No. 17-1393

In the Supreme Court of the United States

MARISA N. PAVAN, ET AL., PETITIONERS

v.

NATHANIEL SMITH, M.D., MPH

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF OF PETITIONERS

SHANNON MINTER
CHRISTOPHER STOLL
AMY WHELAN
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street
Suite 370
San Francisco, CA 94102

CHERYL MAPLES
P.O. Box 59
Heber Springs, AR 72543

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP
2099 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com

CHRISTOPHER THOMAS BROWN
DANIEL FINE
PATRICK ROATH
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

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Respondent asks this Court to supply a hypothetical rationale for the Arkansas Supreme Court's ruling and then rely on that fiction to conclude that this Court lacks jurisdiction. That argument inverts the legal standard that governs this case. In addition, respondent's hypothetical justification for the Arkansas Supreme Court's decision has no footing in Arkansas state law. Indeed, it is the exact opposite of the position respondent advocated in state court.

The state courts of Arkansas cannot be permitted to deny prevailing civil rights plaintiffs their federal statutory right to attorney's fees. Nor can those state courts be permitted to frustrate the jurisdiction of this Court by failing to explain their denial of petitioners' federal claim. This Court should issue the writ of certiorari and reverse the judgment of the Arkansas Su-

preme Court, which has yet again placed itself directly at odds with federal law and this Court's rulings.

A. This Court Cannot Assume That The Arkansas Supreme Court Relied On An Adequate And Independent State Ground That Precludes This Court's Review

Respondent asks this Court to supply a hypothetical state law rationale for the Arkansas Supreme Court's decision in order to insulate the state court's ruling from this Court's review. That argument flips the applicable legal standard on its head.

This Court has long held that "when[] * * * a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983).

Here, there is no serious dispute that the state court decision "fairly appears to rest primarily on federal law." 463 U.S. at 1040. The underlying claim is unquestionably one of federal law. This Court summarily reversed the state court for its refusal to comply with this Court's binding construction of the United States Constitution in *Obergefell* v. *Hodges*, 135 S. Ct. 2071 (2015). See *Pavan* v. *Smith*, 137 S. Ct. 2075, 2079 (2017). Petitioners' motion for fees similarly was based exclusively on federal law. The first line of petitioners' motion for appellate fees explained that it "move[d] for an award of attorney's fees and expenses pursuant to 42 U.S.C. § 1988." Pet. App. 10a. That motion also ex-

pressly noted that "the Arkansas Supreme Court *does not have a rule* requiring fee motions within a particular time." *Ibid.* (emphasis added). Respondent, in turn, relied exclusively on federal law in his proposed opposition. For example, respondent argued that petitioners were not a "prevailing" party under Section 1988(b) at all stages of the litigation. See App., *infra*, 4a.

The Arkansas Supreme Court's order denying attorney's fees provided no explanation for that ruling, much less a "'plain statement' that its decision rests on state law." *Illinois* v. *Rodriguez*, 497 U.S. 177, 182 (1990). The Arkansas Supreme Court's "opinion does not rely on (or even mention) any specific provision of" Arkansas law. *Ibid.* As this Court has explained, in such a case, it has jurisdiction to review an "unelaborated order" with "no reasoning for its decision." *Foster* v. *Chatman*, 136 S. Ct. 1737, 1745 (2016). The same holds here.

Respondent's reliance on *Coleman* v. *Thompson*, 501 U.S. 722 (1991), and *Durley* v. *Mayo*, 351 U.S. 277 (1956), is misplaced. In *Coleman*, the state court opinion at issue "stated plainly that it was granting the Commonwealth's motion to dismiss the petition for appeal," and "[t]hat motion was based solely on Coleman's failure to meet the [state] Supreme Court's time requirements." 501 U.S. at 740. Thus, it was plain that the state court decision did not "fairly rest[]" on a federal law claim. Similarly, *Durley* is inapposite because it was decided before this Court, in *Long*, "established a conclusive presumption of jurisdiction" in cases where a state court decision fairly appears to rest primarily on or be interwoven with federal law. *Id.* at 733.

Petitioners' Section 1988 fee motion "fairly rested" on a federal law and, in the absence of a statement expressing "explicit reliance on a state-law ground," this Court must assume that the state court's disposition of the claim did as well. *Harris* v. *Reed*, 489 U.S. 255, 266 (1989). This Court has jurisdiction to review the state court order.

B. The State Procedural Ground Hypothesized By Respondent Is Not, In Any Event, "Adequate" To Preclude This Court's Review

Even if this Court were to speculate that the Arkansas Court relied on an unstated state procedural rule, reliance on that rule would not be an "adequate" state law ground that would preclude review.

This Court's precedent instructs that "only a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Ford* v. *Georgia*, 498 U.S. 411, 423-424 (1991) (quoting *James* v. *Kentucky*, 466 U.S. 341 (1984)). "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958) (declining to apply state procedural rule, even where rule appeared "in retrospect to form part of a consistent pattern of procedures," because the defendant in that case could not be "deemed to have been apprised of its existence").

Here, respondent cannot identify *any* precedent or rule of court establishing the purported procedural "rule" respondent attributes as the basis of the Arkan-

sas Supreme Court's order. Even *within this case*, respondent has argued that Arkansas practice requires the *opposite* of what he now urges.

Respondent now asserts that petitioners (i) were required to file their motion for attorney's fees in the trial court, and that, (ii) if they were allowed to file their motion in the Arkansas Supreme Court, then they should have filed within fourteen days of the court's opinion, rather than its mandate. Respondent principally relies on post-hoc commentary on the Arkansas Supreme Court's fee denial, offered by a state trial court in a footnote to an order published one month after the fee denial was entered. *Compare* Resp. App. 28 (date of Circuit Court's opinion was February 16, 2018), *with* Pet. App. 2a (date of Arkansas Supreme Court's order was January 4, 2018). If the practice was, in fact, "firmly established" under state law, respondent would be able to cite authority for this Court's consideration. Instead, respondent can point only to a footnote in a later decided trial court opinion that does not cite any Arkansas case, rule, or authority of any kind.

In fact, the purported procedural requirements asserted by respondent conflict with extant Arkansas authority on this point. Indeed, respondent repeatedly urged the opposite position in the earlier state court proceedings in this case. As respondent previously acknowledged, the clearest extant statement of Arkansas law on this point establishes that "where the additional award of costs on appeal was not awarded at the direction of the appellate court, was not of a ministerial nature, and was for the services of the prevailing party's attorney on appeal, we hold that the trial court was without authority to award attorney fees following the appeal." *Race* v. *Nat'l Cashflow Sys., Inc.*, 810 S.W.2d

46, 48 (Ark. Ct. App.), aff'd, 817 S.W.2d 876 (Ark. 1991). The Arkansas Supreme Court referenced a similar rule in *Jones* v. *Jones* where the court held that it had authority to award fees for counsel's work on appeal, but any motion for work performed in the trial court should be made to that court. 938 S.W.2d 228, 231 (Ark. 1997). Respondent referenced this proposition when petitioners initially made a protective request for appellate fees in the state trial court. See App., *infra*, 10a (original attorney's fees response in circuit court, citing *Race* for rule that "any fees and costs awarded to a prevailing party on appeal must come from the appellate court"). And, in the proposed opposition attached to his motion to file an untimely response in the Arkansas Supreme Court to petitioners' protective fee application in that court, respondent again argued that under binding state court precedent "any fees and costs awarded to a prevailing party on appeal must come from [the Arkansas Supreme] Court, not the circuit court." *Id.* at 7a (citing *Race*, 810 S.W.2d 46); see also *id.* at 3a (reiterating "the State's position that the circuit court cannot award fees and costs for appellate work").

In light of this record, there is simply no reasonable basis to conclude that the Arkansas Supreme Court relied on an unwritten and unacknowledged procedural rule, with no apparent footing in Arkansas law, that appellate fee requests must be made to the trial court. Nor can petitioners fairly be deemed to have been appraised of any such purported rule, as even respondent urged the opposite practice at all earlier stages of this very litigation.

Nor is there any "firmly established" rule in Arkansas requiring appellate fee motions to be filed with-

in fourteen days of the appellate court's opinion. The case law that respondent cites, and on which petitioners were entitled to rely, establishes exactly the opposite. See Resp. Br. 20 (citing *Norman* v. *Norman*, 66 S.W.3d 635, 639 (Ark. 2002)). The *Norman* decision states that "[t]he entry of judgment triggering the application of Rule 54 *was our mandate* issued on July 17, 1998." 66 S.W.3d at 639 (emphasis added). Arkansas courts retain "inherent power and jurisdiction to allow attorney's fees" in matters before them, even absent specific statutory authority. *Lyman* v. *Ivy*, No. CA02-722, 2003 WL 1125721, at *5 (Ark. Ct. App. Mar. 12, 2003). And the Arkansas Supreme Court has squarely rejected respondent's contention that such an application for appellate fees must be filed within fourteen days of the Supreme Court's opinion. In *Jones*, the Arkansas Supreme Court rejected the opposing party's contention that the court "should deny the [fee] petition on account of Ms. Jones's failure to file it within seventeen days from the date of this Court's decision reversing the Court of Appeals." 938 S.W.2d at 230. The court observed that a fee request is a "collateral" proceeding and that, "even after the mandate has been issued" in a case, the Supreme Court "retains jurisdiction to consider a motion for attorney's fees." *Id.* at 231. Petitioners' fee application was timely under this precedent.

Similarly, even if respondent's argument that petitioners should have filed their fee petition in the trial court did not contradict Arkansas authority and respondent's own position below, the Arkansas Supreme Court's own rules state that it should have transferred petitioners' fees motion to the proper venue. See Ark. Sup. Ct. R. 1-2(f) ("No case filed in either the Supreme

Court or the Court of Appeals shall be dismissed for having been filed in the wrong court but shall be transferred or certified to the proper court."). Here, the state court was expressly asked to consider whether petitioners had correctly filed their fee petition in the Arkansas Supreme Court and to explain where the motion should have been filed if not. Indeed, petitioners filed *both* a "Motion for Clarification" as to the correct venue for their motion for appellate attorney's fees *and* a motion to transfer the motion to the Circuit Court in the event that was the proper forum. See Appellees' Mot. for Clarification (Nov. 2, 2017) (No. CV-15-988); Appellees' Mot. to Transfer (Nov. 21, 2017) (No. CV-15-988). The Arkansas Supreme Court did neither.

Under this Court's precedent, state courts may not erect or selectively enforce novel procedural "rules" in order to frustrate a plaintiff's attempt to vindicate federal claims—especially federal civil rights claims. As Justice Holmes wrote in *Davis* v. *Wechsler*, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." 263 U.S. 22, 24 (1923). That precedent is even more important where, as here, the state court in question has already demonstrated its hostility to plaintiffs' assertion of their federal rights and cites no authority at all for its denial of the fee award to which the prevailing plaintiffs are presumptively entitled as a matter of substantive federal law. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (prevailing civil rights plaintiff is presumptively entitled to recover her attorney's fees absent "special circumstances"); *James* v. *City of Boise*, 136 S. Ct. 685, 686 (2016) (per curiam)

(holding that state courts are "bound by this Court's interpretation of [Section 1988]").[1] This Court has the authority and duty to look past the surface of the hypothetical procedural rules conjured by respondent to assess the legitimacy of the application of those "practices" here. See *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965) (onerous state procedural requirements must be "sufficient to serve legitimate state interests" in order to evade review).

* * *

The Supremacy Clause compels the Arkansas Supreme Court to follow this Court's binding conclusions on questions of federal law. As established in the petition, the state court here flaunted that requirement by summarily denying petitioners' motion for the attorney's fees to which they were presumptively entitled.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted and either set for argument or, in the alternative, the judgment of the Supreme Court of Arkansas should be vacated and the case remanded with clear instructions to make an award of petitioners' appellate

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[1] Contrary to respondent's assertion, petitioners do not seek to hold the state court to an "opinion-writing standard." Resp. Br. 11 (quoting *Johnson* v. *Williams*, 568 U.S. 289, 300 (2013)). Absent "special circumstances," petitioners are entitled to an award of fees as a matter of substantive federal law. For the reasons stated in the petition and text above, respondent has not identified any such "special circumstances" under federal law, nor any adequate and independent state law basis for denying petitioners their federal right to a fee award.

attorney's fees and expenses, including for this second petition, in accordance with federal law and this Court's well-established standards for calculating fees under Section 1988.

Respectfully submitted,

DOUGLAS HALLWARD-DRIEMEIER
CHRISTOPHER THOMAS BROWN
DANIEL FINE
PATRICK ROATH
ROPES & GRAY LLP

SHANNON MINTER
CHRISTOPHER STOLL
AMY WHELAN
NATIONAL CENTER FOR LESBIAN RIGHTS

CHERYL MAPLES

Counsel for Petitioners

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