No. _____

In the Supreme Court of the United States

PATRICIA L. CARUSO, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS

Petitioners,

v

MICHELLE BAZZETTA, et al

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff in a 42 U.S.C. § 1983 action may retain disputed interim attorney fees awarded during the pendency of the litigation when the plaintiff – having lost on all claims in a merits decision by this Court – is plainly not a "prevailing party" under 42 U.S.C. § 1988(b)?

PARTIES TO THE PROCEEDING

Petitioners are the Michigan Department of Corrections (MDOC) and the Director of the Michigan Department of Corrections and its Director, Patricia L. Caruso, who is automatically substituted as a party in place of the former Director, Kenneth McGinnis, pursuant to S. Ct. R. 35.3.

Respondents include eleven class representatives on behalf of themselves and all others similarly situated, including all inmates incarcerated by MDOC and non-incarcerated potential visitors of MDOC inmates. The eleven representative plaintiffs are Michelle Bazzetta, Stacey Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Branaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton, and Arturo Bunton, through his next friend, Valerie Bunton.

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The unpublished opinion of the United States Court of Appeals for the Sixth Circuit was entered on August 28, 2008.[1] The Court of Appeals affirmed the order and judgment of the United States District Court for the Eastern District of Michigan entered on November 20, 2006, which dismissed the case with prejudice. But the Court of Appeals denied Petitioners' motion to vacate an earlier order awarding interim attorney fees to Respondents.[2] The Court of Appeals denied Petitioners' Motion Rehearing and Suggestion for Rehearing En Banc in an unpublished order entered on December 11, 2008.[3]

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] *Bazzetta v. McGinnis*, (unpublished opinion, 6th Cir. Nos. 06-2643/2644, August 28, 2008; Pet. App. 1a-9a.)

[2] *Bazzetta v. McGinnis*, (unpublished order, ED Mich No. 95-73540, November 20, 2006; Pet. App. 10a-14a.) That order denied Petitioners' request to vacate a June 27, 2002, order for payment of interim attorney fees, Pet. App. 10a-14a; and granted Petitioners' request to vacate an August 19, 2002 order granting Respondents' attorney fees, Pet. App. 10a-14a. On that same day, the District Court entered a judgment dismissing the case with prejudice. *Bazzetta v. McGinnis* (E.D. Mich. No. 95-73540, November 20, 2006; Pet. App. 151a.)

[3] *Bazzetta v. McGinnis*, (unpublished order denying rehearing (6th Cir. Nos. 06-2643/2644, December 11, 2008; Pet. App. 15a-16a.)

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, 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.

STATEMENT OF THE CASE

1. This Court's decision on the Merits

This is a fourteen-year-old controversy brought by Respondent incarcerated felons and their visitors against Petitioners challenging prison visitation restrictions. Respondents initially achieved some injunctive relief from the District Court and the Court of Appeals,[4] but

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[4] *Bazzetta v. McGinnis,* 286 F.3d 311 (6th Cir. 2002).

ultimately lost on every claim. In *Overton v. Bazzetta*, this Court unanimously reversed the Court of Appeals and held that the challenged prison visitation restrictions did not violate the First, Eighth or Fourteenth Amendments to the United States Constitution.[5] After further proceedings in the District Court and the Court of Appeals, a judgment dismissing the case with prejudice was entered on November 20, 2006.[6] Respondents did not appeal the dismissal of their case with prejudice. Thus, the end result is that, Respondents lost on every claim, on the merits.

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[5] *Overton v. Bazzetta*, 539 U.S. 126 (2003). Rather than repeat the lengthy and complex procedural history in this case, Petitioner MDOC relies on the factual and procedural background set forth in *Overton, supra.*

[6] In response to this Court's unanimous decision on August 28, 2003, the Court of Appeals vacated its decision affirming the District Court's April 19, 2001 findings of fact and conclusions of law, *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001), and remanded the case back to the District Court for further consideration in light of this Court's opinion. Pet.App. 59a-60a. Despite this Court's unanimous decision in Overton on December 23, 2003, the District Court issued an opinion and order agreeing with Plaintiffs' claim that MDOC's visitation restriction for inmates found guilty of substance abuse misconduct violated the procedural Due Process Clause of the Fourteenth Amendment, and held that it was still valid. Pet. App. 102a-118a. Petitioners appealed and, the Court of Appeals reversed, *Bazzetta v. McGinnis*, 423 F.3d 557 (6th Cir. 2005). On November 28, 2005, the Court of Appeals issued an amended opinion, *Bazzetta v McGinnis*, 430 F.3d 795 (6th Cir. 2005), clarifying that *Overton* foreclosed Respondents' procedural due process claim. Respondents' petition for writ of certiorari was denied by this Court on October 10, 2006. Pet. App. 137a. After this Court denied certiorari on October 31, 2006, Petitioner filed in the District Court a motion for entry of judgment on the basis that all of the claims at issue in Respondents' third amended complaint had been decided in favor of Petitioners. On November 20, 2006, the District Court granted Petitioners' motion for entry of judgment, and on that same day the District Court issued a judgment dismissing the case with prejudice; Pet. App. 151a.

2. Proceedings on the Interim Attorney Fees

During the pendency of the litigation—after the Court of Appeals opinion in 2002 but before this Court ultimately granted certiorari and unanimously reversed in 2003—the District Court, over Petitioners' objection, granted interim attorney fees to Respondents' counsel and ordered immediate payment.

The sole issue presented in this petition is whether Respondents are entitled to retain such attorneys fess when they are not prevailing parties under 42 U.S.C. § 1988(b).

Respondents were not prevailing parties under 42 U.S.C. § 1988(b) so Petitioners timely, properly, and repeatedly objected to any award of attorney fees. Before this Court granted the initial Petition for Certiorari, they disputed the factual basis of certain fees claimed by Respondents' counsel, but did not dispute the reasonableness of some other calculations of hourly rates and time spent, as submitted by Respondents' counsel. On June 27, 2002, the District Court ordered Petitioners to make immediate payment of the "interim" amount of $223,991.92 plus interest—the amount of hours and rates that Petitioners did not dispute: "Defendants shall make the following payments. . . within fourteen (14) days of this order."[7] Pursuant to that order Petitioners paid $224,036.92.

Three weeks later, on August 19, 2002, the District Court held that Respondents were prevailing parties and awarded additional attorneys' fees of

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[7] *Bazzetta v. McGinnis*, (unpublished order, E.D.Mich. No. 95-73540, June 27, 2002, order for payment of interim attorney fees; Pet.App. 35a-36a.)

$570,167.35, plus interest.[8] The court, however, did not order immediate payment of that amount and, accordingly, Petitioners did not pay these additional attorney fees. Subsequently, after the merits of all claims had been finally resolved against Respondents, the District Court entered an order vacating the second award, but denied Petitioners' request to vacate the award of interim fees that had already been paid.[9]

On appeal, the Court of Appeals declined to determine whether Respondents were a prevailing party under 42 U.S.C. § 1988(b), but nevertheless affirmed the District Court decision, unpublished opinion p. 7, Pet.App. 1a-9a:

> We make no statement about whether Plaintiffs are a prevailing party with respect to the interim fee award. Rather, we hold only that the district court did not abuse its discretion under § 1988 by refusing to vacate a previously granted award of attorney's fees to which Defendants not only failed to object, but agreed were "not in dispute," and which Defendants paid. [10]

The Court of Appeals committed reversible legal error in reviewing for abuse of discretion instead of determining the prevailing party issue as a matter of

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[8] *Bazzetta v. McGinnis*, (unpublished order, E.D. Mich. No. 95-73540, August 19, 2002, order granting plaintiffs' motion for attorney fees, pp. 14-15, 21; Pet.App. 37a-58a.)

[9] *Bazzetta v. McGinnis*, (unpublished order, E.D. Mich. No. 95-73540, November 20, 2006; Pet.App. 10a-14a.)

[10] *Bazzetta v. McGinnis*, (unpublished opinion 6th Cir. Nos. 06-2643/2644, August 28, 2008; Pet.App. 1a-9a.)

law, and it was simply wrong on the facts in concluding that Petitioners "failed to object" and did not dispute the award of interim attorney fees.[11]

REASONS FOR GRANTING THE PETITION

42 U.S.C. § 1988(b) gives the court discretion to allow a "reasonable attorney's fee" to a "prevailing party." In this case, there has been a dispositive adjudication of the merits in Petitioners' favor after almost 14 years of vigorous litigation, and the parties who brought the lawsuit lost on every claim. Nevertheless, the Court of Appeals has permitted these non-prevailing parties to retain almost one quarter of a million dollars in attorneys' fees. That result is contrary to the text of 42 U.S.C. § 1988(b), the intent of Congress, and decisions of this Court and other circuits. If allowed to stand, the Court of Appeals decision below will encourage the litigation of dubious claims in the hope of generating interim fee awards regardless of whether the party ultimately prevails. Of equal concern is that the Court of Appeals decision has the untoward effect of promoting, rather than discouraging, piecemeal appeals – since a party who does not immediately appeal an interim order awarding attorneys fees does so at their own peril.

I. Respondents are not entitled to any attorney fees because they are not prevailing parties as a matter of law.

The general American Rule is that a prevailing party is not entitled to collect attorneys' fees from the

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[11] The Court of Appeals denied Respondent's motion for rehearing with suggestion for rehearing en banc. *Bazzetta v. McGinnis,* (unpublished order denying rehearing, 6th Cir. Nos. 06-2643/2644, December 11, 2008; Pet.App. 15a-16a.)

loser. In 42 U.S.C. § 1988(b), Congress modified that rule for certain types of civil rights actions, including the present litigation, and has authorized federal district courts to award a "reasonable attorney's fee" to a "prevailing party" in certain circumstances. But the irreducible minimum requirement for this statutory fee is that there must have been a "material alteration of the legal relationship of the parties"[12] and the plaintiff must "receive at least some relief on the merits of his claim before he can be said to prevail."[13] Temporary relief during the course of the litigation is not sufficient.

If there was any doubt on this point, it was put to rest by this Court in *Sole v. Wyner*,: "[F]leeting success" by way of an injunction during trial does not "establish that [plaintiff] prevailed on the gravamen of her plea for injunctive relief."

> Prevailing party status, we hold, does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case.
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> * * *
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> Of controlling importance to our decision, the eventual ruling on the merits for defendants, after both sides considered the case fit for final adjudication, superseded the preliminary ruling. [Plaintiff's] temporary success rested on a premise that the District Court ultimately rejected. [14]

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[12] *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792-793 (1989).

[13] *Hewitt v. Helms*, 482 U.S. 755, 760 (1987).

[14] *Sole v. Wyner*, 551 U.S. 74; 127 S. Ct. 2188, 2196 (2007).

In 2002 – before the merits of the claims had been ultimately resolved by this Court in *Overton*, the District Court concluded that Respondents were prevailing parties and ordered Petitioners to immediately pay interim attorney fees. However, the Court of Appeals decision below was made after the merits had been fully resolved in Petitioners' favor, and after this Court's decision in *Sole v. Wyner*, which clarified the definition of "prevailing party." Thus, the Court of Appeals should have held that Respondents were not prevailing parties as a matter of law, and therefore, not entitled to collect attorney fess under 42 U.S.C. § 1988(b). Instead, the Court of Appeals failed to apply the law and determine whether Respondents were prevailing parties within the meaning of § 1988(b), and further compounded its error by misapprehending the record and characterizing the issue as a factual dispute.[15]

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[15] The United States Court of Appeals for the Sixth Circuit, like other circuits, has held that "prevailing party" status is a question of law. *Radvansky v. City of Olmstead*, 496 F.3d 609, 619 (6th Cir. 2007):

> A district court's determination of prevailing-party status for awards under attorney-fee-shifting statutes -- such as 42 U.S.C. § 1988 -- is a legal question that we review de novo. *See Bridgeport Music, Inc. v. London Music, U.K.*, No. 05-5045, 226 Fed. Appx. 491, 2007 U.S. App. LEXIS 7847, 2007 WL 930409, at *2 (6th Cir. Mar. 28, 2007) (citing *Bailey v. Mississippi*, 407 F.3d 684, 687 (5th Cir. 2005), for the proposition that after *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001), "every Circuit to address the issue has determined that the characterization of prevailing-party status for awards under fee-shifting statutes . . . is a legal question subject to de novo review"); *see also Sole v. Wyner*, 127 S. Ct. 2188, 2194-97, 167 L. Ed. 2d 1069 (2007) (reviewing de novo prevailing-party status without explicitly

The text of 42 U.S.C. § 1988(b) demonstrates Congress's intention that only a "prevailing party" is eligible to recover attorneys' fees. *Sole v. Wyner* plainly holds that a party who obtains injunctive relief during litigation, but ultimately loses on the merits, is not a prevailing party. Thus, as a matter of law, Respondents are not prevailing parties. Just as in *Sole v. Wyner*, Respondents' "initial victory was ephemeral"; they may have won a battle during the trial, but they ultimately lost all their claims on the merits so they lost the war.[16] Here, just as in *Sole*, the same result has occurred since at the end of the litigation the parties' legal relationship was unchanged:

> At the end of the fray, [Michigan's prison visitation regulations] remained intact, and [Respondent Bazzetta] had gained no enduring "chang[e] [in] the legal relationship" between herself and the state officials she sued. [17]

Although the Court of Appeals misapplied the law in its review of the interim attorney fee award, other Circuit Courts have faithfully applied *Sole* and reversed attorney fee awards when plaintiffs have lost the war on the merits of their case.[18] "We have previously stated that 'a judicial pronouncement that the defendant has violated the Constitution, without more, does not make a plaintiff a prevailing party.' . . . Because the final judgment resulted in a finding of no constitutional

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stating the standard of review); *Toms v. Taft*, 338 F.3d 519, 528-30 (6th Cir. 2003) (same).

[16] *Sole*, 127 S. Ct. at 2196.

[17] *Sole*, 127 S. Ct. at 2196.

[18] *See Zessar v. Keith*, 536 F.3d 788 (7th Cir. 2008); and *Advantage Media, LLC v. City of Hopkins*, 511 F.3d 833 (8th Cir. 2008).

violation as to [plaintiff], it would be wrong to find [plaintiff] a prevailing party."[19]

The effect of the erroneous Court of Appeals decision below extends beyond this case, as it will undoubtedly be freely cited to as persuasive authority supporting a plaintiff's claim to interim attorney fees. If a plaintiff succeeds on any interim aspect of its case, regardless of the ultimate result, such decisions will encourage a plaintiff to seek awards of interim attorney's fees, secure in the knowledge that the money will not have to be reimbursed even if it ultimately loses every claim on the merits. A defendant will then be forced to pursue interlocutory appeals in order to protect itself against later claims that it did not resist sufficiently.

If a plaintiff ultimately succeeds to some extent on the merits—i.e., if the legal relationship of the parties is changed after the merits have been resolved—then an interim attorney fee may be appropriate. But that simply is not the case here as Respondents have not prevailed on any issue.

II. Petitioners timely raised and preserved objection to the award of interim attorney fees.

The Court of Appeals committed legal error when it declined to determine whether Respondents were a prevailing party under 42 U.S.C. § 1988(b), but nevertheless affirmed the District Court decision, finding no abuse of discretion. It compounded that error when it mischaracterized the record and concluded that Petitioners "failed to object" and did not dispute the

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[19] *Advantage Media, LLC*, 511 F.3d at 838-839. *See also Center for Biological Diversity v. Marina Point Development Co*, 535 F.3d 1026 (9th Cir. 2008); and *Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226 (10th Cir. 2008).

award of interim attorney fees.[20] The record conclusively demonstrates that in this vigorously-contested case Petitioners timely, properly, and continuously challenged Respondents' entitlement to any attorney fee.

While Petitioners did not object to some of the calculations regarding the number of hours and reasonable rate for some elements of Respondents' claims, Petitioners challenged many of the assertions. Thus, although some parts of the factual calculations were undisputed, Petitioners' objection to any legal entitlement by Respondents to attorneys fees under 42 U.S.C. § 1988(b) was an unyielding constant.

After the Court of Appeals decision in Respondents' favor in 2002, but before this Court granted certiorari and ultimately reversed on the merits, it became clear that the District Court intended to make an award of interim attorney fees, payable immediately, for an amount as to which Petitioners did not dispute the *calculation* of the hourly rate and number of hours.

For example, during the course of a telephone conference discussing an upcoming hearing on disputed aspects of the fee request, the Court said:

> THE COURT: Well, it seems to me, Ms. Ward [counsel for Petitioners] . . . that the State should be ordered to pay an interim attorney fee. I mean, I'm thinking that that's appropriate anyway. Once you pay an interim attorney fee, I don't really care how long this drags out. [21]

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[20] *Bazzetta .v McGinnis*, (unpublished opinion, p. 7, 6th Cir. Nos. 06-2643/2644, August 28, 2008; Pet.App. 1a-9a.)

[21] Transcript of telephone conference, June 13, 2002, p. 7; Pet.App. 22a-28a.

Petitioners', now prophetic, concern was that because the litigation was ongoing, the State of Michigan would be unable to recover an award of interim attorney fees if the Petitioners ultimately prevailed on the merits. As early as August 6, 2001, Petitioners requested that the District Court stay any award for interim attorney fees, or place the money in escrow, because if Petitioners prevailed on appeal it would be difficult for them to get reimbursement for any attorneys fees awarded to Respondents.[22] Respondent, however, opposed placing the money in an escrow account. The court denied Petitioners' request to place interim attorney fees in an escrow account at a hearing on June 17, 2002 and ordered that the State make an immediate interim payment, pending final resolution of all disputed items:

> THE COURT: I'm going to make an interim award of attorney fees here, and I'd like to know, Ms. LaBelle [Respondents' counsel], what your position is with respect to the proposed escrow that the state has asked for.
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> MS LABELLE: You know, Your Honor, I would – I mean, we would oppose it.
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> * * *
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> MS. WARD [counsel for Petitioners]: Okay. First of all, I don't think we're talking about a grant or denial of cert two years down the road. The Supreme Court's pattern is to address this issue early in the fall. We are intending to file our cert

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[22] August 6, 2001 Defendants' motion and brief to hold in abeyance Plaintiffs' motion for attorney fees. Pet.App. 17a-20a.

petition and it is due July 10th and will be timely filed on or before that date. Second of all, the problem, Your Honor, is, first of all, there is no case support for the premise that if we go up on appeal, and if, as defendants have contended all along, there is no constitutional authority for this court, to make the awards that it has, to give the relief that it has, then plaintiffs are entitled to, to hang onto their attorney fees, and the problem is there's no assurances to the taxpayers of the State of Michigan that once they're awarded they're going to get money back. We're not asking for escrow forever, we're asking for escrow in the event that cert's denied, this will be a moot point by presumably fairly early in October. If cert is granted, then we can revisit this issue at that time.

THE COURT: Well, I think they're entitled to their attorney fees, to an interim attorney fee now, and if you want to seek a stay of my order, you know how to do that. I agree with you that there are amounts contested, but I am going to make an award, an interim award in the amount suggested by the state; that is, $223,991.92, payable within the next two weeks to the plaintiffs.

MS. WARD: Your Honor, you're denying our request for escrow by this?

THE COURT: I'm denying the request for escrow. And that's an interim order pending resolution of all of the outstanding

> issues with respect to the hourly rate, the recoverable costs, et cetera, and Ms. LaBelle, would you please prepare the order.[23]

Subsequently, on July 23, 2002, during another hearing on Respondents' motion for attorney fees, the District Court acknowledged that Petitioners' payment of interim attorney fees was involuntary and due to the District Court's order:

> MS. WARD: Secondly, I'd also like the record to reflect we've already sent attorney fees to counsel for a portion of the award.
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> THE COURT: Well, I ordered you to.
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> MS. WARD: Correct, we did it at this court's direction. Again, I've been requested to state for the record, in the event that the sur [sic; cert] petition is granted, we want to contemplate what's going to happen to those fees. We did it under court order, we were required to, it was involuntary.
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> THE COURT: All right, I'll consider the matter submitted.[24]

Although Petitioners made the interim payments as required by the District Court, they were under a court order to do so, and they could have been held in

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[23] Transcript of motion hearing, June 17, 2002, pp. 4-6; Pet.App. 22a-28a.

[24] Transcript of motion hearing, July 23, 2002, p. 71; Pet.App. 29a-34a.

contempt if they had not complied. But that award of interim attorney fees was not a final order appealable by right under 28 U.S.C. § 1291, and Petitioners' compliance with the order does not waive their right to later contest it by appealing the final judgment.[25]

The order that was entered on June 27, 2002, confirmed this interim award, "pending resolution of Plaintiffs' petition for fees and costs."[26] A subsequent order was entered on August 19, 2002, granting an additional attorney fee of $570,167.35, plus interest.[27] The Court did not order Petitioners to pay that additional amount immediately and, accordingly, Petitioners did not pay it. The Court subsequently vacated that portion of the fee award in the November 20, 2006, order.[28]

After this Court unanimously reversed the lower courts' rulings in this case, on November 4, 2003, Petitioners filed a second motion to place the attorney fees in escrow, which the District Court denied on December 23, 2003.[29] And after the Court of Appeals

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[25] *Weipking v. Prudential-Bache Securities Inc*, 940 F.2d 996, 999 (6th Cir. 1991). "One hesitates to contemplate the avalanche of motions for discretionary review that would burden the courts if parties were required to seek relief from clearly interlocutory orders or forfeit their right to appeal the matter when the litigation is concluded. *Id* at 1000.

[26] *Bazzetta v. McGinnis*, (unpublished order, E.D. Mich. No. 95-73540, June 27, 2002 order for payment of interim attorney fees; Pet.App. 35a-36a.)

[27] *Bazzetta v. McGinnis*, (unpublished order, E.D. Mich. No. 95-73540, August 19, 2002 order granting plaintiffs' motion for attorney fees, pp. 14-15, 21; Pet.App. 37a-58a.)

[28] *Bazzetta v. McGinnis*, (unpublished order, E.D. Mich. No. 95-73540, November 20, 2006; Pet.App. 151a.)

[29] *Bazzetta v. McGinnis*, (unpublished order E.D. Mich. No. 95-73540, December 23, 2003, Order denying motion to place attorney fees in escrow; Pet.App. 102a-118a.)

issued its decision on November 28, 2005,[30] Petitioners filed a third motion to place attorney fees in escrow on January 6, 2006, which the District Court denied on September 20, 2006.[31]

On appeal, the Court of Appeals erroneously found that Petitioners had "agreed" that the fees were "not in dispute," referring to the June 17, 2002 letter of Petitioners, which summarized the verbal ruling of the District Court. (Court of Appeals Opinion, Pet. App. 1a-9a) (June 17, 2002 letter; Pet. App. 68a). Contrary to this appellate finding of fact, at no time did Petitioners concede that Respondents were legally entitled to the interim attorney fees. Rather, what the letter was referring to was that the calculation and the amount of the interim fees were not in dispute, and that Petitioners were to comply with the District Court's order requiring payment. The Court of Appeals' finding of fact in this regard is patently wrong, for two reasons.

First, the June 17, 2002 letter itself conflicts with the Court of Appeals' finding. In that letter, Petitioners specifically asked that payment for the interim fees be escrowed "in the event Defendants prevail in their appeal to the Supreme Court" so that the "taxpayers of the State of Michigan are reimbursed for any attorneys fees and costs wrongly paid to Plaintiffs." (June 17, 2002 Letter; Pet. App. 68a). It makes no sense to find, as the Court of Appeals did, that Petitioners "agreed" that Respondents were legally entitled to interim attorneys fees, when in the same letter the Petitioners asked that

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[30] *Bazzetta v McGinnis*, 430 F.3d 795 (6th Cir. 2005), clarifying that *Overton* foreclosed Respondents' procedural due process claim.

[31] *Bazzetta v McGinnis*, (unpublished order E.D. Mich. No. 95-73540, September 20, 2006, order denying motion to place attorney fees in escrow; Pet. App. 136a.)

the fees be escrowed so Michigan's taxpayers could be reimbursed in the event that Petitioners prevailed.

Second, the Court of Appeals' finding is contradicted by Petitioners' actions throughout the history of this lawsuit. As the record forcefully demonstrates, this case has been vigorously contested by both parties. Under these circumstances, it was plainly unreasonable for the Court of Appeals to determine that the Petitioners, in their June 17, 2002 letter, were renouncing or waiving any future claim regarding the payment of these interim attorneys fees.

The record is clear: Petitioners timely, properly, and consistently opposed the award of any attorney fee. Because Respondents are not "prevailing parties," they are not entitled to any attorney fees under 42 U.S.C. § 1988(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Alternatively, this Court should grant the petition, vacate the decision below and remand the case to the Court of Appeals with instructions that it determine whether Respondents are "prevailing parties" under 42 U.S.C. § 1988(b), and, if not, it should enter an order directing Respondents to reimburse the award, with interest, to Petitioners.

Respectfully submitted

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