No. ___

IN THE

Supreme Court of the United States

ANDREW J. MILLER,

Petitioner,

v.

MIGUEL VILLEGAS, et al.,

Respondents.

On Petition for Writ of Certiorari to the Indiana Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff who successfully challenges a government policy on state administrative procedure grounds is entitled to attorney fees under 42 U.S.C. § 1988 without (1) prevailing on a federal claim, (2) achieving any relief, or (3) prevailing on a state claim that shields a federal claim from ever being adjudicated.

PARTIES TO THE PROCEEDINGS

Petitioner is Andrew J. Miller, Commissioner of the Indiana Bureau of Motor Vehicles.

Respondents are Miguel Villegas, Betty Doe, and Mary Smith[1], on their own behalves and on behalf of a class of those similarly situated.

[1] Pursuant to an order of the trial court, both "Betty Doe" and "Mary Smith" were permitted to proceed anonymously. App. 51A.

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PETITION FOR WRIT OF CERTIORARI

Andrew J. Miller, in his official capacity as Commissioner of the Indiana Bureau of Motor Vehicles, respectfully petitions the Court for a writ of certiorari to the Indiana Court of Appeals.

OPINIONS BELOW

This case comes to the Court after two trips up and down the Indiana judicial tree, the first concerning the merits, and the second concerning attorney fees. Beginning with the attorney-fees decisions, the denial of transfer by the Indiana Supreme Court is unpublished but is reprinted in the appendix at App. 1A. The opinion of the Indiana Court of Appeals—which, given the Indiana Supreme Court's denial of discretionary review, is the focus of this Petition—is reported as *Silverman v. Villegas*, 894 N.E.2d 249 (Ind. Ct. App. 2008), and is reprinted in the appendix at App. 3A. The trial court's decision awarding attorney fees is unpublished but printed at App. 35A.

The Indiana Supreme Court's merits-stage order disposing of the case as moot is reported as *Villegas v. Silverman*, 855 N.E.2d 1000 (Ind. 2006), and is reprinted in the appendix at App. 41A. The opinion of the Indiana Court of Appeals is reported as *Villegas v. Silverman*, 832 N.E.2d 598 (Ind. Ct. App. 2005), and is reprinted in the appendix at App. 43A. The trial court's original Findings of Fact, Conclusions of Law and Judgment are unpublished but are reprinted in the appendix at App. 69A.

JURISDICTION

The Indiana Court of Appeals ruled in favor of Respondent Miguel Villegas on his claim for attorney fees under 42 U.S.C. § 1988[2] on September 30, 2008. The Court of Appeals denied rehearing on December 3, 2008. The Indiana Supreme Court denied discretionary review on April 6, 2009. On June 30, 2009, Justice Stevens granted an extension of time to file the petition until August 6, 2009. The Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory and constitutional provisions, 42 U.S.C. § 1983, 42 U.S.C. § 1988, Indiana Code § 9-24-9-2, and U.S. Const. amend. XIV, are reprinted in the appendix at 105A.

STATEMENT

This case brings a novel application of 42 U.S.C. § 1988 before the Court where plaintiffs have been awarded Section 1988 fees without (1) prevailing on a federal rights claim, (2) achieving any relief, or (3) prevailing on a state claim that shields the federal rights claim from ever being adjudicated. And it does so in a case brought by illegal aliens seeking

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[2] Respondent Miguel Villegas proceeded in this case on his own behalf and on behalf of a class of those similarly situated. For ease of reference, this brief will refer to the entire Respondent class as "Villegas."

state identification to which they concede they have no right. The Court should take the case to address whether awarding Section 1988 fees to claimants under these circumstances is permissible simply because they happen to have alleged Section 1983 claims in the complaint.

1. On Friday, July 12, 2002, the Indiana Bureau of Motor Vehicles ("BMV") announced that, in order to prevent identity theft, it would on Monday July 15, 2002, begin implementing new identification requirements for driver's license, permit, and state identification card applicants. App. 44A. Previously, in order to obtain a license, permit, or state ID card, applicants were required to present proof of identity, which could be accomplished by providing a wide variety of documents either singly or in combination. App. 44A-45A. Each document was assigned a point value and an applicant's identity was satisfactorily proven when his or her documents totaled six points. App. 44A-45A.

Under the BMV's new July 15, 2002, policy, however, applicants were required not only to document their identities, but also provide valid Social Security numbers and, if necessary, immigration documents. App. 71A-74A. The BMV's new policy did away with the previous point system and instead required applicants to choose from a list of acceptable documents in each of four categories: (1) Social Security Verification; (2) Primary Documents; (3) Secondary Documents; and (4) Proof of Indiana Residency. App. 71A.

The BMV announced the change solely via publication and press conference, without following any of the state standards for promulgating administrative rules. App. 5A. At the same time, the BMV distributed, via publication and its website, a list of documents that applicants could use to satisfy the requirements for obtaining a license or ID card. App. 70A. No formal notice or public hearing took place. App. 70A.

2. In the wake of the BMV's announcement, Villegas, an illegal alien who wished to procure valid state identification but could not do so because of the new requirements, brought this lawsuit asking the Indiana courts to enjoin and declare invalid the BMV's new rule as "unconstitutional and unlawful." App. 81A-82A, 90A-91A, 94A. Villegas claimed that the BMV's rule violated state procedures for promulgating regulations, federal due process and equal protection rights, and the Supremacy Clause of the United States Constitution. App. 93A-94A.

In particular, Villegas protested the possibility that aliens currently *seeking* lawful status (*i.e.*, illegal aliens) were nonetheless unable to receive a license due to lack of required INS documentation. App. 98A-99A. However, Villegas was the only member of the plaintiff class who alleged that his status as a lawful citizen was currently pending before the INS at the time of his application. App. 90A-92A.

3. In the trial court it became clear that another barrier completely distinct from the BMV's new requirements precluded Villegas from obtaining a driver's license. Indiana Code Section 9-24-9-2 already required applicants for licenses and ID cards to provide proof of a valid Social Security number. As an illegal alien, Villegas lacked a Social Security number. App. 76A.

Villegas had not in his complaint challenged the validity of the statute requiring license or ID card applicants to have Social Security numbers. Accordingly, the trial court, recognizing the State's interest in preventing both identity theft and misuse of government machinery to hide illegal aliens, ruled that, without a valid Social Security number, Villegas was ineligible to receive a license or state ID cards, regardless of the new BMV rules. App. 79A. The judge further found that none of the plaintiffs had a Social Security card issued by the Social Security Administration, although at least one, Betty Doe, had previously submitted to an employer a Social Security number registered to two other persons. App. 76A-77A. Another plaintiff, Mary Smith, was counseled by her attorney not to state whether she had similarly given a social security number to an employer. App. 77A. Villegas himself was a suspended driver with a driving record under two different license numbers. App. 76A.

On this record, unsurprisingly, the trial court concluded that Villegas lacked standing to challenge

the BMV rule on either statutory or constitutional grounds and dismissed the case. App. 79A-80A.

4. The Indiana Court of Appeals reversed, however, holding that Villegas had standing because, Section 9-24-9-2 notwithstanding, the BMV had allowed prior applicants without Social Security numbers to sign affidavits attesting to their lack of a Social Security number prior to receiving a license. App. 55A-56A. Thus, the court held that the new identification requirements were the only thing preventing Villegas from obtaining a driver's license and, therefore, he had "suffered concrete and direct injury" that conferred standing to challenge the requirements. App. 56A.

After concluding that Villegas had standing, the Court of Appeals, rather than remanding the case to the trial court for further proceedings, ruled that the BMV had adopted its new identification requirements in violation of Indiana's Administrative Rules and Procedures Act, Indiana Code § 4-22-2, *et seq.* ("ARPA"). App. 68A. Not wanting to render an "advisory opinion," however, the Court of Appeals did not address Villegas' constitutional claims. App. 67A. The Court of Appeals instead remanded the case to the trial court with instructions to enter summary judgment in favor of Villegas on the ARPA claims only. App. 68A. Significantly, the Court of Appeals did *not* enjoin BMV from enforcing its policy.

Before the Court of Appeals certified its decision as final to the trial court—a process akin to issuance of a mandate in federal appellate practice—the BMV asked the Indiana Supreme Court to accept the case on discretionary review. App. 8A. The BMV's Petition to Transfer—in which it argued that the Court of Appeals' decision was contrary to precedent on standing and was an improper advisory opinion on the merits of the rule—automatically stayed certification of the Court of Appeals' judgment to the trial court. Ind. Appellate Rule 65(E).

While the Petition to Transfer was pending in the Indiana Supreme Court, the BMV, following the dictates of ARPA, properly promulgated as a formal administrative rule substantially the same identification requirements that it purported to issue as policy on July 15, 2002. App. 8A-9A. The only significant differences between the original policy and the newly promulgated rule were: (1) the allowance of additional INS documents, including I-797, I-512 and I-131 forms, which could be provided by applicants to prove their lawful immigration status; and (2) the allowance of two additional types of documentation to satisfy the Social Security number requirement: a Social Security card bearing the legend "Valid for Work Only with DHS Authorization" and a Social Security card bearing the legend "Not Valid for Employment." 140 Ind. Admin. Code 7-4-3(c), (f).

In light of this new rule that plainly met the objections of the Court of Appeals, the BMV moved

to dismiss as moot its petition in the Indiana Supreme Court. App. 8A. The Indiana Supreme Court granted the motion. App. 41A-42A.

5. Shortly after the dismissal of the BMV's Petition to Transfer, Villegas filed a motion with the trial court to enter judgment in his favor, which the trial court granted. App. 8A-9A, 38A. Villegas then filed a petition for attorney fees under Section 1988. App. 9A, 35A. The trial court found—without explanation—that Villegas was a prevailing party and granted his application for attorney fees in the amount of $112,468.43. App. 35A-37A.

The BMV appealed the award, but the Indiana Court of Appeals affirmed, holding that Villegas had prevailed on a state statutory claim that was pendent to a "substantial" federal constitutional claim that arose out of a common nucleus of operative fact. App. 30A-31A.

Chief Judge Baker dissented from the court's decision, concluding that the state law claim brought by Villegas—*i.e.*, the administrative procedure claim—was "completely unrelated" to and "wholly separate and distinct from" his federal constitutional claims. App. 32A. Chief Judge Baker also observed that Villegas "did not achieve the goal of [his] federal claims" and caused "no substantive changes" in the identification requirements before the first Court of Appeals case had concluded. App. 33A.

Relying on *Farrar v. Hobby*, 506 U.S. 103 (1992), Chief Judge Baker wrote that Section 1988 "is not intended to produce windfalls for attorneys," App. 32A, and criticized the majority opinion for essentially holding "that a claimant need only advance 'some' type of constitutional claim and succeed on a non-related state claim to become entitled to attorneys' fees under Section 1988, regardless of any failure to prove the constitutional claim or even make a showing that the federal claims were substantial." App. 33A-34A. Because Villegas' counsel "did not receive any recovery that was beneficial to their clients pursuant to their federal claim," App. 34A, Chief Judge Baker concluded, Section 1988 does not authorize an award of attorney fees.

The BMV petitioned the Indiana Supreme Court for transfer, but that court declined to accept the case without comment on April 6, 2009. App. 1A-2A. One Justice, the Honorable Brent Dickson, voted to hear the case but issued no comment respecting the denial of transfer. App. 2A.

REASONS FOR GRANTING THE PETITION

In *Smith v. Robinson*, 468 U.S. 992, 1015 (1984), the Court rejected the proposition that a plaintiff who prevails on a non-fee claim may recover attorney fees under Section 1988 simply because the complaint also happened to have asserted a Section 1983 claim that was ultimately left undecided by the courts. The Court said that, where plaintiffs have

"presented distinctly different claims for different relief, based on different facts and legal theories, and have prevailed only on a nonfee claim, they are not entitled to a fee award simply because the other claim was a constitutional claim that could be asserted through § 1983." *Smith*, 468 U.S. at 1015. Otherwise, plaintiffs could ensure fee awards for "successful judicial efforts" at the pleadings stage, and "[i]t is unlikely that Congress intended such a result." *Id.* at 1015-16.

This case presents a variation on the theory of pleadings-based recovery rejected in *Smith*. Here the trial court, affirmed by a divided Indiana Court of Appeals, awarded Section 1988 fees where the plaintiff prevailed on a non-fee claim "simply because the other claim was a constitutional claim that could be asserted through § 1983." *Id.* at 1015. The Court should grant certiorari and reject the highly anomalous award of Section 1988 fees in this case, where Villegas prevailed on no federal claims, gained no benefits from a judgment or injunction, and was in no way shielded by state claims from pursuing federal claims to judgment. Indeed, in light of the sheer novelty of the fee award in this case, the Court may wish to consider summary reversal.

I. The Rule Applied Below Conflicts With the Court's Precedents Requiring That Plaintiffs Actually Benefit From a Final Judgment to be Eligible for § 1988 Fees

The decision below awarded fees in light of a judgment that afforded Villegas *no* relief whatever. In light of the utter irrelevance to Villegas' interests of the judgment entered on a non-fee claim, the decision below plainly contravenes the Court's precedents requiring a plaintiff to benefit directly from a judgment in order to be a prevailing party.

1. A party asserting a Section 1983 claim prevails and is eligible for Section 1988 fees only when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 109, 111-12 (1992). The Court reinforced this principle in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 604 (2001), where, in rejecting the catalyst rule, the Court held that there must be a "material alteration of the legal relationship of the parties" to justify Section 1988 fees. The Court stressed that "'[r]espect for ordinary language requires that a plaintiff receive at least *some relief* on the merits of his claim before he can be said to prevail.'" *Id.* at 603 (quoting *Hewitt v. Helms,* 482 U.S. 755, 760 (1987)) (emphasis added).

Even more recently, in *Sole v. Wyner*, 551 U.S. 74 (2007), a unanimous Court held that a plaintiff whose initial success is ultimately undone cannot be a prevailing party. In a passage having particular relevance to this case, the Court stated, "[a]t the end of the fray, Florida's Bathing Suit Rule remained intact, and Wyner had gained no enduring 'chang[e] [in] the legal relationship' between herself and the state officials she sued." *Sole*, 551 U.S. at 2196 (citing *Texas State Teacher's Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

The decision below awarding fees plainly conflicts with the rule of *Farrar*, *Buckhannon* and *Sole* that a plaintiff must "directly benefit[]" in some enduring way from a final judgment in order to be eligible for Section 1988 fees. Villegas won a judgment on a state procedural claim, but never stood to benefit because the BMV corrected the procedural deficiencies before the trial court could even enter judgment. As Chief Judge Baker observed in dissent, even once the trial court entered judgment, "the plaintiffs were still not able to obtain driver's licenses or identification cards as a result of the litigation." App. 28A.

Making clear its departure from *Farrar*, the majority below responded to Chief Judge Baker's criticism by stating that, so long as Villegas achieved his goal of invalidating the BMV's rule, it was irrelevant for section 1988 purposes whether he could actually achieve his overall objective of receiving a license. App. 29A. The court deemed the

properly promulgated rule, which prevented Villegas from obtaining a license, "irrelevant to the determination at hand," stating, "[w]e cannot judge the extent of the plaintiffs' success based upon events occurring after (and as a direct result of) our [earlier] decision. . . ." App. 29A.

The decision below thus rejects the notion that courts must take account of whether the plaintiff benefitted from the litigation before awarding fees. The Court should act to correct this gross misapprehension of the law governing awards of attorney fees under 42 U.S.C. § 1988.

2. Debates among lower courts over when a judgment or injunction "directly benefits" a plaintiff sufficiently to justify fees confirm the waywardness of the decision below. Some courts demand to see an immediate benefit before awarding fees. *See, e.g., Barnes v. Broward County Sheriff's Office*, 190 F.3d 1274, 1279 (11th Cir. 1999); *Martinez v. Wilson*, 32 F.3d 1415 (9th Cir. 1994). Others are content with a merely *conceivable* benefit that may arise in the future. *See, e.g., Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1181 (6th Cir. 1995). Still others examine the extent to which the relief granted not only benefits the plaintiff but also matches the relief sought. *See, e.g., Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 556 (5th Cir. 2008); *Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F.3d 726, 731 (7th Cir. 1995).

What all these tests have in common, however, is *some* requirement that the plaintiff actually benefit from the litigation in order to be eligible for attorney fees. *See Roark & Hardee LP*, 522 F.3d at 556; *Barnes*, 190 F.3d at 1278; *Dambrot*, 55 F.3d at 1192; *Johnson*, 51 F.3d at 731; *Martinez*, 32 F.3d at 1422. Villegas simply does not meet this threshold requirement. He neither benefited immediately from the Court of Appeals' decision on the merits or the trial court's entry of judgment, nor does he have any conceivable hope of benefiting from either in the future. By only establishing that the BMV's initial rule was improperly promulgated, Villegas received no relief. Because Villegas never established any right or ability to receive a state license or ID cards—for himself or for any class members—he ultimately received no benefit from the litigation. At most, Villegas scored the kind of "technical victory" that this Court has previously held "insufficient to support prevailing party status." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989).

Neither the result nor the rule of decision applied by the Indiana Court of Appeals can be squared with the Court's precedents. The Court's intervention—perhaps even by way of summary reversal—is necessary to ensure justice as well as uniform understanding of the law. *See* 28 U.S.C. § 2106 (authorizing the Court to "reverse any judgment . . . lawfully brought before it for review . . . as may be just under the circumstances").

II. The Court Should Address the Propriety of § 1988 Fee Awards Where Undecided Fee-Generating Claims Are Not Shielded

If the Court determines that summary reversal is not warranted, a second rationale exists for plenary review: The decision below awarded fees for undecided federal claims that Villegas may yet raise in a new lawsuit.

When the BMV properly promulgated the current license and identification rules, that action left Villegas in exactly the same position as when the case started—ineligible for an Indiana license or ID cards. Villegas may, of course, file a new lawsuit against the BMV alleging the exact same unaddressed federal constitutional claims asserted in this case. Yet Villegas has been awarded the full amount of attorney fees allowed under Section 1988 under the counterfactual theory that his success on a state law claim shielded his federal claims. *See* App. 29A. The BMV can find no appellate case upholding an award of Section 1988 fees in such a situation.

To be sure, there are many cases where appellate courts have upheld Section 1988 awards where the plaintiffs prevailed on state law grounds and received all the relief that would have been possible under their unaddressed federal claims. Awards in such circumstances, where the state claim effectively shields the federal claim from review, are wholly appropriate. When enacting Section 1988, Congress anticipated that, under the doctrine of constitutional

avoidance, judges would not rule on Section 1983 constitutional claims if a lawsuit could be resolved on other claims that do not justify on their own an award of attorney fees. *See* H.R. Rep. No. 94-1558, p. 4, n.7 (1976). Where the result is that that civil-rights plaintiff gets all the relief sought, the result can be that non-fee claims ultimately shield fee claims from decision, and thereby deprive the plaintiff of a legitimate chance to be awarded attorney fees, in contravention of federal policy. *See Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980); *cf. Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989) ("The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties *in a manner which Congress sought to promote in the fee statute.*") (emphasis added).

Under those circumstances, the logic of awarding Section 1988 fees where the plaintiff prevails on non-fee claims is sound. That is, without some assurance that fees will not be foreclosed if the court uses state claims to cut off review of constitutional issues, deserving plaintiffs would have a difficult time finding attorneys to take their cases. Valid constitutional claims will often parallel non-fee state (or federal) law claims, and it would not further the policies underlying Section 1988 to deny fees where such non-fee claims actually do shield fee claims. Accordingly, it is appropriate that lower courts regularly award Section 1988 fees where the fee claim is shielded by the non-fee claim. *See, e.g., Gerling Global Reinsurance v. Garamendi*, 400 F.3d

803 (9th Cir. 2005); *Williams v. Hanover Hous. Auth.*, 113 F.3d 1294 (1st Cir. 1997); *Nat'l Helicopter Corp. of Am. v. City of New York*, 1999 WL 562031 (S.D.N.Y. 1999); *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 870 N.E.2d 12 (Ind. Ct. App. 2007); *Int'l Assoc. of Machinists and Aerospace Workers v. Affleck*, 504 A.2d 468 (R.I. 1986).

But that logic does not hold where, as here, the non-fee claim has *not* actually shielded a fee claim from review. The BMV, after its initial rule was invalidated, properly promulgated a rule that was just as restrictive as the original. If Villegas truly believes that the BMV's license and identification rules—which are materially the same now as before—are unconstitutional, nothing prevents him from continuing to challenge the rules.[3]

In this regard it is worth observing that Villegas has put himself in an enviable—though unjust—position. Villegas has received an award of fees for all the work done by his attorneys. However, because his constitutional claims were not reached, and because the underlying judgment has not affected the BMV's ability to enact the same rule, Villegas is in a position to bring another lawsuit and, if successful, recover fees a second time for the same federal claims. Or, should Villegas bring a new

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[3] To date there has been no challenge to the properly promulgated BMV rule, even though Villegas has no greater access to a State license or ID card now than when he first filed this case. A new lawsuit may yet arise, however, after this case is over.

challenge and lose, he will have nonetheless received attorney fees in the first case based upon the mere assertion of meritless federal claims—fees that the State would be unlikely to recover.

Whether Section 1988 permits fees where such anomalous outcomes are reasonably foreseeable is an important issue that the Court has not addressed; certiorari is justified for that reason as well.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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