NO. 18-_____

In the Supreme Court of the United States

HOUSTON AUTO M. IMPORTS GREENWAY, LTD. D/B/A MERCEDES-BENZ OF HOUSTON GREENWAY,

Petitioner,

v.

MARK ZASTROW and Z-Z INTERESTS INCORPORATED D/B/A HEIGHTS AUTOHAUS,

Respondents.

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. By affirming an attorneys' fee award under 42 U.S.C. § 1988, did the United States Court of Appeals for the Fifth Circuit sanction a departure from the accepted and usual course of judicial proceedings by the United States District Court for the Southern District of Texas as to call for an exercise of the Supreme Court's supervisory power?

2. Did the United States Court of Appeals for the Fifth Circuit decide an important federal question regarding an award of attorneys' fees under 42 U.S.C. § 1988 in a way that conflicts with relevant decisions of the Supreme Court?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Petitioner HOUSTON AUTO M. IMPORTS GREENWAY, LTD. D/B/A MERCEDES-BENZ OF HOUSTON GREENWAY ("MBHG") is a limited partnership organized and existing under the laws of the State of Texas. MBHG's general partner is HOUSTON IMPORTS GREENWAY GP, LLC, a limited liability company organized and existing under the laws of the State of Delaware.

HOUSTON IMPORTS GREENWAY GP, LLC is a 100-percent owned subsidiary of AN DEALERSHIP HOLDING CORPORATION, a corporation organized and existing under the laws of the State of Florida.

AN DEALERSHIP HOLDING CORPORATION is a 100-percent owned subsidiary of AUTONATION ENTERPRISES INCORPORATED, a corporation organized and existing under the laws of the State of Florida.

AUTONATION ENTERPRISES INCORPORATED is a 100-percent owned subsidiary of AUTONATION, INC., a publicly traded corporation organized and existing under the laws of the State of Delaware. AUTONATION, INC.'s stock trades on the NYSE under the ticker symbol "AN."

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PETITION FOR WRIT OF CERTIORARI

HOUSTON AUTO M. IMPORTS GREENWAY, LTD. D/B/A MERCEDES-BENZ OF HOUSTON GREENWAY petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. This Court should grant this petition for certiorari because this case provides an opportunity for the Court to not only correct a manifest injustice occasioned by a clear error of law but also an opportunity to make a definitive statement of the rules governing awards of attorney's fees in civil rights cases.

OPINIONS BELOW

The Fifth Circuit opinion affirming the district court's judgment is reported at *Zastrow v. Houston Auto M. Imps. Greenway*, No. 17-20680, 736 Fed. Appx. 496, 2018 LEXIS 25198 at *1 (5th Cir. Sept. 5, 2018) (per curiam). (App.1a) The Fifth Circuits opinion affirming in part, vacating in part, and reversing in part the district court's judgment is reported at *Zastrow v. Houston Auto M. Imps. Greenway, Ltd.,* No. 16-20258, 695 Fed. Appx. 774, 2017 LEXIS 11010 at *1 (5th Cir. June 21, 2017) (per curiam). (App.9a) The Fifth Circuit's opinion affirming in part and vacating and remanding in part the district court's summary judgment is reported at *Zastrow v. Houston Auto Imps. Greenway, Ltd.,* 789 F.3d 553 (5th Cir. 2015). (App.27a) The district court's summary judgment in favor of MBHG on all claims is reported at *Zastrow v. Houston*

Auto M. Imps. Greenway, Ltd., 2014 U.S. Dist. LEXIS 62577 at *1 (S.D. Tex. May 6, 2014). (App.55a) The district court's September 29, 2017, Order on Plaintiffs' Motion for Attorney Fees is unreported. (App.7a) The district court's October 2, 2017, Final Judgment is unreported. (App.4a)

JURISDICTION

The Fifth Circuit entered its judgment on September 5, 2018. (App.3a) On September 19, 2018, Petitioner petitioned the Fifth Circuit for an en banc rehearing. On October 5, 2018, the Fifth Circuit denied the Petition for Rehearing En Banc. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1). (App.57a)

RELEVANT STATUTORY PROVISIONS

- 42 U.S.C. § 1981

  (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

- 42 U.S.C. § 1988(b)

(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 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 U.S.C. §§ 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.

INTRODUCTION

Federal law permits a court to award reasonable attorneys' fees to a party that prevails in an action to enforce certain civil rights statutes. 42 U.S.C. § 1988(b). This Court has held that the degree of success realized by a plaintiff is a crucial factor in determining the proper amount of an award of attorneys' fees under 42 U.S.C. § 1988. *Hensley v. Eckerhard*, 461 U.S. 424 (1983). After Petitioner secured summary judgment on Respondent's claims of conspiracy, violations of the RICO statute, and retaliation in violation of the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981 and 1982, and after the trial court denied the injunctive relief requested by Respondents, Respondents appealed. The Fifth Circuit upheld the judgment on all claims save for the Section 1981 retaliation claim. (App.27a) Respondent's Section 1981 claim was tried to a jury. Respondent asked the jury to award damages in excess of one million dollars ($1,000,000.00). (App.17a) The jury found for Respondent on liability but awarded $939.29 in economic damages, and declined to impose punitive damages or award damages for mental anguish. (App.68a-70a) On this verdict, and against the great weight of relevant authority, the trial court awarded Respondents attorneys' fees in the amount of $110,000.00, and, following a successful appeal by Petitioner, increased the award to $117,000.00, over 124 times the amount of damages awarded by the jury. (App.22a, 24a, 9a, 7a, and 4a) After a second appeal, the Fifth Circuit upheld the fee award.

(App.1a, 3a) The attorney fees award runs afoul of this Court's precedent and that of the Fifth Circuit.

This Court should grant certiorari and reverse.

STATEMENT OF THE CASE

Zastrow is a former MBHG employee and a shareholder of Z-Z Interests, Incorporated ("Z-Z Interests"), which does business under the assumed name "Heights AutoHaus." Prior to the events giving rise to this suit, Heights AutoHaus purchased replacement parts at a discount from MBHG. (App.28a)

Zastrow was retained as an expert witness in an arbitral proceeding wherein the claimants were represented by Respondents' counsel. (App.28a) The dispute arose from claimants' purchase of a vehicle from MBHG and involved consumer claims and civil rights claims. (App.28a)

On January 8, 2013, Zastrow, unaware of the pending civil rights claims, appeared for deposition. (App.28a, 29a) His testimony concerned his inspection of the vehicle and his opinions regarding repairs performed on the vehicle. (App.29a) He did not testify about any discriminatory acts he personally witnessed. (App.38a, 39a) In the course of his deposition testimony, Zastrow criticized the business operations of MBHG and made disparaging and defamatory remarks about MBHG's business operations and employees. (App.11a)

On January 14, 2013, MBHG's counsel mailed a letter to Zastrow advising that MBHG was severing

its business relationship with Heights AutoHaus. (App.29a)

MBHG's corporate representative, Brian A. Davis ("Davis"), testified that Zastrow's disparaging comments during the deposition about the dealership's business practices was the only reason MBHG stopped selling parts to Heights AutoHaus.

On January 23, 2013, Respondents' counsel sent a Notice of Retaliation Against Witness in Discrimination Suit and Intent to Sue ("Notice of Intent to Sue") to the arbitrator. (App.29a) In the letter, Respondents' counsel, on behalf of the claimants, demanded that MBHG sell parts to Zastrow at a 25% discount "until Mercedes-Benz of Houston Greenway ceases to exist" and pay $700 in attorneys' fees.

Petitioners filed this lawsuit on March 4, 2013, asserting claims against MBHG, George A. Kurisky, Jr. (MBHG's counsel, hereinafter "Kurisky") and Mr. Kurisky's law firm, Johnson DeLuca Kurisky & Gould, P.C. ("JDKG" and with Kurisky, collectively, the "Attorney Defendants") for: (1) conspiracy; (2) violation of the RICO statute; and (3) retaliation in violation of the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981 and 1982. (App.11a) Respondents sought actual damages, exemplary damages, treble damages, attorneys' fees, interest, costs of court and injunctive relief against all Defendants. (App.17a)

Respondents brought suit in the United States District Court for the Southern District of Texas, invoking that court's federal question jurisdiction. *See* 28 U.S.C. § 1331.

MBHG, Kurisky, and JDKG moved for summary judgment as to all claims. The district court granted both motions for summary judgment on May 6, 2014. (App.55a)

Respondents appealed. On June 12, 2015, the Fifth Circuit affirmed summary judgment on all claims against MBHG and the Attorney Defendants except for the retaliation claims against MBHG under 42 U.S.C. § 1981. (App.43a, 44a) The Court reversed summary judgment on the Section 1981 retaliation claim solely because the parties failed to address the *McDonnell Douglas* framework in summary judgment briefing. (App.41a, 42a, 43a)

This case proceeded to a two-day jury trial on March 7, 2016, solely on the Section 1981 retaliation claim against MBHG. (App.11a, 12a, 59a) Respondents' counsel asked the jury to award economic damages in the range of $54,000 to $108,000, mental anguish damages, and punitive damages of $540,000 to $1,080,000, and argued that the jury was free to award more in punitive damages than what they asked. (App.17a)

The jury found for Respondents on the liability question, but awarded only $939.29 in economic damages. (App.17a) The jury found that MBHG did not act with malicious or reckless intent and declined to award punitive damages. (App.68a-70a) The jury did not award damages for alleged mental anguish. (App.69a)

On March 22, 2016, Respondents filed Plaintiffs' Motion for Attorney Fees seeking an award of $197,160 in fees incurred from the beginning of the case. Respondents failed to provide a copy of any engagement letter, failed to aver whether their agreement was

fixed or contingent, and failed to keep contemporaneous billing records.

On April 7, 2016, the district court signed a second Final Judgment wherein it awarded Respondents fees in the amount of $110,000.00. (App.24a) In making this award, the district court did not consider Respondents' degree of success. (App.16a)

Petitioner appealed the jury's verdict and the court's award of $110,000 in attorneys' fees and certain unrecoverable costs. The Fifth Circuit agreed that the district court failed to consider Respondents' degree of success in awarding attorney's fees after trial. (App.16a)

The Fifth Circuit vacated and remanded the attorneys' fees award for the district court to reconsider in light of the critical factor of Respondents' degree of success. It was left to the district court to determine what impact, if any, Zastrow's degree of success had on its award of attorneys' fees. (App.17a)

Following remand, Respondents filed Plaintiffs' Renewed Motion for Attorney Fees asking the Court to increase the award of attorneys' fees to $117,000. Respondents' renewed request ignored the fact that: (1) their claims against the Attorney Defendants were disposed on summary judgment; (2) their RICO claims, Section 1982 and Title VII claims were disposed on summary judgment; (3) their request for injunctive relief was denied; and (4) they asked the jury to award them over $1 million in actual and punitive damages but were awarded under a thousand dollars.

On September 29, 2017, the district court signed a revised order awarding attorney's fees (the "Second

Order Awarding Attorneys' Fees"). (App.7a) The Second Order Awarding Attorneys' Fees largely tracks verbatim the proposed order submitted by Respondents. (App.7a)

The Second Order Awarding Attorneys' Fees included the following revisions, which were in Respondents' proposed order:

(1) in the first paragraph, the district court conclusorily recited that it considered "(g) the plaintiffs' degree of success" (App.8a);

(2) in the second paragraph, the district court amended its original finding that Respondents recovered nominal damages to find that Respondents recovered actual, compensatory damages (App.8a);

(3) in the third paragraph, the district court added that Respondents were required to defend the jury's verdict in a second appeal (App.8a);

(4) in the fourth paragraph, the district court added the phrase "the plaintiffs' degree of success" and deleted language specifying the number of hours and rates charged per attorney (App.8a); and

(5) in the fifth paragraph, the district court increased the attorneys' fee award to $117,000 (App.8a).

The district court failed to include any findings, conclusions or explanations regarding whether an increased fee award of $117,000 was excessive in light of the fact Respondents recovered only $939.29, when they sought a verdict over $1 million. (App.7a, 8a)

On October 27, 2017, Petitioner timely appealed the Second Order Awarding Attorneys' Fees and the third Final Judgment entered on October 2, 2017.

Finding no reversible error, the Fifth Circuit affirmed the third Final Judgment on September 5, 2018. (App.3a) In a brief opinion, the court noted that "a more robust explanation than the one given would have been preferable and advisable." (App.1a, 2a)

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S APPLICATION OF EXISTING LAW IS INCORRECT

A "more robust explanation" of an attorneys' fee award where the district court gave Petitioners in attorneys' fees what they failed to recover in damages is not just "preferable and advisable;" it is the law of the land as established under long-standing U.S. Supreme Court and Fifth Circuit precedent. The Panel's decision disregarded precedent in finding no reversible error where the district court merely signed a proposed order submitted by Respondents and increased the attorneys' fee award to $117,000, which is 124 times the amount of damages recovered. Further, the Panel's decision fails to review the disparity between the amount of damages sought and the amount of damages awarded, which the district court also failed to consider.

"The court must provide 'a reasonably specific explanation for all aspects of a fee determination.'" *Combs v. City of Hunting, Texas*, 135 F.3d 1041, 1048 (5th Cir. 1998). "It is essential that the judge provide

a reasonably specific explanation for all aspects of a fee determination. . . . *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553-54, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010) (emphasis added).

In *Hensley*, this Court advised that a district court's failure to consider the material issue of success on the merits "would not have been obviated by a mere conclusory statement that this fee was reasonable in light of the success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 439 n. 15 (1983).

Petitioners successfully appealed the district court's decision to award $110,000.00 in attorneys' fees to Respondents because the district court failed to consider their degree of success. (App.16a) On remand, the district court simply signed a revised order reciting that it considered Respondents' degree of success, and then increased the attorneys' fee award to $117,000.00. (App.7a, 8a) The district court failed to provide any analysis or conclusions as to why its award of $117,000.00 in attorneys' fees was not excessive where Respondents recovered only $939.29 in damages and failed to recover on all of their other claims against all other defendants. (App.7a, 8a)

By merely signing the proposed order submitted by Respondents, with one minor revision, the district court failed to provide a reasonably specific explanation of its fee determination and failed to "answer the question of what is 'reasonable' in light of" the plaintiff's limited success. *See Combs*, 829 F.3d at 396. Further, the district court's complete failure to consider the disparity between the amount of damages awarded and the fee award is not obviated by merely adding the conclusory phrase "the plaintiffs' degree of success."

The Fifth Circuit's decision disregarded precedent from this Court as well as its own precedent by failing to find error where the district court provided a less "robust explanation" of the fee award.

The Fifth Circuit's decision fails to follow *Combs* because the Panel found no reversible error even though the district court gave no consideration to the disparity between the million-dollar verdict Respondents sought from the jury and the $939.29 they received. In a private civil rights suit, a district court must consider any disparity between the amount of damages sought and the amount of damages awarded. *Combs*, 829 F.3d at 395–96 (emphasis added) (*citing Migis v. Pearle Vision*, 135 F.3d 1041, 1048 (5th Cir. 1998) ("[T]he plaintiff's monetary success in a private civil rights suit must be the primary determinant of the attorney's fee.")); *Hodges v. City of Houston*, 71 F.3d 877, 1995 WL 726463, at *4-5 (5th Cir. 1997) (unpublished table decision) (concluding that a $65,000 fee award was "grossly excessive" where plaintiff "asserted $45,800 in monetary losses and requested $1 million in damages" but received only $3,500)).

The Fifth Circuit consistently emphasizes that "there is no per se requirement of proportionality in an award of attorney fees." *Branch-Hines v. Hebert*, 939 F.2d 1311, 1322 (5th Cir. 1991); *Hernandez v. Hill Country Tel. Co-Op., Inc.*, 849 F.2d 139, 144 (5th Cir. 1988); *see also West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 395 (5th Cir. 2003) ("[U]nder civil rights statutes such as the ADEA, [t]here is no per se requirement of proportionality in an award of attorney fees." (citation and internal quotation marks omitted)). Nevertheless, proportionality remains "an appropriate consid-

eration in the typical case." *Hernandez*, 849 F.2d at 144; *see also Branch-Hines*, 939 F.2d at 1322-23.

The *Combs* court rejected an argument that reductions to the lodestar, like enhancements to it, be allowed only where the outcome of the litigation is directly tied to the attorney's performance. *Combs,* 829 F.3d at 393-94. The *Combs* court relied on *Hensley* for the proposition that the degree of success is the most critical factor even if "conscientious counsel tried the case with devotion and skill." *Id.* (*citing Hensley*, 461 U.S. at 436)).

In the instant case, the district court's explanation that the reputation of the attorneys representing Respondents was "above reproach" and "coupled with his experience and skills and the plaintiff's degree of success" justified an award of $117,000 in attorneys' fees is contrary to this Court's holding in *Combs. Id.* The reputation, experience, and skills of Respondents' counsel are not relevant to Respondents' degree of success. The result is what matters.

In *Gagnon v. United Technisource, Inc.*, the Fifth Circuit vacated a fee award that "was more than six times greater than the amount of relief awarded." 607 F.3d 1036, 1044 (5th Cir. 2010).

In *Saldivar v. Austin Indep. School Dist.* the Fifth Circuit affirmed the district court's 82% downward adjustment of a lodestar from $161,406.25 to $29,053.12 where the plaintiff recovered $2,171.20 in damages based on the plaintiff's limited success and an analysis of fee awards in similar cases. *Saldivar v. Austin Indep. School Dist.*, 675 Fed. Appx. 429 (5th Cir. 2017). The *Saldivar* court found that the district court correctly

applied *Migis* by recognizing a ratio of 79 to 1 is "simply too large to allow the fee award to stand." *Id.* at 432.

In this case, neither the district court nor the Fifth Circuit addressed the disparity between the damages Respondents asked the jury to deliver and the $939.29 awarded. The maximum recovery Respondents sought was $1.18 million. (App.17a) The jury awarded $939.29—nothing for mental anguish and no punitive damages. (App.17a)

Respondents originally asked for an attorneys' fee award of $197,160, which would have been a ratio of 210 to 1. The district court originally awarded about 56% of the fees Respondents' requested, which was $110,000, coincidentally about the same amount Respondents asked from the jury in economic damages. (App.22a) The ratio of the original fee award was 117 to 1. After the Second Appeal, the district court increased the fee award to $117,000, which is a ratio of 124 to 1. (App.7a) Under *Migis* and its progeny, a ratio of 124 to 1 is "simply too large to allow the fee award to stand." *Saldivar*, 675 Fed. Appx. at 432 (*quoting Migis*, 135 F.3d at 1048). In the Second Order Awarding Attorneys' Fees, the district court provided no explanation why an attorneys' fee award 124 times the amount of damages awarded by the jury was not excessive under this Court's well-established precedent. The reputation of Respondents' counsel may be "above reproach," but it does not adequately explain or justify such a grossly excessive fee award where he failed to present credible evidence justifying $108,000 in damages and failed to persuade the jury to award a million dollar judgment.

The Fifth Circuit failed to follow *Combs*, *Perdue*, and a host of other guiding precedent by delivering a

short 2-page opinion that found no reversible error even though the district court wholly failed to do anything more than provide a conclusory recitation that it considered the Plaintiff's degree of success while awarding attorneys' fees that were 124 times more than the jury's award.

The Administrative Office of the United States Courts estimates that almost 40,000 civil actions are filed under the Federal Civil Rights Statutes each year. *See* Federal Judicial Caseload Statistics 2017; https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017. Each and every one of these cases involve a request for fees. To the extent that uncertainty exists as to the standards for determining the propriety of an award of fees to a prevailing party in a civil rights lawsuit, this case presents the opportunity to eliminate that uncertainty.

CONCLUSION

The petition for a writ of certiorari should be granted because the Fifth Circuit's decision sanctions a departure from the accepted and usual course of judicial proceedings by the United States District Court for the Southern District of Texas to such an extent as to warrant an exercise of this Court's supervisory power. The petition should also be granted because the Fifth Circuit has decided an important federal question regarding an award of attorneys' fees under 42 U.S.C. § 1988 in a way that conflicts with relevant decision by this Court. Because the decision below is so clearly wrong, the Court may wish to reverse summarily. In the alternative, the case should be set for argument.

Respectfully submitted,

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