No. _____

In The
Supreme Court of the United States

CHERYL GRIFFITH,
Petitioner,

v.

DENIS McDONOUGH
Secretary,
DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a settlement in a case covered by statutory fee shifting provisions under terms entitling plaintiff's attorneys to reasonable fees and costs as determined by a judge requires fees to be determined:

a) under *Blum v. Stenson's* prevailing market rate in the relevant community as opposed to fees determined under contract principles in *Johnson v. Georgia Hwy. Exp. Inc.*, 488 F.2d 714 (5th Cir. 1979) capping fees at lower hourly rates; and

b) with a right to recover fees and costs incurred in order to obtain fees.

RELATED CASES

Griffith v. Department of Veterans Affairs, Case No.: 8:18-cv-00432-26-CPT, United States District Court, Middle District of Florida, Tampa Division.

Griffith v. United States Department of Veterans Affairs, No. 20-14464, U.S. Court of Appeals for the Eleventh Circuit, Opinion entered September 29, 2021.

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PETITION FOR WRIT OF CERTIORARI

This case involves important questions concerning settlement of civil rights, statutory fee shifting cases prior to trial and the need to avoid *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714 (5th Cir. 1974) from overriding *Blum v. Stenson,* 465 U.S. 886, 895 (1984); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 566 (1986), *supplemented* 483 U.S. 711 (1987); *Blanchard v. Bergeron,* 489 U.S. 87, 92-95 (1989) (rejecting *Johnson's* effect of allowing a defendant to assert a contract rate to prevent a plaintiff from receiving a prevailing market rate); *Perdue v. Kenny A. ex rel Winn,* 559 U.S. 542, 550-551 (2010); and from directly conflicting with *Save Our Cumberland Mountains v. Hodel (SOCM),* 857 F.2d 1516, 1524 (D.C. Cir. 1988), (en banc) (the lodestar or prevailing market rate test should apply to for profit attorneys who practice at reduced rates reflecting non-economic goals.) While the present case involves a settlement and retention of jurisdiction to determine reasonable fees and costs, nothing in the cases cited nor in the orders in this case prevents application of their conflicting holdings to reasonable fees in all settings. This court's long-standing precedent has required consideration of prevailing market rates in the relevant community. It has simultaneously rejected an application of contract limitations from cases such as *Johnson v. Georgia*, when used to derail analysis of prevailing market rates. *Blanchard supra* at 92-95; *Delaware Valley* at

563; *Perdue* at 550-1; *see also Save Our Cumberland Mountains* at 1524. The orders in this case conflict with that precedent and create the precise inequitable result rejected by the D.C. Circuit, en banc.

In this case, the Secretary lost the key portions of its summary judgment and agreed to settle the case, under an agreement which denied liability but agreed to give Griffith all the relief she sought, and perhaps more. However, the Secretary wanted to try to limit attorney's fees through the court. Having a trial on liability (even if victory seems virtually assured) simply to preserve an attorney's right to fees is obviously undesirable, indeed, a waste of many people's time and money. If reasonable fees and costs cannot be obtained at settlement, it undermines settlement and places a wedge between the attorney and his client. However, as discussed in footnote 4 below in the Middle District of Florida several lawyers, who obtained the relief their clients sought, lost all fees by agreeing to have a court decide reasonable fees. Rather than accept the undesirable result, we attempted to avoid this by identifying decisional factors and avoiding them. Griffith agreed to a settlement which recognized Griffith's disability and the VA's continuing obligation to accommodate that, paid her $10,000 and most importantly for present purposes, tied both of these to a fee shifting provision to pay her attorneys reasonable fees and costs. The Settlement Agreement made the entire agreement contingent upon the District Court

accepting jurisdiction and awarding reasonable attorney's fees and costs.

Throughout this case, Griffith has argued that *American Disability Association, Inc. v. Chmielarz*, 289 F.3d 1315, 1320-21 (11th Cir. 2002) controlled the prevailing-party determination in this case:

> [I]f the district court either incorporates the terms of a settlement into its final order of dismissal or expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties' agreement. Its authority to do so clearly establishes a 'judicially sanctioned change in the legal relationship of the parties,' as required by Buckhannon, because the plaintiff thereafter may return to court to have the settlement enforced.

289 F.3d at 1320. *Chmielarz* is based upon *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources,* 532 U.S. 598, 598, 604 (2001). Here, as in *Chmielarz,* the district court expressly retained jurisdiction to enforce the outstanding terms of the Settlement Agreement, i.e., the fee-shifting provisions. *See* 289 F.3d at 1320-21. This retention of jurisdiction was an express condition of the Settlement Agreement, and without it, there would be no release or settlement. In determining Plaintiff's prevailing-party status under

these circumstances, the Settlement Agreement and the retention of jurisdiction to enforce the agreement have the same effect as a court order imposing the same terms. *Id.; see also Nat'l Coalition for Students with Disabilities v. Bush,* 173 F. Supp. 2d 1272, 1279 (N.D. Fla. 2001).[1]

In this case, the parties filed a Joint Motion to Dismiss and Jurisdiction requiring "that the court retain jurisdiction to enforce the parties' Settlement and Release … for the purpose of resolving Plaintiff's counsel's reasonable costs and attorney's fees." The court did and ruled that all of Griffith's attorney's hours were determined to be reasonable, but the District Court did not award reasonable attorney's fees based upon prevailing market rates in the relevant community. Instead, it rejected traditional market rate evidence including the only federal court fee award in a Rehabilitation and Title VII case because it was from the S.D. of Florida and a Tampa District Court decision which was ten years old, but still too high for the District Court. Instead, under *Johnson* and its progeny, selective, low, non-economic

[1] Given the difficulty prior plaintiffs had in the Middle District of Florida, we also alternatively argued that the law would be the same under a contractual fee shifting settlement agreement under Florida law. *Home Depot, Inc., et al. v. Home Depot, Inc. (The) Home Depot USA, Inc.,* 931 F.3d 1065, 1903 (11th Cir. 2019). On its face *Home Depot* maintains the rules relating to prevailing market rate and fees on fees provisions are the same as in fee shifting statutes. *Id.* at 1084-1086,1093. The opinions appealed did not reject *Chmielarz* nor distinguished their holdings based on these theories.

contract rates were found to be the best evidence of prevailing market rates. It made no adjustments to evidence based prevailing market rates. Instead it used *Johnson v. Georgia Hwy. Exp.* and its progeny to determine reasonable fees based on Griffith's fee contract with her attorneys which contained special lower rates for a civil rights/public interest plaintiff. In direct conflict with *Save Our Cumberland Mountains,* the Eleventh Circuit recognized Griffith had "provided evidence of judicially awarded fees in the relevant market that could have supported a higher reasonable rate," but said "we cannot conclude the magistrate clearly erred by awarding only contracted rates." "The fact that a client and attorney have agreed on the contracted rates is strong indication of a reasonable rate. *Tire Kingdom,* 253 F.3d at 1337." 5a. *Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 253 F.3d 1332 (11th Cir. 2001) (per curium) was a commercial case which relied on *Johnson* while misdescribing *Blanchard,* a statutory fee shifting case. The panel did not reverse the District Court's order on the reasonable hourly rate, nor reverse its complete refusal to award fees and costs for having to litigate fees. It did, however, require the District Court to consider the fees Griffith's attorney incurred in preparing a Reply to the Secretary's response to the Motion for Fees and Costs. 6a-7a.

The Griffith opinions conflict with statutory fee shifting precedent of this Court and the D.C. Circuit, en banc. If unaddressed these opinions will lead to

inequitable results and additional unnecessary fee litigation in statutory fee shifting cases.

OPINIONS AND ORDERS BELOW

The September 29, 2021 opinion of the court of appeals, which was not designated for publication, is set out at pp. 1a-7a of the Appendix. The post-appeal February 10, 2022 denial of the Petition for Rehearing or Rehearing En Banc is set out at pp. 30a-31a of the Appendix. The September 30, 2020 Order of the U. S. District Court is set out at pp. 8a-29a of the Appendix.

JURISDICTION

The decisions of the court of appeals were entered on September 29, 2021 and February 10, 2022. *See* 1a and 30a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Under 42 U.S.C. § 2000e-16, employees of federal agencies are permitted to sue the federal government for employment discrimination based on race, sex, retaliation and other protected characteristics. 42 U.S.C. § 2000e-16(a), (c). Section 2000e-5(k) allows courts to award reasonable attorney's fees to the prevailing party in litigation under §§ 2000e to 2000e-17. *See* 42 U.S.C. § 2000e-5(k); *see also* 42 U.S.C. § 2000e-16(d) (stating 42 U.S.C. § 2000e-5(k) applies to actions against the federal government brought under § 2000e-16). Similarly, the Rehabilitation Act

prohibits federal agencies from discriminating on the basis of disability and allows employees of federal agencies to sue the government and, if successful, recover attorney's fees. 29 U.S.C. § 791(a), (f); *see also* 29 U.S.C. § 794a(a), (b) (referencing 42 U.S.C. §§ 2000e-16, 20002-5(k).

This Court has held that attorney's fee award provisions in statutory fee shifting civil-rights actions are sufficiently similar so that decisions interpreting one are applicable to all. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) (noting the standards set forth in the opinion are generally applicable in all cases in which Congress has authorized an award of fees to a "prevailing party").

Entitlement to fees is a creature of legislative fiat, and the federal courts have uniformly concluded that compensation for litigating fees is a recoverable portion of that statutory entitlement. *See, e.g., Lund v. Affleck,* 587 F.2d 75, 77 (1st Cir. 1978) (finding it to be inconsistent with the purpose of the statute to dilute a fees award by refusing to compensate the attorney for the time reasonably spent in establishing and negotiating his rightful claim to the fee); *Donovan v. CSEA Loc. Union 1000, Am. Fedn. Of State, County and Mun. Employees, AFL_CIO,* 784 F.2d 98, 106 (2d Cir. 1986) ("The fee application is a necessary part of the award of attorney's fees. If the original award is warranted,. . . a reasonable amount should be granted for time spent in applying for the award."); *Prandini v. Natl. Tea Co.,* 585 F.2d 47, 54 (3d Cir. 1978) (holding

that the appellant's attorneys were entitled under Title VII to be compensated for time spent successfully appealing the first fee award, and in preparing the fee petition, to the extent that time was reasonably necessary to obtaining a reasonable fee award); *Hymes v. Harnett County Bd. of Ed.*, 664 F.2d 410, 413 (4th Cir. 1981) (finding the district court erred where it neglected to include any allowance for the time spent, in the district court and on appeal, to defend the entitlement to and to argue the amount of fees); *Johnson v. State of Miss.*, 606 F.2d 635, 638 (5th Cir. 1979) (finding that attorney's fees may be awarded for time spent litigating the fee claim and reversing the portion of the district court's judgment refusing to consider fee claim time and costs); *Weisenberger v. Huecker,* 593 F.2d 49, 53-54 (6th Cir. 1979) (finding the district court abused its discretion in refusing to award attorney's fees for counsel time spent pursuing the recovery of attorney's fees); *Bond v. Stanton*, 630 F.2d 1231, 1235 (7th Cir. 1980) ("[P]revailing plaintiffs under [§1988] are properly entitled to fee awards for time spent litigating their claim to fees."); *Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 239 (8th Cir. 1982) (finding the plaintiffs' attorneys to be entitled to compensation for services performed in litigating the attorney's fees claim in the district court and on appeal); *Clark v. City of Los Angeles,* 803 F.2d 987, 992 (9th Cir. 1986) ("We, like every other court that has considered the question, have held that the time spent in establishing entitlement to an amount of fees awardable under

section 1988 is compensable."); *Love v. Mayor, City of Cheyenne, Wyo.*, 620 F.2d 235, 237 (10th Cir. 1980) (finding the plaintiff to be entitled to attorney's fees for work done on appeal and for work done in resolving the fee issue itself); *Thompson v. Pharm, Corp. of Am., Inc.*, 334 F.3d 1242, 1245 11th Cir. 2003) (finding an abuse of discretion where the district court deducted all the time attributed to efforts to recover a fee); *Copeland v. Marshall,* 641 F.2d 880, 901 (D.C. Cir. 1980) ("[T]he time spent litigating the fee award normally is itself compensable.").

STATEMENT OF THE CASE

The opinions in this case deviate from the established meaning of reasonable attorney's fees in statutory fee shifting cases. In this case the District Court erroneously changed the meaning of reasonable attorney's fees and costs from the prevailing market rate in the relevant community to the rates contained in a private fee agreement designed to help plaintiffs and reflecting non-economic goals. The Decision further penalized Griffith and her attorneys for litigating the attorney's fee issues by denying any fees on fees. The Eleventh Circuit did not correct these errors when it directed the District Court to consider fees relating to a reply to the Defendant's response to the motion for fees and costs. Significantly, the opinions in this case will become an invitation to future litigation, as defendants seek to use their holdings to litigate what was settled law relating to

reasonable fees and fees on fees at all stages of statutory fee shifting litigation.

A. LEGAL BACKGROUND

a. Reasonable Attorney's Fees

According to this Court, the "lodestar"--the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate –provides the starting point for determining the amount of a "reasonable attorney's fee." *See Hensley,* 461 U.S. at 433 ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."); *Blum*, 465 U.S. at 888 ("The initial estimate of reasonable attorney's fees is properly calculated by multiplying the number of hours reasonably expended on litigation times a reasonable hourly rate.") (citing *Hensley*).

In *Blum*, the Supreme Court interpreted the meaning of the statutory phrase "reasonable attorney's fee" in the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988 (1976 & Supp. V). Section 1988 provided, in relevant part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title…, 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." *See* 465 U.S. at 893 n.7; *Hensley*, 461 U.S. at 433 n.7 (covers Title VII). After considering the

statute and the legislative history, the Supreme Court held that "reasonable fees under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Id.* at 895 (emphasis added).

The old Fifth Circuit rule was that "[i]n no event…should a litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted to that amount." *Johnson v. Georgia Hwy.,* 488 F.2d at 718. . The Supreme Court has held that fee agreements should not place such a limit on fee awards. *See Blanchard,* 489 U.S. at 92-95 (explicitly rejecting the holding in *Johnson* that fee agreements impose an automatic ceiling on an award of attorney's fees). The Court has also found most if not all of *Johnson* factors are subsumed in the lodestar. *Delaware Valley,* 478 U.S. at 566 . In *Perdue v. Kenny A.*, the Court found *Johnson's* factors too subjective. 559 U.S. 550-51.

In *Save Our Cumberland Mountains*, the D.C. Circuit, en banc, addressed whether the prevailing market rate was to be used by courts in calculating fee awards for firms, such as ours, that charge reduced rates in order to serve a public interest type of client. 857 F.2d at 1524. The en banc court concluded that the application of a rate lower than the prevailing market rate would be "inconsistent with the intent of Congress in enacting fee award statutes and with the

Supreme Court's decision in *Blum v. Stenson* which construed those statutes." *Id.* It stated:

> In short, we conclude that our prior decision in *Laffey v. Northwest Airlines, Inc.,* and the panel decision in this case, which it compelled, are both inconsistent with the intent of Congress in enacting fee award statutes and with the Supreme Court's decision in *Blum v. Stenson* which construed those statutes. We therefore expressly overrule *Laffey* to the extent that it imposes the above discussed different method of determining reasonable attorney fees on attorneys situated as Yablonski and Galloway are here. Henceforth, the prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals.

Id.

b. Fees for Litigating Fees

The district court's order rejected Griffith's supplemental fee-on-fees request. As discussed above all federal circuits recognize the right to fees on fees when reasonable attorney's fees are at issue under Congressional fee shifting statutes.

The U.S. Supreme Court has also implicitly recognized fees on fees are covered in such circumstancs. *See Comm'r, INS v. Jean*, U.S. 154, 163 n.10 (1990) ("Because *Hensley v. Eckerhart*, 461 U.S. 4224, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983), requires the district court to consider the relationship between the amount of the fee awarded and the results obtained, fee for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation.").

B. FACTUAL BACKGROUND

Griffith has been an Assistant Regional Counsel GS-14 at the VA Office of Regional Counsel at all material times. From approximately 2011 to 2014, she developed cyclical neutropenia, which is a rare blood disorder characterized by recurrent episodes of abnormally low levels of white blood cells (i.e., neutrophils) in the body.[2] Consequently, Griffith formally requested a reasonable accommodation for her condition in April 2014. The Local Regional Accommodation Coordinator (LRAC) determined that Griffith was a qualified person with a disability and that reasonable accommodation was available; however, management denied Griffith an official determination that she was a qualified person with a

[2] Cyclical neutropenia is a permanent condition that results in episodes of immunosuppression, thereby causing the individual to be abnormally susceptible to recurrent infections. Griffith's doctors advised her to isolate herself during these episodes until her white blood cell count returned to normal.

disability, prevented written findings by the LRAC and ultimately failed to provide Griffith with an accommodation. Instead, Griffith was harassed by management. Previously evaluated as an outstanding attorney, she was met with multiple claims she failed to do one thing or another to justify management's new found hostility. These proved baseless, but only after we took multiple depositions as noted in billing records.

On December 4, 2014, Griffith filed her formal EEOC complaint. On February 22, 2018, Griffith filed suit in federal court. Griffith alleged that the VA had failed to reasonably accommodate her disability in violation of Section 501 of the Rehabilitation Act of 1973. She also alleged discrimination and retaliation in violation of Title VII and the Rehabilitation Act on the same facts. Finally, she alleged a hostile work environment based on the same facts because of her race, disability and protected activity. Throughout the administrative stage and federal proceedings, the Secretary refused to consider any resolution of Griffith's claim.

The case was assigned to a Magistrate for trial. On August 20, 2019, the court granted in part and denied in part the Secretary's Motion for Summary Judgment (MSJ).[3] On December 20, 2019, the parties entered

[3] Griffith dropped her race discrimination and retaliation claim because the race and retaliation claims merely involved

into a Settlement and Release Agreement (Settlement Agreement) releasing Griffith's claims in consideration for (1) recognition Griffith was a qualified person with a disability (neutropenia) entitled to a continuous reasonable accommodation through telework and various potential assignments, (2) $10,000 in damages, and (3) Griffith's "costs and attorney's fees in the amount determined reasonable by order of the United States District Court."

The Secretary sought to settle the case rather than go to trial but wanted to litigate attorney's fees. Merkle & Magri, P.A.'s fee agreement for federal employee civil rights/public interest clients, employs a framework charging multiple rates, which have each increased over time. First, a reduced rate that is significantly less than our reasonable hourly rate. This covers little more than our overhead. Second, if the case settles, the client is liable for a higher reduced hourly rate for all hours worked that is still lower than our reasonable hourly rate. However, it covers all hours worked because the client is liable for all such hours. A third separate provision is an interest provision for extended non-payment. A fourth provision covers presentation of fees to a court or judge and permits the court to determine our

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other potential motivations for the denial of reasonable accommodation. She responded on her reasonable accommodation claim and hostile work environment claims. On August 20, 2019, the Court denied the MSJ as to the reasonable accommodation and hostile work environment counts, while granting it on the race and retaliation counts.

reasonable hourly fees and costs expended to obtain the fees and costs, regardless of how the court rules. The client is obligated for this time and costs.

The Settlement Agreement did not incorporate the fee agreement rates. Rather, it required a reasonable attorney's fee. After summary judgment, the Secretary sought to settle the case but refused to settle for fees at the settlement rate for all hours worked. Given several Middle District of Florida cases, we carefully negotiated language.[4] We chose

[4] In *Access for the Disabled, Inc. v. STF Investments, LLC*, No. 6:06-cv-857-ORL-22UAM, 2007 WL 2010831, at *2-3 (M.D. Fla. July 6, 2007), the parties settled non-monetary issues only and requested the district court to retain jurisdiction to decide the attorney's fees issue. The court retained jurisdiction to address the attorney's fees but did not retain jurisdiction to enforce the terms of the settlement agreement. *Id.* The court also did not incorporate by reference any terms of the settlement agreement into its order of dismissal or enter an order that was functionally equivalent to a consent decree. *Id.* Based on this, the court determined that it "never juridically altered the legal relationship of the parties within the meaning of *Buckhannon* [and] *Chmielarz*….and Plaintiffs have not demonstrated that they are prevailing parties entitled to fees." *Id.* Thus, the court denied the plaintiffs' motion for attorneys' fees. *Id.* In *Access for the Disabled, Inc. v. Shiv Shraddha, LLC,* 8:11-cv-1960-T-33TBM, 2010 WL 2865491, at *1 (M.D. Fla. July 11, 2012), *aff'd*, 507 Fed. Appx. 845 (11th Cir. 2013) (unpublished), the parties filed a joint stipulation to dismiss the case requesting the court retain jurisdiction to enforce the parties settlement agreement and to determine the entitlement and attorneys' fees, costs and litigation expenses. *Id.* While the court retained jurisdiction on the issue of attorneys' fees, it expressly declined to retain jurisdiction to enforce the settlement agreement. *Id.* at *2, Based on this, the court found that the plaintiffs had not obtained a

language with settled law that would allow the Secretary to make its challenges while protecting our client's rights to avoid losing substantive relief due to unpaid fees and to obtain both reasonable fees and costs and fees on fees because ¶7 of the fee agreement makes her liable for fees on fees.

Our historic fee framework or structure has been consistent, but the rates have evolved over time. The clients fee agreement also contains Florida's standard clients' rights form for contingent fee agreements. Several District Courts (going back to 2007 in the Middle and Southern Districts of Florida) and the Merit Systems Protection Board (MSPB) have found that fee shifting case law and ¶7 of our fee contract, as the case may be, allows our clients and their attorneys to recover reasonable fees and costs notwithstanding other lower rates in our fee agreements. The Settlement Agreement in this case did as well. Those District Court cases, several Supreme Court cases, *In re Home Depot Inc.*, 931 F.3d 1065 (11th Cir. 2019), and *Norman v. Housing Authority of the City of Montgomery,* 836 F.2d 1292, 1299 (11th Cir. 1988) recognize the starting point for determining "reasonable" fees is consideration of "market rates" based on similarly-situated counsel with similar experience and expertise in the particular area times the number of reasonable hours.

"court-ordered change in the legal relationship" between the parties necessary to be considered a "prevailing party" and were, therefore, not entitled to recover attorneys' fees. *Id.* at *3-4.

The trial court found the number of hours were reasonable. It also recognized the need to determine market rates, but ignored analysis of prevailing market rates in favor of an alleged "reasonable" rate only consistent with the pre-settlement billing rates, except it awarded Mr. Magri the settlement rate in our fee agreement.

The Settlement Agreement was contingent on a provision requiring the court to retain jurisdiction to determine reasonable attorney's fees and costs. A motion for reasonable attorney's fees and costs was filed with expert declaration and considerable supporting documentation concerning Griffith's attorneys' background and experience in this area of the law and the difficulties of the Defendant's actions and defenses. The expert was experienced in this type of litigation and worked in the Tampa and Miami offices of an international law firm. His hourly rate was over $500 per hour. The motion was opposed by the Secretary without countervailing expert affidavits, or any analysis of market rates. Despite its promise in the Settlement Agreement, it argued our legal fees should be capped by one of four fee provisions, the lowest, contained in our fee contract with Griffith to which the Secretary was not a party and which was not incorporated into the Settlement Agreement.

C. PROCEEDINGS BELOW

On December 20, 2019, the parties filed the Settlement Agreement along with a Joint Motion to Dismiss and Retain Jurisdiction "requesting that the Court retain jurisdiction to enforce the parties' Settlement and Release… for the purpose of resolving Griffith's counsel's reasonable costs and attorney's fees" which the Court granted. The issue before the Court was the amount of Griffith's reasonable fees and costs as opposed to her entitlement to fees and costs.

Griffith's Motion for Attorney's Fees and Costs and Memorandum of Law was alternatively based on (1) statutory fee-shifting under *Chmielarz*, and (2) contractual fee-shifting under *Home Depot*.[5]

Here, as in *Chmielarz*, the district court expressly retained jurisdiction to enforce the outstanding terms of the Settlement Agreement, i.e., the fee-shifting

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[5] Throughout this case, Griffith has argued, without the rejection or disagreement, that *Chmielarz*, which derives from *Buckhannon*, controls the prevailing-party determination in this case:

> [I]f the district court either incorporates the terms of a settlement into its final order of dismissal or expressly retains jurisdiction to enforce a settlement, it may thereafter enforce the terms of the parties' agreement. Its authority to do so clearly establishes a 'judicially sanctioned change in the legal relationship of the parties' as required by Buckhannon, because the plaintiff thereafter may return to court to have the settlement enforces. 289 F.3d at 1320.

However, *Home Depot* also held that contractual fee shifting is governed by statutory fee shifting authority. 931 F.3d at 11084-1086, 1093. Given the difficulty in case law (fn4) *Home Depot* was a fall-back position.

provisions. *See* 289 F.3d at 1320-21. This retention of jurisdiction was an express condition of the Settlement Agreement, and without it, there would be no release or settlement. In determining Griffith's prevailing party status under these circumstances, the Settlement Agreement and the retention of jurisdiction to enforce the agreement have the same effect as a court order imposing the same terms. *Id.; see also Bush*, 173 F. Supp. 2d at 1279; *Buckhannon,* 532 U.S. at 604. In the Settlement Agreement the Secretary agreed that Griffith was a qualified person with a disability (neutropenia) entitled to reasonable accommodations specifically delineated (telework) which followed her in the event of identified potential reassignments. It also entitled her to damages and reasonable attorney's fees and costs determined by the court. The court accepted jurisdiction over the Settlement Agreement to resolve those reasonable fees and costs. Had it not, there would have been no settlement, because the release was contingent upon the district court accepting jurisdiction.

Along with her original motion for fees, Griffith submitted declarations of three attorneys and a paralegal who worked on her case, invoices for fees and costs, receipts for costs, Griffith's Fee Agreement and Statement of Client Rights, the Laffey Matrix regarding attorney's fees in another jurisdiction in which we practice. The declarations contained descriptions of our attorney's experience in private practice, the US Attorney's Office, including as First

Assistant and Acting US Attorney, and the factors courts look to for market rates. They focused primarily on our work in the Middle and Southern Districts of Florida. An affidavit relating to similar cases filed in the Middle District and Southern District of Florida delineated cases handled by our firm and all other firms of the type of federal employment cases we handled in Miami for 10 years and in Tampa for 15 years. Concerning the market rate factor of a need for attorneys, it showed roughly 50% of federal employee cases were *pro se* in those Districts. It is hard for federal employees to afford or to obtain lawyers who will represent them in these cases. The affidavit also compared the number of our cases with those other lawyers handled. Our Tampa cases are several multiples of the next closest lawyer and we were the only attorneys to prevail at trials in Tampa and Miami. Our settlement to loss ratio is considerably higher than other attorneys. The Motion also reflected that our firm does cases in many other states. We do not advertise or otherwise solicit these cases. Mr. McCormack addressed our reputation in his affidavit. We have had meaningful success and just enough adversity to help us grow. The present litigation was handled efficiently enough that the court found all our hours and all our costs to be reasonable.

We also submitted a declaration by an attorney, J. Robert McCormack, who works for an international law firm with 53 offices out of its Tampa and Miami offices. Mr. McCormack had handled federal and

state employment litigation for his firm's clients (employers) and for years federal employees. He is a litigation attorney and is very familiar with attorneys practicing in employment litigation generally as well as the difficulties involved in federal employment litigation. He is particularly familiar with the work of this law firm and the success we have had in this area. He is also familiar with other lawyers who have pursued their work in private firms like his own or others and the rates they charge. His rate is $510 per hour. He agreed with the reasonable hourly rate sought in the Motion of $550 for Joseph Magri; $350 for Sean McFadden; $200 for Gerard Roble; $125 for Meagan Blackshear Ross-Culpepper and $150 for Angela Merkle. We also submitted a Southern District of Florida decision, *Horne v. Barr,* 1:12-cv-23507-JEM in a Rehabilitation Act and Title VII case where the District Court accepted a Magistrate's recommendation which found the reasonable hourly rates of: Joseph Magri $550 per hour; Ward Meythaler $525 per hour; Gerard Roble $200 per hour; Sean McFadden $350 per hour; Ms. Ross-Culpepper $125 per hour; Ms. Merkle $165 per hour.[6]

[6] In the Eleventh Circuit we cited a 2020 decision by the MSPB which awarded the same rates in a whistleblowing case tried in Tampa, Fla. *Gorgus, Laura v. Dep't of Vet. Affairs*, No. AT-1221-17-0705-A-1, 2020 WL 6449031 (M.S.P.B. Oct. 30, 2020). It came down after the Magistrates Order but continues to show we maintain a gap between contract rates and reasonable hourly rates, and that judges have not confused these provisions as the District Court did here.

The motion was opposed by the Secretary without: challenge to our experience or expertise; countervailing expert affidavits; or any analysis of the prevailing market rate. Despite the Secretary's promise in the language of the Settlement Agreement, the Secretary argued that it should get the benefit of the reduced rates provided in Griffith's fee agreement. It also challenged the reasonableness of the number of hours worked.

In paragraph 36 of the original motion for fees, Griffith provided notice that she would be filing supplemental motions for fees on fees. On June 12, 2020, Griffith filed her Supplemental Motion requesting fees on fees. The Secretary opposed it as untimely.

On September 30, 2020, the district court entered an order awarding Griffith $80,520.00 on attorney's fees and $8,933.48 in costs. The court found our billed time and costs to be reasonable but held that the reasonable attorney's fees were to be calculated using the reduced rates in the fee agreement with our client. It rejected as irrelevant a 2020 decision from the Southern District of Florida in a Rehabilitation Act and Title VII case, which was consistent with the rates requested.[7]

[7] Interestingly, *Johnson v. Georgia Highway Express* recognized that under these circumstances decisions outside the locality are evidence of market rate. 488 F.2d at 719 (lists over a

The court rejected all the prevailing market rate evidence submitted by Griffith in favor of reduced rates lower than those awarded to the same attorneys in the same district in the same type of case ten years prior. *Fiedler v. Shinseki*, No. 8:07-cv-1524-T-TBM, 2010 WL1708621 (M.D. Fla. April 26, 2010).[8]

The court also denied Griffith's motion for fees on fees.

The District Court addressed *Blanchard* by reference to *Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 253 F.3d 1332, 1336 (11th Cir. 2001) (per curium). Ignoring the different nature of *Blanchard* and *Tire Kingdom* the District Court points out that the court in *Tire Kingdom* stated: "At least in the context of contingent fee agreements, a fee agreement should not place a strict limit on a fee award." *Tire*

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dozen cases reviewed for this purpose). Here there were no contrary federal employee fee decisions in either the Florida Middle or Southern Districts. Indeed, there is no court decision that the Magistrate accepted as evidence of market rates. The closest it came to discussing them was to criticize our expert's reliance on certain ones, but not to use them as evidence of the market rate because it was relying on reduced non-economic rates.

[8] The Magistrate was an AUSA since 1994 and a member of the US Attorney's Office in Tampa since 2004. He was there in 2007 when *Krop* went to trial and fees were awarded and when Griffith's attorneys won the *Fiedler/Cote* case at trial in 2009, and in 2010 and 2012 when they obtained reasonable fees in that case. He was there when more than 20 cases settled and when a case began which resulted in *Babb v. Wilkie,* 140 S.Ct. 1168 (2020). If he was unfamiliar with our fee agreement and its purpose, we explained it in our motion.

Kingdom, 253 F.3d at 1336. The court then ignored the fact that *Blanchard* was talking about a fee agreement providing less than a reasonable fee. Its point was that the defendant nevertheless would be required to pay the higher amount. The court followed up on page nine of its Order by considering a series of cases in which courts in this circuit faced a "disparity between a litigants contractional fee rate with counsel or a higher purportedly reasonable rate". Every one of those cases involved commercial litigation except *Fiedler v. Shinseki*, (awarding hourly rates higher than the contractional rates following jury verdict for the Plaintiff). The *Fiedler* case was a case that this firm tried to verdict in 2009, the fee contract is the same as the Griffith contract except the settlement rate was lower. In *Fiedler* the court rejected a lower contract settlement amount and awarded a reasonable hourly rate of $350.00. That court also considered affidavits including an expert affidavit and a description of our experience. At that point our experience with Federal employee litigation was considerably less than it is now, however, we now have extensive federal employee litigation experience. It is remarkable that Mr. Magri's reasonable hourly rate in 2010 was found by a Middle District Court to be $350.00 an hour, however, a District Court in 2020 reduced them to $300.00 an hour. Mr. Roble's was $200 per hour, but in 2020 that became $130. In that case we again sought fees in 2012 and requested $350. The court granted it, but noted he could have given more if we asked for it.

The Court improperly used provisions in our fee agreement designed for another purpose to deny us our reasonable hourly rate. In *Blanchard v. Bergeron*, the Supreme Court held that "[s]hould a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount." 489 U.S. at 93. That language cannot be ignored by refusing to determine market rates outside the lower fee contract rate. Many courts have recognized *Blanchard's* holding. The District Court accepted the Secretary's argument and erred as a matter of law.

REASONS FOR GRANTING THE WRIT

I. Prevailing Market Rates

This Court's long-standing precedent has required consideration of prevailing market rates in the relevant community. *Blum,* 465 U.S. at 895; *Delaware Valley*, 478 U.S. at 566; *Perdue*, 599 U.S. at 550-551; *Blanchard*, 489 U.S. at 92-95. It has simultaneously rejected an application of contract limitations from cases such as *Johnson v. Georgia Highway Express* and its progeny to derail an analysis of prevailing market rates. It is especially important in this case which involves for-profit attorneys who practice at reduced rates reflecting non-economic goals. *Save Our Cumberland Mountains*, 857 F.2d at 1524.

The Settlement Agreement was to allow the Secretary to challenge Griffith's fees and to allow

Griffith to avoid damage by making it a fair fight. The Secretary has long been familiar with the fee agreement structure that Griffith had. Had the Secretary accepted the settlement amount under Griffith's fee agreement, it would have paid exactly the same amount it is to pay under the court's order. However, if the Secretary was going to challenge those fees, Griffith would have to pay for the fee litigation. The Secretary also knew this. In order to protect Griffith from the various eventualities that could occur and to deter the Secretary from requiring others to face the undesirable choice it laid on Griffith and her attorneys, there needed to be a benefit to Griffith. That benefit was the ability to obtain the reasonable fees that her attorneys had been entitled to in other cases involving the Secretary. She needed to obtain reasonable fees based on the prevailing market rate. That was the parties' bargain.

However, the Secretary had one basic argument to the district court magistrate judge. It wanted our fees limited to the lowest amounts contained in our fee agreement. To get this, the Secretary never challenged the traditional evidence of prevailing market rates that we produced. It never challenged our expert with an expert of its own. Rather it challenged all of that by arguing that we were bound by our lowest contract rates. If that was true than any amount that we were entitled to as a reasonable hourly rate would have looked like a windfall. That is precisely the argument the magistrate accepted.

The problem with this is it does not consider the prevailing market rate. This was a litigation that the Secretary picked. But the Secretary did not come into that litigation to argue prevailing market rates. It had done so in several cases and was well aware of records reflecting district courts and the MSPB awarding Griffith's attorneys reasonable hourly rates under paragraph 7 of our fee agreement when fees were decided by a judge. Such reasonable hourly rates are determined under the lodestar and with a determination of the prevailing market rate. The Secretary sought to avoid that fight. In doing so he not only took away Griffith's bargain, but disturbed settled law.

Perhaps the best way to understand what is legally wrong with what happened here is to look at *Save Our Cumberland Mountains*. In that case a District Court and a panel of the Court of Appeals did not award for-profit private lawyers who gave their clients reduced fees the prevailing market rate that was available to public interest and large firms. The District of Columbia Circuit, en banc, ruled that denied the in-between law firms the ability to obtain the prevailing market rate Supreme Court precedent required. It held:

> We therefore expressly overrule *Laffey* to the extent that it imposes the above discussed different method of

> determining reasonable attorney's fees on attorneys situated as your blondes and Galloway are here. Henceforth the prevailing market rate method heretofore used in awarding fees to traditional for-profit firms in public interest legal service organizations shall apply as well to those attorneys who practice privately and for-profit but at reduced rates reflecting non-– economic goals.

Conversely, in reaching its decision the District Court focused on *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (11th Cir. 1974) ("In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount."). *Blanchard v. Bergeron,* criticized this statement because no single factor should be determinative. 489 U.S. at 92-95. *Perdue v. Kenny* rejected *Johnson* as being too subjective when looking to determine market rates. 599 U.S. at 551-52. However, at no point does the District Court's decision assess market rate.[9]

More importantly, the district court and panel's reasoning is inconsistent with the intent of Congress

[9] The District Court's citation to *Home Depot* misstates *Home Depot.* That panel stated that *Johnson* factors should be rarely used and are only relevant when not fully captured in the lodestar. 931 F.3d at 1091. Even then, the focus is adjustment of the market rate.

in enacting the fee-shifting statutes and with the Supreme Court's decision in *Blum*. Indeed, the panel's deference to the district court's use of reduced rates in the fee agreement turns the holdings of *Blum* and *Blanchard* on their heads by finding the only persuasive evidence of the prevailing market rate is documentation reflecting reduced rates. While the panel and the district court referenced "prevailing market rate," neither sought to determine the prevailing market rate in the relevant market and ignored that Supreme Court admonishments that reasonable fees should not be limited to reduced rates. *See Blanchard*, 489 U.S. at 93-94; *Perdue,* 559 U.S. at 551-52. Instead, all the traditional evidence of the prevailing market rate provided by Griffith was rejected by the panel while upholding the district court's order. *See* 5a ("While Griffith provided evidence of judicially awarded attorney's fees in the relevant market that could have supported a higher reasonable rate, we cannot conclude that the magistrate judge clearly erred by awarding only the contracted rates.").

Relying on lower rates is contrary to *Blanchard.* In *Blanchard*, 489 U.S. at 92-95 this Court rejected the essence of the Court's order that the reasonable rate be limited by a lower fee provision in the client's fee agreement which derails an analysis of market rates. In *Blanchard* the court stated:

> As we understand § 1988's provision for allowing a "reasonable attorney's fee," it

> contemplates reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount. (emphasis added.)

489 U.S. at 93-94. Here, Secretary explicitly agreed to have the court retain jurisdiction to pay reasonable fees and costs. *Blanchard's* reasoning is applicable to the case under *Chmielarz,* 289 F.3d at 1320-21 (where a settlement agreement over which the court retains jurisdiction alters the parties' position on fee shifting, the plaintiff is a prevailing party).[10] The Settlement Agreement entitles Griffith to reasonable fees and costs.

Finally, the Secretary's argument and the Court's order reject the unambiguous language of the Settlement Agreement. This is a violation of contract law.

For all of these reasons, the Court abused its discretion when it made the clearly erroneous ruling that the lower rates in the fee contract and pre-settlement billing rates were our reasonable hourly rate.

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[10] *Home Depot,* 931 F.3d at 1084-86 (in a contractual fee-shifting case, statutory fee-shifting precedent should be applied.)

II. Fees on Fees

The Court erred when it denied completely a motion for fees on fees, thus further penalizing Griffith who under Paragraph 7 of the Fee Agreement with her attorneys owes this firm for her share of every hour put in to obtain an award from a judge. Under *Chmielarz,* the court accepted jurisdiction over fee-shifting portions of the Settlement Agreement which changed the relationship of the parties on that issue and entitled Griffith to reasonable fees and costs as well as fees to litigate fees under fee shifting statutes and case law.[11]

The panel affirmed, in part, the district court's denial of fees on fees by focusing on the order retaining jurisdiction and requiring a motion for fees and costs to be filed within 30 days. In determining a party's entitlement to fees on fees, however, the court must consider the results obtained in the party's underlying fee request. *See Jean,* 496 U.S. at 163 n.10.

Moreover, the fee shifting standards do not separately discuss fees on fees. Another panel of the Eleventh Circuit has previously held that even a local rule cannot take away the right to fees on fees. *Villano v. City of Boynton Beach* 254 F.3d 1302, 1306 (11th Cir. 2001). The court held:

[11] *Home Depot* also recognizes the right to fees for litigating fees. 931 F.3d at 1093.

> District Court Local Rule 7.3 requires that motions for attorney's fees and costs "be filed and served within 30 days of entry of Final Judgment or other dispositive order." Record, Vol. 8, Doc. 295, at 7. The magistrate judge interpreted this rule to preclude all motions "filed after 30 days of entry of final judgment," extending that interpretation to supplementation of the original motion. *Id.* It is beyond dispute that "district courts remain free to adopt local rules establishing timeliness standards for the filing of claims for attorney's fees." *White v. New Hampshire Dep't of Employment Sec.,* 455 U.S. 445, 454, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982*).* However, we do not accept the magistrate judge's interpretation of the local rule under review; moreover, we would find a rule that eviscerated a statutory right to fees and costs in conflict with federal law.

Id.

Not surprisingly it is the practice in the Middle and Southern Districts of Florida to file requests for fees on fees after the original motion is filed.[12] Griffith's

[12] In *Horne, Krop,* and *Fielder/Cote,* this procedure allowed the parties to resolve fees on fees without further litigation, because they reached an agreement based upon the court's determination on the original fee request that set the hourly rates and a percentage discount. This procedure fosters more settlement and less litigation.

supplemental filings show that requests for fees on fees came after the initial motion for fees and the court's order in *Horne v. Barr,* S.D. Fla. Case No. 1:12-cv-23507. That was also the practice in *Krop v. Nicholson,* M.D. Fla. Case No. 8:06-cv-157; *Cote v. Shinseki*, M.D. Fla. Case No. 8:07-cv-01524. As stated in Griffith's motion for fees below, the fees-on-fees request in *Cote* reflected the second motion was filed three years after the original motion for fees. Here, Griffith submitted her supplemental request after all the pleadings on the issue of entitlement to fees were filed but before the order on entitlement to fees was entered. In all of those cases the motion for fees had a paragraph stating they would be filed later. That was in ¶36 of this motion. The panel's Opinion sanctions a forfeiture of an established right to fees on fees, despite the fact that Griffith was not provided any notice that her request for fees on fees had to be submitted along with her original motion. That necessarily created a forfeiture of fees on fees.

The language that entitled Griffith to fees on fees is "reasonable attorney's fees and costs." That is true under the statutory fee-shifting statutes even though fees on fees are not explicitly mentioned.[13] Looking at the Settlement Agreement and motion filed with the court as well as the arguments filed by the parties, it

[13] That is also true under contractual fee-shifting. According to footnote 7 of *Home Depot,* the fee agreement, like the one at issue here, discussed "reasonable attorney's fees and costs." That authorized fees on fees. 931 F.3d at 1903.

is clear that Griffith was entitled to "reasonable attorney's fees and costs." We are not aware of any statutory or contractual fee-shifting case where a court was permitted to take away a client's right to fees on fees when they were entitled to reasonable fees and costs. Indeed, neither the district court nor the panel cites to any caselaw in support of this notion. A significant problem is that the argument the Secretary made was not put into words in the Settlement Agreement, motion or order. Remaining silent on fees on fees is typical. It should not mean that Griffith should have known to file a partial request for fees-for-fees with the original fee petition especially when it would have been impossible to do so here. The court found that Griffith forfeited her right to fees on fees by failing to do something that was not specified and could not have been done in good faith within the time purportedly required. A harsh result for a client reacting to the Secretary's effort to increase her costs without recompense.

In *Nat. Veterans Leg. Servs. Program v. U.S. Dept. of Veterans Affairs,* 1:96-cv-01740-NHL, 1999 WL 33740260, at *1 (D.D.C. Apr. 13, 1999) ("*NVLSP*", the court rejected the defendant's argument that the plaintiff's supplemental request for fees on fees was untimely under Fed. R. Civ. P. 54(d)(2)(b) even though it was filed 28 days after the court granted attorney fees and costs, because the defendant was not prejudiced and "it would be unjust to work a complete forfeiture." The court went on the reject the

defendant's argument that the plaintiff's supplemental request should be denied or reduced because it was not included with the original fee petition.

Here, there was no statement that Griffith should have included fees-on-fees request with her original motion. As the district court implicitly acknowledged, the December 2019 Order was silent as to when a supplemental motion must be filed. As in *NVLSP*, Griffith notified the Secretary and the Court in her original Motion (¶36) of her intentions to supplement her request with fees-for-fees. Neither the Settlement Agreement nor the Motion to the Court waived Griffith's rights to fees on fees. Therefore, the court had no authority to deny fees on fees.

The fact that the panel found that Griffith could have submitted all of the pre-January 27th fees on fees with the original fee motion does not mean it could have been done in good faith without estimation. Yet it was not required by the language of the order, prior case law, or standard practice to do so. It amounts to a surprise forfeiture and fails to address Griffith's entitlement to fees on fees specifically. This will undoubtedly embolden the Secretary to engage in even more litigation against a "protected" employee.

CONCLUSION

The orders in this case will result in harm to many clients and law firms contrary to Congressional

wishes. It will also embolden more not less fee litigation. For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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