No. 17-618

In The
Supreme Court of the United States

WASHINGTON ALLIANCE
OF TECHNOLOGY WORKERS,

Petitioner,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its petition, the Washington Alliance of Technology Workers (Washtech) demonstrated that the interpretation of the rules governing fee awards set forth in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983) has resulted in chaotic, multi-way circuit splits, with district courts sometimes not even following the rules adopted by their own circuit. Pet. 8-17. The most notable feature of respondent's brief in opposition is that it does not dispute that such circuit splits exist.

ARGUMENT

I. Respondent never contested on appeal that Washtech is a prevailing party.

The district court held, and the court of appeals affirmed, that Washtech was a prevailing party in the litigation because of its success in showing that respondent had failed to provide notice and comment. App. 11, 19-22. Respondent did not appeal this holding; nor did it raise the issue on appeal. Resp. 17. Nonetheless, respondent's principal argument against granting the petition is its claim that Washtech is not a prevailing party. Resp. 10, 17-18.

It is highly inappropriate to reevaluate Washtech's prevailing party status now. This Court's "traditional rule . . . precludes a grant of certiorari . . . when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Respondent seeks to have this Court

address the issue without having raised it in the court below and without making its own petition for certiorari. Resp. 17.

From the record it is obvious why respondent did not challenge Washtech's prevailing party status in the court of appeals: its response represents a complete reversal from its position in the merits appeal. Before the court of appeals, respondent vigorously asserted that Washtech had been victorious. According to respondent, "*they* [Washtech] *prevailed*, the 2008 Rule that they detested no longer existed, so there's no point in continuing – [interruption by bench] – with this litigation because that rule no longer exists." *Wash. All. of Technology Workers* v. *U.S. Dept. of Homeland Security*, No. 15-5239, oral argument, p. 20 (D.C. Cir. May. 4, 2016) (emphasis added). And later respondent stated that "the point is the 2008 Rule is moot, there's nothing more to decide, they've [Washtech] gotten what they've wanted, *they're victorious*, now there's a 2016 Rule which is substantively different and should be challenged in the Court. . . ." *Id.* at pp. 35-36 (emphasis added). In light of its earlier heralding of Washtech's victory, respondent should not be heard now to claim that Washtech did not prevail in the case.

Case law supports Washtech's contention that it won a significant victory. Its petition describes the sordid, secret backroom rulemaking with lobbyists at issue in the case. Pet. 2-3. Such a "[f]ailure to provide the required notice and to invite public comment . . . is a fundamental flaw that 'normally' requires vacatur of the rule." *Heartland Reg'l Med. Ctr.* v. *Sebelius*, 566

F.3d 193, 199 (D.C. Cir. 2009). Indeed, the Administrative Procedure Act directs the courts to "set aside agency action" made "without observance of procedure required by law." 5 U.S.C. § 706. Disrupting this unlawful regulatory scheme was a major accomplishment. Furthermore, the only remedy a party can receive under the APA is an order to vacate the rule, *id.*, and Washtech accomplished that. App. 85.

Respondent further argues that the subsequent mootness of the case deprives Washtech of prevailing party status. Resp. 17. Nonetheless, it is settled law in the D.C. Circuit that "the subsequent mootness of a case does not necessarily alter the plaintiffs' status as prevailing parties." *Nat'l Black Police Ass'n* v. *District of Columbia Bd. of Elections & Ethics*, 168 F.3d 525, 528 (D.C. Cir. 1999); *accord Williams* v. *Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980); *Doe* v. *Marshall*, 622 F.2d 118, 120 (5th Cir. 1980). Respondent cites no case law showing that there is dispute among the circuits on this point.

II. The court of appeals explicitly treated prevailing party status on appeal as distinct from prevailing party status in the litigation.

Washtech's petition demonstrates the multi-way circuit splits on the question of whether prevailing party status on appeal is separate from prevailing party status in the litigation. Pet. 8-12. Respondent does not contest the existence of these circuit splits.

Instead, respondent denies that the court of appeals treated prevailing party status on appeal as distinct from prevailing party status in the litigation. Resp. 13. Yet, in affirming the denial of fees for appeal, the court of appeals explicitly stated that, while Washtech was a prevailing party in the district court (App. 4), Washtech "did not prevail in its appeal." App. 8 (citing the prevailing party standard in *Lewis* v. *Cont'l Bank Corp*., 494 U.S. 472, 480 (1990)).

In further support of its flawed argument, respondent advances the fiction that courts below denied fees for appeal under *Hensley*'s reasonableness standard. Resp. at 10-12. If those courts had applied the *Hensley* standard, they would have addressed the question of whether Washtech's requested fee was a reasonable one for achieving standing in light of adverse prior authority (*i.e.*, *Programmers Guild, Inc.* v. *Chertoff*, 338 F. App'x 239 (3d Cir. 2009) (holding American workers did not have standing to challenge the same regulation under identical facts)); obtaining a vacatur order for the regulation in question; and obtaining vacatur of the adverse holdings of the district court on appeal. *See Hensley*, 461 U.S. at 435. The district court did none of these things. It did not evaluate whether the fees requested for the appeal were reasonable for obtaining the result of vacating its adverse holdings. App. 29. Instead, it disallowed fees for appeal in their entirety without regard for this outcome. *Id.* Likewise, the district court did not evaluate what a reasonable fee was for the litigation. App. 30-31. The district court simply reduced the remainder of the

requested fee by an arbitrary 85%, with no explanation of how it arrived at this figure. *Id.*

On this issue, respondent has no answer to the main point raised in the petition: that whether a party in Washtech's position is entitled to fees for its appeal currently depends on which circuit the case is brought in, and that the circuits are split multiple ways. Pet. 8-12. Contrary to the D.C. Circuit's holding here, in the Fifth Circuit, a prevailing party in the litigation, such as Washtech, is entitled to fees for a mooted appeal. *Murphy* v. *Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 471 (5th Cir. 2003). This fragmentation to the point of chaos among the various circuits on the question of whether prevailing party status extends to appeals is an important issue for the Court to address.

III. The standard of the court of appeals for determining whether claims are related cannot be reconciled with the standard used by all other circuits.

Washtech's petition shows that the court of appeals created a circuit split by adopting a new standard for determining whether claims are related. Pet. 12-15. The dissent would have held that Washtech's claims were alternate grounds to achieve the same outcome of vacatur. App. 11 (Kavanagh, J., dissenting). Nonetheless, the court of appeals held that the various claims were unrelated because they could have produced different outcomes after vacatur. App. 9-10. Washtech demonstrated in its petition that the standard the

court of appeals used is contrary to that employed in all of the other circuits, which hold that claims are related if they arise from a common core of facts or are based on related legal theories. Pet. 12-15.

Respondent argues that the court of appeals did not apply a new standard. Resp. 14. Then, bizarrely, respondent argues that the court of appeals was correct in holding that Washtech's claims were unrelated under the new standard because they could have produced different outcomes after vacatur. Resp. 15 ("A favorable judicial ruling on the broader claims would have wholly eliminated the OPT regulations and STEM extension"). At no point did the court of appeals or respondent show that Washtech's claims did not involve a common core of facts or unrelated legal theories, the standard used by all the other circuits. *See, e.g.*, *Jackson* v. *Ill. Prisoner Review Bd.*, 856 F.2d 890 (7th Cir. 1988).

Respondent argues that "[t]he court of appeals followed the latter portion of *Hensley*, explaining that a district court may properly deny fees for 'interrelated' but unsuccessful claims by 'identifying specific hours that should be eliminated,' as the district court did here." App. 7 (quoting *Hensley*, 461 U.S. at 436). Resp. 14. In fact, the district court did no such thing.

The district court held that Washtech's claims were interrelated (prior to the appeal and post-judgment motions) and that the hours *could not be separated* by claim. App. 28-29. That meant that, under *Hensley*, the "lawsuit [could not] be viewed as a series of discrete

claims." 461 U.S. 424, 435 (1983). But then the district court treated the claims as distinct and unrelated (because they would have resulted in different outcomes) when it reduced Washtech's fees for activities prior to summary judgment by 85% (for a total reduction of 91%). App. 29-30. This novel view of the court of appeals about when claims are related, parroted by respondent, has created a split between the D.C. Circuit and every other circuit in the country.

The standard applied by the court of appeals and respondent to determine whether claims are related is inconsistent with the principle of claim preclusion. This Court has explained that "[t]he congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Hensley*, 461 U.S. at 435. Here, the district court (affirmed by the court of appeals) treated claims under the Administrative Procedure Act as if they could have been brought under separate lawsuits. App. 9-10, 30. Yet the district court, court of appeals, and respondent provide no explanation of how Washtech could have even brought its multiple Administrative Procedure Act claims against the same regulatory scheme in separate lawsuits. Claim preclusion would have barred just that. *See* Restatement (Second) of Judgments § 24 (1980); *United States* v. *Tohono O'odham Nation*, 563 U.S. 307, 316 (2011) ("The now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on factual

overlap, barring 'claims arising from the same transaction.' ") (quoting *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 482 n.22 (1982)).

In addition, Washtech raised in its petition (Pet. 14-15) the issue of why the fee award should have been reduced for its work on issues on which the courts below failed to reach a decision, when this Court has admonished that the "failure to reach certain grounds is not a sufficient reason for reducing a fee." *Hensley*, 461 U.S. at 435. Respondent wholly fails to address this issue.

IV. Washtech raised the issue of the district court's *sua sponte* fee objections in the court of appeals.

Washtech's petition describes a three-way circuit split on whether a district court may raise fee objections *sua sponte*. (Pet. 16-18). Respondent does not address this circuit split. Instead, respondent claims that "petitioner did not argue on appeal that the district court had made *sua sponte* reductions to the fee award." Resp. 15. To the contrary, Washtech specifically raised the issue of the district court's *sua sponte* reductions in the court of appeals. Pet. C.A. Op. Br. 21 (stating that "[t]he district court identified four other factors for reducing fees"). As respondent notes, Washtech again raised this issue in its petition for rehearing. Resp. 15. That petition in turn cites the pages in the opening brief where the issue was initially raised. Pet. C.A. Reh'g Pet. 14.

The circuit split on this issue is highly significant, as this case illustrates. Here, the *sua sponte* nature of the district court's objections caused clear harm. For example, the district court raised the objection to the fee request that Washtech had used seven attorneys on the case, and held, on that basis, that "plaintiff's fees were unjustifiably high." App. 30-31. This is an objection that respondent would never have raised on its own because to do so would have been ludicrous. Respondent had more attorneys work on the case than Washtech! *See* Pet. C.A. Op. Br. 22. Also, if respondent had raised this objection, Washtech (in addition to pointing out respondent's greater number of attorneys) could have replied that seven attorneys worked on the case *at some point over three years* as attorneys joined and left the firm, and only one attorney worked on the case from beginning to end – but Washtech never received the opportunity to make that argument because the district court raised that objection for the first time in its opinion. *Id.*

Indeed, with this issue, the petition raises the central question of the role of the district court in handling fee requests. Does the district court serve as a neutral adjudicator between one party's fee request and the other party's objections to that request? Or may the district court serve as an advocate for one of the parties?

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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