit held Smith to a higher understanding of the law than a federal judge with over two decades of experience on the bench. That should not be. School administrators have a difficult enough job without the daunting threat of liability for damages solely because they cannot predict constitutional jurisprudence. This Court should grant review to provide much-needed guidance on (i) the meaning of a "clearly established right" and (ii) whether, in light of the broad latitude traditionally accorded public school

officials in their day-to-day discretionary functions, the qualified immunity doctrine should be applied more flexibly in the sensitive context of public school education.

After the jury found that Barrow's parental rights claim was unconnected to a Free Exercise claim, the Fifth Circuit misused the procedural framework of qualified immunity to avoid a straightforward application of *Yoder*'s rational basis test. Even though the Fifth Circuit admitted that Smith's application of *Yoder* had merit, the court nevertheless refused to address the issue by referring to the earlier panel's decision as "law of the case." This Court should grant Smith's petition in order to address these important issues concerning qualified immunity.

Finally, this case involves three important and interrelated questions regarding how to analyze Rule 68 offers of judgment and requests for attorney's fees in order to "ensure just, speedy, and inexpensive resolutions of civil disputes." 28 U.S.C. § 471. The three questions concern whether district courts are required to award fees for time spent on unreasonable and unsuccessful motions, whether an award of fees can be based on unreliable evidence, and whether a district court can disregard its own factual findings in order to avoid the effectiveness of a Rule 68 offer of judgment which the court acknowledged would have made Barrow whole.

OPINIONS BELOW

The orders and judgments of the United States District Court for the Northern District of Texas are reprinted at App. 41-118, 121-206, 238-266, and 281-332 and are not otherwise published. The three opinions of the United States Court of Appeals for the Fifth Circuit are reported or available at 332 F.3d 844 (5th Cir. 2003), *cert. denied*, 540 U.S. 1005 (2003) (*Barrow I*) (App. 272-280), 480 F.3d 377 (5th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 255 (2007) (*Barrow II*) (App. 27-38), and 2007 U.S. App. Lexis 24778 (5th Cir. 2007) (*Barrow III*) (App. 1-24). The Court of Appeals order denying rehearing and rehearing en banc is reprinted at App. 335-336 and is not otherwise published.

JURISDICTION

The Fifth Circuit decided *Barrow III* on October 23, 2007, and denied rehearing and rehearing on banc on November 20, 2007. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

FOURTEENTH AMENDMENT

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

42 U.S.C. Section 1988(b)

§ 1988. Proceeding in vindication of civil rights

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such

action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b).

Federal Rule of Civil Procedure 68

Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer.

More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer.

An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability Is Determined.

When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer

> of judgment. It must be served within a reasonable time – but at least 10 days – before a hearing to determine the extent of liability.
>
> (d) Paying Costs After an Unaccepted Offer.
>
> If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

FED. R. CIV. P. 68.

STATEMENT OF THE CASE

A. Factual Background.

In 1998, an administrative position, that of assistant principal of the middle school, became open at the Greenville Independent School District ("GISD"). Ms. Karen Barrow ("Barrow"), a teacher at GISD, expressed interest in being promoted to the position. Barrow's children were enrolled in a nearby, competing private school.

Barrow brought suit against GISD and its superintendent, Dr. Herman Smith ("Smith"), because she was not promoted. Barrow alleged that GISD and Smith had violated her religious rights under the First Amendment and her parental rights under the Fourteenth Amendment by failing to promote her.

At trial, Barrow lost her First Amendment religious rights claim against both defendants and her Fourteenth Amendment parental rights claim against GISD. Barrow's only victory was on her Fourteenth

Amendment parental rights claim against Smith. The jury found that Smith had violated Barrow's parental rights when he failed to promote her because she refused to enroll her children in public school. App. 217-222. The jury awarded Barrow $15,455 in compensatory damages and $20,000 in punitive damages against Smith. App. 226-227, 228-229.

B. Procedural History.

1. On May 1, 2000, Barrow brought suit against Smith and GISD.

2. On January 18, 2001, Smith submitted a Rule 68 offer of judgment of $100,000. App. 96, 171 n.17. Barrow rejected the offer.

3. On February 20, 2002, the district court ruled that Smith was entitled to qualified immunity from Barrow's claims and entered a judgment in his favor. App. 310-332. Barrow appealed.

4. On June 2, 2003, the Fifth Circuit reversed the district court's grant of summary judgment to Smith [App. 272-280 (*Barrow I*)] and on November 10, 2003, this Court denied Smith's petition for writ of certiorari. App. 267.

5. After the Fifth Circuit decided *Barrow I*, but before the case was tried, the district court submitted the case to Senior Judge Barefoot Sanders for a preliminary determination on the issue of attorney's fees – the sole issue preventing a settlement of the

case. Judge Sanders recommended that Barrow's fee request be denied in its entirety.

6. After a two week trial, the jury reached its verdict on March 25, 2005. App. 207, 209. The jury rejected all of Barrow's claims against GISD and rejected the religious rights claim Barrow brought against Smith. The jury found in Barrow's favor on only one of her claims against Smith – her parental rights claim. App. 221-222.

7. Smith filed timely post-trial motions which were denied. App. 121-204.

8. Barrow appealed the judgment in favor of GISD and the Fifth Circuit affirmed. App. 27-38 (*Barrow II*). On October 1, 2007, this Court denied Barrow's petition for writ of certiorari.

9. Barrow filed her request for attorney's fees, which was granted in part [App. 41-118] and the district court issued an Amended Judgment. App. 119-120.

10. Smith appealed and Barrow cross-appealed. App. 2.

11 On October 23, 2007, the Fifth Circuit denied Smith's appeal and Barrow's cross-appeal [App. 1-24 (*Barrow III*)] and on November 20, 2007, denied Smith's motion for rehearing and rehearing en banc. App. 335-336.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW UNREASONABLY INTERFERES WITH THE MANAGEMENT OF PUBLIC SCHOOLS.

In order to meet the needs of students and maintain high standards, public school superintendents should be permitted to impose reasonable regulations on school administrators, even when those regulations impact an administrator's exercise of her parental right to direct the education of her children.

"Public schools often walk a tightrope between the many competing constitutional demands made by parents, students, teachers, and the schools' other constituents." *Parker v. Hurley*, ___ F.3d ___, 2008 U.S. App. Lexis 2070, *53 (1st Cir. 2008). These competing demands highlight why, when a private citizen enters government service, the citizen, by necessity, must accept certain limitations on his or her freedom. *Garcetti*, 126 S. Ct. at 1958. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 126 S. Ct. at 1958. Public employees often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions. *Id.* School personnel, particularly administrators, represent governmental entities in an unusually public manner. *Fraser*, 478 U.S. at 683; *Morse*, 127 S. Ct. at 2629.

Despite the precedent of this Court and of Courts of Appeals across the country which hold that the parental rights claims of citizens are entitled to rational basis scrutiny, the Fifth Circuit applied heightened scrutiny to the parental rights claim of a public school employee. This Court should make clear that public school administrators are not entitled to greater parental rights than parents who are not employed by the government. If a parental rights claim brought by a citizen is entitled to rational basis scrutiny, then it should not be the case that, when that parent becomes a school employee that parent's claim is then favored with a heightened level of scrutiny.

A. The Fifth Circuit's Decisions Conflict with the Precedents of This Court.

The Fifth Circuit's decisions in *Barrow I* and *Barrow III* conflict with the precedents of this Court which have repeatedly used the language of rational basis scrutiny when evaluating parental rights claims. Despite this Court's clear precedent, the Fifth Circuit applied heightened scrutiny.

This Court has repeatedly used the language of rational basis scrutiny when evaluating parental rights claims. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) ("[T]his liberty may not be interfered with ... by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect"); *Pierce v. Soc'y of*

Sisters, 268 U.S. 510, 535 (1925) ("[R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state"); *Yoder*, 406 U.S. at 233 (parental rights claims, when unconnected from a free exercise claim, are subject to rational basis scrutiny); *Runyon v. McCrary*, 427 U.S. 160, 177-179 (1976) ("[Parents] have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 567 n.4 (1993) (Souter, J., concurring) (pursuant to *Pierce* and *Yoder*, parental rights claims, when unconnected from a free exercise claim, are subject to rational basis scrutiny).

This Court has only applied heightened scrutiny to a parental rights claim when that parental rights claim has been coupled with a Free Exercise claim. *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990); *Yoder*, 406 U.S. at 233. Parental rights claims which are coupled with a Free Exercise claim are "hybrid-rights" claims and, arguably, are entitled to heightened scrutiny. *Smith*, 494 U.S. at 881; *Yoder*, 406 U.S. at 233.[1]

While *Barrow III* acknowledged that Smith may be correct in arguing that "only rational basis – and

[1] For a discussion of the conflicting approaches taken by various courts, see E. Chemerinsky, *Constitutional Law* § 12.3.2.3, at 1262 (3d ed. 2006).

not strict scrutiny – should be applied in evaluating a state action that imposes requirements on parental decisions regarding education," it nevertheless applied heightened scrutiny to Barrow's parental rights claim. App. 17. *Barrow III* held that

> a state cannot take an adverse employment action against a public-school employee for exercising [the right to educate his or her children in private school] unless it can prove that the employee's selection of private school materially and substantially affects the state's educational mission

App. 11 (citing *Barrow I* (App. 277)). *Barrow III* acknowledged that this level of scrutiny is a form of heightened scrutiny, though it did not specify whether it was strict scrutiny or some intermediate level of scrutiny. App. 11-12 (citing *Barrow I* (App. 280 n.20)). *Barrow III* also held that heightened scrutiny applied "regardless of whether First Amendment religious rights or merely more general due process parental rights were involved." App. 20. This Court should grant Smith's petition because the decisions below conflict with this Court's prior decisions which applied rational basis scrutiny to parental rights claims.

B. This Case Involves Important Legal Issues That This Court Should Resolve.

If this Court has not already established the proper standard for evaluating parental rights claims, then it should do so. Despite this Court's prior

decisions indicating that rational basis scrutiny is the appropriate standard to be applied to parental rights claims, there appears to be a great deal of confusion concerning this issue which seems to have increased following this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000). Two aspects of *Troxel* have contributed to this confusion.

First, *Troxel* failed to articulate the appropriate standard of review for parental rights claims. *Id.* at 80 (Thomas, J., concurring) ("The opinions of the plurality [...] recognize such a right, but curiously none of them articulates the appropriate standard of review.").

Second, by referring to parental rights as "fundamental rights," the plurality in *Troxel* created confusion by arguably implying that heightened scrutiny may be the appropriate standard. *Id.* at 65-66. For example, Justice Thomas, in his concurrence, interpreted the language of "fundamental rights" as a basis for applying strict scrutiny. *Id.* at 80. This confusion has caused a split in the circuits. *Compare Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 289 (5th Cir. 2001) (applying rational basis) and *Gruenke v. Seip*, 225 F.3d 290, 304-05 (3d Cir. 2000) (applying strict scrutiny). This Court should grant Smith's petition because of the importance of the issue, the confusion surrounding it, and the likelihood that this issue will continue to arise in the management of public schools throughout the country and in litigation involving parental rights.

C. The Fifth Circuit's Decisions Conflict with the Decisions of Other United States Courts of Appeals.

The Fifth Circuit's decisions conflict with the precedents of numerous other courts of appeals which have held that parents' rights to direct the education of their children, when unconnected from a Free Exercise claim, are entitled to only rational basis scrutiny.[2]

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[2] *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (*Meyer* and *Pierce* indicate rational basis scrutiny for parental rights claims); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461 (2d Cir. 1996) ("rational basis review applies."); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (applying rational basis scrutiny post-*Troxel*); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 343-44 (3d Cir. 2004) (applying rational basis); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996) ("reasonable regulation by the state is permissible even if it conflicts with that interest. That is the language of rational basis scrutiny."); *Littlefield*, 268 F.3d at 291 ("a rational-basis test is the appropriate level of scrutiny for parental rights in the public school context"); *Kite v. Marshall*, 661 F.2d 1027, 1029 (Former 5th Cir. Nov. 1981) (applying rational basis scrutiny to parental rights claim and noting that in "situations which, at first blush, appear to rest at the heart of parental decision making, the Supreme Court refrained from clothing parental judgment with a constitutional mantle."); *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 423 (6th Cir. 1996) ("the Court has applied rational basis review"); *Murphy v. Arkansas*, 852 F.2d 1039, 1043-44 (8th Cir. 1988) (applying rational basis scrutiny to state home-schooling regulations); *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1041-42 (9th Cir. 2000) (applying rational basis to *Meyer/Pierce* parental rights); *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 698-700 (10th Cir. 1998) (rejecting heightened scrutiny in favor of rational basis scrutiny).

Other courts of appeals have applied various forms of heightened scrutiny to parental rights claims.[3] Frequently, the courts of appeals have failed to decide what standard is appropriate or, as in *Barrow I*, failed to even decide the textual source of the right they were analyzing. App. 275 ("Our inquiry at this stage is limited to the question whether there is a recognized constitutional right and not whether that right is grounded in the First Amendment, the Fourteenth Amendment, or both.").

In light of the conflicts created by the Fifth Circuit's decisions in *Barrow I* and *Barrow III* and the conflicts that already existed among the circuits regarding parental rights claims, this Court should resolve this substantial, on-going split among the circuits.

D. Smith's Conduct Was Reasonable.

Judge Fitzwater, an experienced and well-respected district court judge, correctly concluded that Smith had a rational basis for his conduct and

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[3] *See, e.g.*, *Gruenke*, 225 F.3d at 304-05 (3d Cir. 2000) (applying strict scrutiny in light of *Troxel*); *Doe v. Heck*, 327 F.3d 492, 520 (7th Cir. 2003) ("Thus, after *Troxel*, it is not entirely clear what level of scrutiny is to be applied.... What is evident, however, is that courts are to use some form of heightened scrutiny"); *Hutchins v. District of Columbia*, 188 F.3d 531, 541-46 (D.C. Cir. 1999) (en banc) (applying intermediate scrutiny); *United States v. Loy*, 237 F.3d 251, 269 (3d Cir. 2001) (applying strict scrutiny).

that his conduct was "objectively reasonable." The evidence in the record supports the district court's conclusion.[4] Perhaps the best evidence of the reasonableness of Smith's decision came from Barrow herself. Barrow admitted that a person in the community "could legitimately and reasonably form the opinion that having a senior administrative person ... have his or her children enrolled in a private school [is] a vote of no confidence in the public school." V. 61, pp. 4622-23 and DN 439, p. 244.[5] The record reflects that this "vote of no confidence" perception existed in the community. Barrow also admitted that "reasonable people can disagree about whether or not it materially and substantially impedes the educational mission of the school district to promote to administrative positions people who have their children enrolled in private schools." V. 61, pp. 4622-23 and DN 439, p. 245. Moreover, the record reflects that patronage policies were an accepted practice in many Texas school districts and that public school funding in Texas is directly tied to the number of students enrolled.

Barrow's admissions and the record evidence underscore the reasonableness of Smith's conduct. With increasing competition between public schools and private schools, patronage policies are likely to

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[4] The district court excluded most of this evidence. Without this evidence, it is understandable that the jury decided against Smith.

[5] The Fifth Circuit record is divided into volumes cited as "V. ___, p. ___" and loose docket entries cited as "DN ___, p. ___."

represent the next step towards treating schools more like competitive businesses. In 2001, Congress enacted the *No Child Left Behind Act*, which, "injected competition and market forces into our public schools in ways that might have seemed impossible half a dozen years ago"[6] and in 2002, this Court upheld a state law authorizing parents to assign tax dollars to another public school or to a private school upon their decision not to enroll their children in the schools of the public school district in which they reside. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). With competition between public and private schools increasing across the country, public school districts need clarification from this Court in order to fulfill their mission to efficiently and effectively educate the children entrusted to their care.

The reasonableness of Smith's conduct is also evident when one considers the particular circumstances of the local community. When Smith was hired, the community was suffering from racial tension caused by recent burnings of African-American churches.[7] Smith was recommended by the NAACP and hired, in part, for the specific purpose of

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[6] 147 Cong. Rec. S13322-03, S13336 (daily ed. Dec. 17, 2001) (Statement of Sen. Carper).

[7] Racial tensions have historically been an issue in this community. Until the late 1960s or early 1970s, the City of Greenville had a sign at its city limits which read "The Blackest Land, The Whitest People." DN 514 (Trial Transcript V.9, p.12); *see also* http://www.georgetownbookshop.com/georgetown/display2.asp?id=684 (Georgetown Book Shop).

easing racial tensions. In light of the racial tensions which existed in Greenville and the prominence of public school administrators in the community, it is certainly reasonable to think that Barrow's choice of a virtually all-white private school with an all-white faculty could be perceived as detrimental to easing racial tensions. V.62, pp.4835-36; DN 512 (Trial Transcript V.7, pp.231-32). Regardless of Barrow's subjective intention in sending her children to the Greenville Christian School, a patronage policy was a reasonable regulation of her rights in this situation.

Even though *Barrow III* recognized that "it is possible to argue that without a situation akin to that in [*Yoder*], only rational basis – and not strict scrutiny – should be applied," App. 17; it nevertheless concluded that *Barrow I* was "law of the case," and, therefore, it had to apply heightened scrutiny. App. 19. Regardless, the "law of the case cannot bind this Court in reviewing decisions below." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (citing *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 283-284 (1987)). "Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review." *Id.* at 817-818. Even if the law of the case doctrine was binding on the Fifth Circuit, it is not binding on this Court. This Court should grant Smith's petition in order to correct the conflict between *Barrow I* and *Yoder*.

II. THE FIFTH CIRCUIT DEPARTED FROM WELL-ESTABLISHED PRINCIPLES OF QUALIFIED IMMUNITY BECAUSE IT ADMITTED THAT THE LAW WAS NOT CLEAR, BUT STILL IMPOSED LIABILITY.

Barrow III departs from well-established principles of qualified immunity by admitting that the law was not clear, but nevertheless imposing liability. *Barrow III* inappropriately used the law of the case doctrine to bar Smith from raising the defense of qualified immunity, even though the facts found by the jury were materially different from the facts which were presumed at the time *Barrow I*, a qualified immunity appeal, was decided.

The Fifth Circuit denied Smith's entitlement to qualified immunity even though both the district court and the panel in *Barrow III* concluded that the law was not clearly established. This denial of qualified immunity in the face of judicial disagreement conflicts with this Court's pronouncement that "[i]f judges . . . disagree on a constitutional question, it is unfair to subject [governmental actors] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999).[8]

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[8] *See also Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267, 1274 (11th Cir. 2000); *Marsh v. Butler County*, 268 F.3d 1014, 1039 n.20 (11th Cir. 2001); *Key v. Grayson*, 179 F.3d 996, 1002 (6th Cir. 1999); *Kinney v. Weaver*, 367 F.3d 337, 398 (5th Cir. 2004) (en banc) (Jolly, J., dissenting) ("It seems disingenuous to hold that the law is *clearly* established when it takes 20,467 words to

(Continued on following page)

This case raises important questions regarding the proper application of the concept of "clearly established law." If judges disagree about the law, how can it be said that the law is "clearly established?" This case also raises important and fundamental questions regarding the current analytical framework of qualified immunity. This Court has often recognized, but never resolved, the problems associated with determining Constitutional questions in qualified immunity appeals. *See County of Sacramento v. Lewis*, 523 U.S. 833, 858-859 (1998); *Bunting v. Mellen*, 541 U.S. 1019, 1023-1024 (2004); *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004); *Morse*, 127 S. Ct. at 2641; *Scott v. Harris*, ___ U.S. ___, 127 S. Ct. 1769, 1774 n.4 (2007). This unresolved question concerns the relationship between a pre-trial determination of a Constitutional question in a qualified immunity appeal and the application of the law of the case doctrine. The Court should grant Smith's petition in order to resolve these two important issues.

A. What Constitutes "Clearly Established Law?"

Under this Court's current analytical framework for qualified immunity, lower courts are required first to resolve the following threshold question: Taken in the light most favorable to the party asserting the

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explain, and when six United States Court of Appeals judges sharply disagree about it.").

injury, do the facts alleged show that the public official's conduct violated a constitutional right? *Scott*, 127 S. Ct. at 1774 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). "If, and only if, the court finds a violation of a constitutional right, 'the next, sequential step is to ask whether the right was clearly established.'" *Scott*, 127 S. Ct. at 1774. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201.

The "clearly established" standard is "the adaptation of the fair warning standard to give officials ... the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *United States v. Lanier*, 520 U.S. 259, 270-71 (1997). The Fifth Circuit departed from the well-established standards of qualified immunity by imposing liability, including punitive damages, on Smith despite implicitly holding that the law was not clearly established.

In 1998, when Barrow was denied the promotion, the boundaries of the Fourteenth Amendment parental right were unclear and numerous courts of appeals, including the Fifth Circuit, had held that claims involving the parental right to direct the education of one's children were subject to reasonable regulation. *See, e.g., Brown*, 68 F.3d at 533; *Immediato*, 73 F.3d at 461; *Herndon*, 89 F.3d at 179; *Kite*, 661 F.2d at 1029; *Goff*, 92 F.3d at 423; *Murphy*, 852 F.2d at 1043-44; *Swanson*, 135 F.3d at 698-700. Numerous decisions applied rational basis scrutiny to

parental rights claims in light of this Court's consistent use of the rational basis standard in parental rights cases. *Meyer*, 262 U.S. at 399-400; *Pierce*, 268 U.S. at 535; *Yoder*, 406 U.S. at 233; *Runyon*, 427 U.S. at 177-179; *Church of Lukumi Babalu Aye*, 508 U.S. at 567 n.4 (Souter, J., concurring).

In February of 2002, the district court granted Smith summary judgment, finding that he was entitled to qualified immunity because the law was not clearly established, there was a rational basis for his conduct and his conduct was objectively reasonable. App. 310-332. Despite all of the uncertainty in the law and despite the conclusion of the district court that Smith's conduct did not violate clearly established law, that he had a rational basis for his conduct and that his conduct was objectively reasonable, *Barrow I* concluded that no reasonable official could conclude that Smith's actions were constitutional.

Two years *after* Smith's decision, Justice Souter noted in *Troxel* that this Court had not yet clearly described the boundaries of parental rights. *Troxel*, 530 U.S. at 78 (Souter, J., concurring) ("Our cases ... have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child."). Justice Kennedy in his dissent in *Troxel* cautioned that, although parental rights exist in "broad formulation," the courts should use "considerable restraint ... as they seek to give further and precise definition to the right." *Id.* at 95. Justice Thomas, in his concurrence, noted that although the

plurality opinions in *Troxel* recognized parental rights, none of the justices had articulated the appropriate level of scrutiny. *Id.* at 80.

In 2003, five years *after* Smith's decision, the Seventh and the Third Circuits recognized the uncertainty which surrounded parental rights claims. *Doe*, 327 F.3d at 520 ("[A]fter *Troxel*, it is not entirely clear what level of scrutiny is to be applied"); *McCurdy v. Dodd*, 352 F.3d 820, 825 (3d Cir. 2003) ("in § 1983 cases grounded on alleged parental liberty interests, we are venturing into the murky area of unenumerated constitutional rights.").

In 2005, seven years *after* Smith's decision, the Third Circuit noted that although this Court had never been called upon to define the precise boundaries of a parent's right to control a child's upbringing and education, it was clear that the right was neither absolute nor unqualified. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005).

The "rigid order of battle" requirement of *Saucier* has resulted in lower courts deciding constitutional issues in overly broad terms. *See Brosseau*, 543 U.S. 194. As this Court noted in *Scott* that "[t]here has been doubt expressed regarding the wisdom of *Saucier*'s decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward." *Scott*,

127 S. Ct. at 1774 n.4.[9] *Barrow I*, for example, addressed the issue so broadly that it did not even tell the parties where the right came from or what level of scrutiny was applicable to the claim. All that *Barrow I* said was that the law was "clearly established."

In light of the uncertainty that exists in the area of parental rights, it is hard to understand how the Fifth Circuit could have concluded that the law was clearly established unless the concept of "clearly established law" had lost all its meaning. This Court should grant Smith's petition to bring clarity to the concept of clearly established law.

The problem of the overly broad definition of rights in *Barrow I* was compounded in *Barrow III* by the Fifth Circuit's use of the doctrine of law of the case. The application of law of the case is particularly troubling in a case such as this which involves the difficult framework of qualified immunity, which has been criticized by this Court.

B. The Problem of the Law of the Case Doctrine as Applied to Qualified Immunity Appeals.

Barrow III applied the law of the case doctrine so as to preclude Smith from asserting the defense of

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[9] *See also Lewis*, 523 U.S. at 858-859; *Bunting*, 541 U.S. at 1019, 1023-1025; *Brosseau*, 543 U.S. at 198 n.3 and 201-202; *Scott*, 127 S. Ct. at 1774 n.4; *Morse*, 127 S. Ct. at 2641.

qualified immunity, when the law of the case was based on facts which were presumed prior to trial and the superintendent's qualified immunity defense was based on the actual facts which were found at trial. The improper application of law of the case is underscored by a brief review of the procedural history of the case.

Barrow brought suit against Smith and GISD alleging that in 1998 they had refused to promote her to an administrative position because she enrolled her children in a private religious school. App. 3-4. Barrow claimed that this decision violated her First Amendment free exercise rights and her Fourteenth Amendment parental rights. App. 274-275.

The district court granted Smith summary judgment, finding that he was entitled to qualified immunity because the law was not clearly established and because his conduct was objectively reasonable. App. 4. In *Barrow I*, the Fifth Circuit reversed the grant of summary judgment and remanded the case to the district court for further proceedings. App. 280. *Barrow I* specifically refused to decide whether the right claimed by Barrow was "grounded in the First Amendment, the Fourteenth Amendment, or both." App. 275.

At trial, Barrow asserted two claims against Smith – a religious rights claim and a parental rights claim. App. 4-5. The jury rejected Barrow's religious rights claim, but found in her favor on her parental rights claim. *Id.* Smith argued in post-trial motions

and on appeal that because Barrow lost on her religious rights claim, Smith was entitled to qualified immunity because: (1) parental rights claims, when unconnected to a religious rights claim, are entitled to rational basis scrutiny; and (2) assuming that heightened scrutiny applies, it was not clearly established that heightened scrutiny applied to parental rights claims when those claims are unconnected to a religious rights claim. App. 5-6.

Barrow III acknowledged that parental rights claims, when unconnected to a religious rights claim, might be subject to rational basis scrutiny.

> [W]e acknowledge that it is possible to argue that without a situation akin to that in *Wisconsin v. Yoder*, ... only rational basis – and not strict scrutiny – should be applied in evaluating a state action that imposes requirements on parental decisions regarding education.... *Yoder* arguably supports Smith's contention that heightened scrutiny is appropriate only where the state action also adversely affects free exercise of religion, which the jury verdict in this case makes clear is no longer at issue.

App. 17. This acknowledgement by the Fifth Circuit is important, particularly when one considers it within the context of the current analytical framework for qualified immunity. *See Saucier,* 533 U.S. 194.

Under the *Saucier* framework, the first question is whether the public official's conduct violated a

constitutional right while the second question is whether the right was clearly established in light of the specific context of the case. *Barrow III* admitted that since no religious claim exists in the case, the appropriate standard of review might be rational basis. By admitting that rational basis scrutiny might be the appropriate standard, *Barrow III* admitted that Smith's decision arguably did not violate Barrow's constitutional rights at all much less violate her clearly established constitutional rights. Given the fact that *Barrow III* admitted that rational basis scrutiny is arguably the appropriate standard and given the fact that the district court originally concluded that there was a rational basis for Smith's conduct, it seems ironic that *Barrow III* held that Smith should be made to pay to Barrow actual damages, punitive damages and an enormous amount of attorney fees (over $640,000). How can *Barrow III* admit, on the one hand, that there arguably has been no constitutional violation at all while, on the other hand, affirm that Smith's conduct violated clearly established constitutional law? The answer *Barrow III* gives is "law of the case." App. 19.

Barrow III's invocation of "law of the case" is improper. *Barrow III* held, in essence, that although it was concerned that *Barrow I* was wrongly decided and may conflict with *Yoder*, it could not do anything to rectify the conflict. The admission in *Barrow III* that there may be a conflict between *Barrow I* and *Yoder* highlights the need for granting Smith's petition.

"The law of the case doctrine presumes a hearing on the merits." *United States v. Hatter*, 532 U.S. 557, 566 (2001). The doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not [to limit] their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). It is "understandably crafted with the course of ordinary litigation in mind" and while it "directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618-19 (1983). The doctrine does not apply if the prior decision "is clearly erroneous and would work a manifest injustice." *Id.* at 618 n.8; *Agostini v. Felton*, 521 U.S. 203, 236 (1997). One basis for finding that adherence to the prior decision would work a manifest injustice is that the erroneous prior decision affects the validity of the plaintiff's claim. *Id.* at 236.

Barrow III should not have applied the law of the case doctrine because: (1) there was no hearing on the merits in *Barrow I* regarding a parental rights claim unconnected to a free exercise claim; (2) *Barrow I* and *Barrow III* are clearly erroneous because they deviate from this Court's precedents which apply rational basis scrutiny to parental rights claims; and (3) adherence to the prior decision (*Barrow I*) would work a manifest injustice because establishing a heightened level of scrutiny is determinative of whether Barrow's claim is successful. If *Barrow III* had applied rational basis scrutiny instead of following *Barrow I*, Smith would have prevailed because Smith's conduct clearly meets the rational basis test.

Barrow III should have followed this Court's precedents and not applied the law of the case doctrine to perpetuate the erroneous standard announced in *Barrow I*.[10]

The procedural history of this case underscores a fundamental problem associated with the current analytical framework of qualified immunity, namely, how the court should treat preliminary constitutional determinations made on the basis of presumed facts when it is later determined by the jury that the actual facts are materially different from the presumed facts.

In light of *Barrow III*'s admission that the law was not clearly established and its erroneous application of the doctrine of law of the case to prevent Smith from urging his defense of qualified immunity, this Court should grant Smith's petition in order to clarify the meaning and proper application of "clearly established law" and to establish the proper relationship between a pre-trial determination of a Constitutional question in a qualified immunity appeal and the application of the law of the case doctrine.

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[10] This Court is not bound by the law of the case. *Christianson*, 486 U.S. at 817.

III. THE DECISION BELOW APPLIES THE WRONG LEGAL STANDARD FOR AWARDING ATTORNEY'S FEES AND FOR ANALYZING RULE 68 OFFERS OF JUDGMENT, THUS THWARTING RULE 68's PURPOSE OF ENCOURAGING SETTLEMENT.

The Court should grant Smith's petition in order to address three important and interrelated legal issues regarding attorney's fees and offers of judgment. The first issue concerns the district court's conclusion that it was prohibited from reducing Barrow's fee award for time spent pursuing unreasonable and unsuccessful motions.

The second issue concerns the district court's error in shifting the burden of proof regarding attorney's fees. The district court erroneously awarded attorney's fees to Barrow's counsel even though the court's factual findings established that Barrow had not met her burden of proof. The district court's error regarding these two legal issues directly affected the issue of whether Smith's Rule 68 offer of judgment was effective.

The final issue concerns the district court's erroneous decision to disregard its own factual findings so as to thwart the effectiveness of Smith's Rule 68 offer of judgment. The district court initially concluded that Smith's offer of judgment was, according to its own calculations, effective. The district court then erroneously shifted the burden of proof to Smith and denied Smith the benefit of his effective offer of judgment. This Court should grant Smith's

petition in order to clarify the appropriate legal standard to apply to these issues relating to attorney's fees and Rule 68 offers of judgment so as to further the important public policy of ensuring the just, speedy and inexpensive resolution of civil disputes. *See* 28 U.S.C. § 471.

This case could have and should have been settled long ago. In a case in which her actual damages were $15,455, Barrow could have early on accepted Smith's offers of judgment and been made whole. Instead, she decided to litigate. The costs to the parties and to the judicial system have been enormous. By granting Smith's petition, this Court can clarify the law in such a way as to ensure the just, speedy and inexpensive resolution of future civil disputes.

A. Barrow Was Awarded Fees for Unreasonable Activities.

The lower court erred when it concluded that it could not reduce Barrow's award of attorney's fees for the time her lawyers spent pursuing unreasonable and unsuccessful motions, but could only reduce the award based on unsuccessful claims.

The lower court's ruling is erroneous because it encourages plaintiffs to engage in wasteful litigation tactics, particularly where an award of attorney's fees for those wasteful activities has a direct impact on whether an offer of judgment is effective. The Fifth Circuit compounded the lower court's legal error by

applying the wrong standard of review. The legal issue – whether a district court has the authority to reduce an award of attorney's fees for time spent on unreasonable and unsuccessful motions – should have been reviewed de novo. Instead, the Fifth Circuit applied the erroneous and deferential abuse of discretion standard.

Section 1988 permits district courts to award prevailing parties a *"reasonable attorney's fee."* 42 U.S.C. § 1988 (emphasis added). The fee applicant bears the burden of establishing entitlement to a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In *Hensley*, this Court addressed a district court's discretion to award or reduce attorney's fees when the plaintiff has had partial or limited success on his or her claims. *Id.* at 436. This case raises the question of whether district courts have discretion to reduce attorney's fees for time spent on unreasonable and unsuccessful motions. The district court held that it was not allowed to reduce a fee award for time spent on unreasonable and unsuccessful motions, but only on unsuccessful claims. App. 67-68.

In a pre-trial review of the Barrow's fee request, Judge Sanders concluded that Barrow's counsel filed numerous irrelevant and unsuccessful motions which took up most of the court's docket sheet and had done nothing to further Barrow's claims. App. 253-254. Judge Sanders concluded that Barrow's counsel should not be awarded fees for fifteen irrelevant and unsuccessful motions. *Id.* The district court did not disturb Judge Sanders' factual findings, but erroneously concluded

that it was required by *Hensley* to award fees for time spent on irrelevant and unsuccessful motions.

The Fifth Circuit's approval of the district court's legal conclusion creates a split among the United States Courts of Appeals on an important issue in civil rights litigation that has not been, but should be decided by this Court. Section 1988 only permits the awarding of fees for time "reasonably expended on the litigation." *Hensley*, 461 U.S. at 433. Numerous Courts of Appeals and district courts have reduced or approved of the reduction of attorney's fees for specific tasks based on the reasonableness of the activity. *See, e.g., Hotel & Rest. Employers Local 25 v. JPR, Inc.*, 136 F.3d 794, 800 (D.C. Cir. 1998); *Luciano v. Olsten Corp.*, 109 F.3d 111, 117 (2d Cir. 1997); *Sands v. Runyon*, 28 F.3d 1323, 1333 (2d Cir. 1994); *Jacobs v. Mancuso*, 825 F.2d 559, 561-62 (1st Cir. 1987); *United States v. Metro. Dist. Comm'n*, 847 F.2d 12, 16 (1st Cir. 1988).

The district court's holding that, as a matter of law, it could not reduce an award of attorney's fees for time spent on unreasonable and unsuccessful motions creates a perverse incentive for plaintiffs' attorneys to engage in wasteful litigation tactics. This Court should grant Smith's petition for writ of certiorari in order to correct this erroneous decision.

B. Barrow Did Not Meet Her Burden of Proof on Her Fee Request.

The district court found that the scale of the errors in the fee records "calls into question the accuracy of Barrow's entire fee application and its ability to rely on the accuracy of the records is materially compromised." App. 65. Judge Sanders concluded that Barrow's fee application "shocked the conscience of the court" and should be denied entirely. App. 248-251. Judge Lindsay also found that fee applications submitted by Barrow's attorney were "exorbitant." App. 249-250.

Despite the findings of three separate judges, all of which call into serious question the validity and reliability of Barrow's attorney fee records, the district court awarded Barrow fees which totaled more than forty-one times the amount of Barrow's actual damages.

The burden of proving entitlement to fees under Section 1988 is on the fee applicant. *Hensley*, 461 U.S. at 437; *see also id.* at 441 (Burger, C.J., concurring) (prevailing parties must provide more evidence that a client might need because there is no relationship of trust and confidence between adversaries); *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1210 (10th Cir. 1986) ("It remains counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero."); *United Slate, Tile & Composition v. G&M Roofing*, 732 F.2d 495, 502 n.2 (6th Cir. 1984).

Barrow did not meet her burden of proof in seeking attorney's fees. The Fifth Circuit's failure to correct the error of the district court encourages plaintiffs' attorneys to keep inaccurate, insufficient, misleading and potentially fraudulent billing records and merely face a percentage reduction of their overall exorbitant request. "Congress did not intend to foster such gamesmanship when it enacted the Civil Rights Attorney's Fees Award Act of 1976." *Fair Housing Council v. Landow*, 999 F.2d 92, 98 (4th Cir. 1993).

Judge Sanders found Barrow's fee application was the most unreasonable application he had reviewed in 25 years on the district bench; that it was "so excessive that it shocks the conscience of the Court"; that the billing records were unreliable and difficult to analyze because of excessive block-billing;[11] and that certain alterations in the billing records raised concerns of "purposeful concealment." App. 257-258.[12]

Judge Fitzwater found that Barrow's counsel's block-billing was so excessive that it prevented the trial court from adequately assessing the reasonableness of

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[11] *See* App. 242, 249-250, 254-258.

[12] Judge Sanders also found that Bundren sought fees for hours that were unproductive, excessive and unnecessary. App. 256. Judge Sanders noted that Bundren should have been aware of the excessiveness of his fee requests because of Judge Lindsay's prior findings in *Williams v. Kaufman County*. App. 249-250.

the fee request.[13] He also found that there were numerous unexplained errors in the billing records and that the scale of the errors in the records called into question the accuracy of Barrow's entire fee application and "*its ability to rely on the accuracy of the records is materially compromised.*" App. 65 (emphasis added). Judge Fitzwater noted that if Barrow's lawyer actually worked the hours his records reflect then he worked *an inhuman number of hours*. App. 62.

The Fifth Circuit ignored the factual findings of Judges Fitzwater, Sanders and Lindsay when it affirmed the award of attorney's fees. Considering the factual findings by these three district court judges, Barrow did not meet her burden of proof in regard to attorney's fees. Barrow's fee application gives every indication that her attorney "intended to submit an outrageously excessive fee petition in the hope that the district court would at least award some, preferably high, percentage of the requested fees." *Landow*, 999 F.2d at 98.

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[13] App. 51-54, 70, 72, 74, 77, 79 ("cannot accurately determine"; "the court cannot determine, *inter alia*, the reasonableness of the time"; "make it impossible to know"; "impossible to conduct meaningful review"; "prevents the court from determining"; "impossible due to [...] block billing"; "precludes an exact determination").

C. The District Court Departed From Well-Established Principles of Law in Analyzing Smith's Offer of Judgment.

Despite finding that Smith's offer of judgment exceeded Barrow's recovery, the district court improperly shifted the burden of proof away from Barrow and onto Smith in order to avoid the application of Rule 68. The district court's analysis violates the specific terms of Rule 68 as well as the policies that underlie it. No other court has analyzed Rule 68 in this manner. The district court's decision and the Fifth Circuit's approval of that decision undermine the purpose of Rule 68 and radically depart from the usual course of judicial proceedings.

"Rule 68 provides that if a timely pretrial offer of settlement is not accepted and 'the judgment finally obtained by the offeree is not more favorable than the offer, the offerree must pay the costs incurred after the making of the offer." *Marek v. Chesny*, 473 U.S. 1, 5 (1985). "The plain purpose of Rule 68 is to encourage settlement and avoid litigation." *Id.* Rule 68 "expresses a clear policy of favoring settlement of all lawsuits." *Id.* at 10.

At a very early state of the case, Smith made an offer of judgment in the amount of $100,000. App. 97. When the district court compared Smith's $100,000 offer of judgment with Barrow's total recovery (jury award plus attorney's fees and costs as of the date of the offer of judgment), *the trial court found that Barrow fell "$6,287.56 short of the $100,000 threshold."*

App. 98 n.30 (emphasis added).[14] Despite finding that Barrow's total recovery did not meet or exceed Smith's offer of judgment, the district court chose not to apply Rule 68 based on irrelevant and erroneous considerations. The district court's approach undermines the purpose of Rule 68.

The district court refused to apply the strict terms of Rule 68 because of problems with the records submitted by Barrow's attorneys. The district court disregarded its own calculations and concluded that "it should not apply the percentage cuts according to a methodology that would trigger the preclusive effect of Rule 68." App. 98. Since the burden of proof regarding attorney's fees is on the fee applicant, it was clearly wrong for the district court to make an exception to Rule 68 based on the problems with Barrow's attorney's records.

The district court's erroneous application of Rule 68 was based on flawed considerations. First, the district court declined to apply its percentage cuts to the pre-offer portion of the fee application because its reductions were "rough percentages." App. 99. The reason its reductions were rough percentages was because of the pervasive flaws and errors in Barrow's fee application. By giving Barrow's counsel the benefit

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[14] Barrow's total recovery as of the date of the offer of judgment is actually less because the district court used an incorrect calculation for prejudgment interest. Using the correct prejudgment interest, *Barrow was actually $8,886.68 short of the $100,000 threshold.*

of the doubt, the district court improperly shifted the burden of proof away from Barrow and onto Smith.

Next, the district court used the wrong rates for analyzing the offer of judgment. Barrow's attorneys sought fees for work as far back as 1998. The offer of judgment was made in 2001. The district court analyzed the offer using 2005 rates. App. 98. Rule 68 cannot effectively encourage settlement if, when determining the effectiveness of the offer, attorney's fees are calculated based on post-offer rates. Just as this Court has recognized that post-offer costs should not be included when calculating the effectiveness of the offer, post-offer rates for the attorney's fees should not be used. *See Marek*, 473 U.S. at 7.

Finally, the district court provided "credits" to Barrow for time that Barrow did not claim in her fee application. The district court reasoned that it would not have cut all of the time unclaimed by Barrow's attorneys and, thus, it would be inequitable to apply Rule 68. App. 99-100. The district court's analysis is flawed for two reasons: First, the district court cannot award Barrow for time she does not claim in her fee application. The burden of proof is on Barrow to prove her entitlement to fees, not on Smith to disprove her entitlement to fees she did not claim. Second, the reason Barrow eliminated much of this unclaimed time from her fee application is because Smith presented evidence that the claimed hours appeared to be fraudulent. As Judge Sanders noted, the records raised concerns of "purposeful concealment." App. 257-258. The district court should not have rewarded

Barrow for withdrawing claims which appear to have been improper.

The district court's analysis effectively shifted the burden of proof and gave the benefit of the doubt to Barrow. Counsel for Smith has searched opinions from every circuit and have not found a single case analyzed in this manner. The district court's analysis is based on the issuance of improper "credits" and a disregard of the fact that the fee applicant (Barrow) is the one who must shoulder the burden of proof regarding fees. This Court should grant Smith's petition for writ of certiorari in order to uphold the effectiveness of Rule 68 and in order to encourage the just, speedy and inexpensive resolution of civil disputes.

CONCLUSION

The petition for writ of certiorari should be granted.

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