

**Case No. 23-1374
(Consolidated with Case No. 23-1880)**

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

BROOKE HENDERSON and JENNIFER LUMLEY,

Plaintiffs—Appellants,

v.

SCHOOL DISTRICT OF SPRINGFIELD R12, BOARD OF EDUCATION
OF THE SCHOOL DISTRICT OF SPRINGFIELD R12, GRENITA LATHAN
in her official capacity as Superintendent of Springfield Public Schools,
YVANIA GARCIA-PUSATERI in her official capacity as Chief Equity and
Diversity Officer of Springfield Public Schools, and
LAWRENCE ANDERSON in his official capacity as Coordinator of Equity and
Diversity for Springfield Public Schools,

Defendants—Appellees.

On Appeal from the United States District Court for the
Western District of Missouri, Southern Division
Case No. 6:21-cv-03219 (Harpool, J.)

**PACIFIC LEGAL FOUNDATION’S MOTION FOR
LEAVE TO FILE A BRIEF AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS—APPELLANTS**

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Pursuant to Federal Rule of Appellate Procedure 29(a), Pacific Legal Foundation (PLF) moves for leave to file an amicus brief in support of Plaintiffs-Appellants. The proposed brief accompanies this motion.

Proposed Amicus PLF requested consent from the parties to file its brief. Counsel for Plaintiffs-Appellants consented, but counsel for Defendants-Appellees declined. Accordingly, PLF files this motion seeking leave to file the accompanying brief.

I. PLF Has a Strong Interest in Participating as Amicus Curiae

PLF was founded in 1973 to litigate public interest and civil rights cases in state and federal courts nationwide. PLF is a donor-funded organization that represents clients free of charge to challenge violations of their constitutional and statutory rights. PLF has directly represented civil rights plaintiffs in the Supreme Court nearly twenty times, including three this year. *See Wilkins v. United States*, 143 S. Ct. 870 (2023); *Sackett v. E.P.A.*, No. 21-454 (2022); *Tyler v. Hennepin Cnty., Minn.*, No. 22-166 (2023). In addition, PLF has appeared countless times in federal appellate and district courts as well as state courts—all to vindicate constitutional and civil rights.

PLF has an interest in the district court's decision here to award over \$300,000 to defendants in a section 1983 civil rights action. PLF frequently litigates cases under 42 U.S.C. § 1983 and under the First Amendment. *See, e.g., Minnesota Voters*

All. v. Mansky, 138 S. Ct. 1876, 1892 (2018) (declaring unconstitutional Minnesota statute banning certain clothing or items near polling places); *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990) (compulsory dues collected by legal association could not be used to subsidize ideological activities); *Weiss v. Perez*, No. 22-CV-00641-BLF, 2022 WL 11337461, at *7 (N.D. Cal. Oct. 19, 2022) (denying motion to dismiss in section 1983 action alleging First Amendment retaliation); *Ostrewich v. Hudspeth*, No. 4:19-CV-00715, 2021 WL 4480750, at *18 (S.D. Tex. Sept. 30, 2021) (striking down provision of Texas law prohibiting wearing certain clothes under the First Amendment). Here, Plaintiffs-Appellants are supported and represented by a nonprofit operating free of charge, like PLF, and are engaged in a valuable American tradition of advancing civil rights through litigation. The precedent set by this award and the court's legal error potentially threatens PLF's—and other civil rights organizations—ability to undertake its mission and threatens the advancement of civil rights generally.

The court's award of a sizable fee to the Defendants is a threat not only to PLF's work but to civil rights litigation generally. Constitutional litigation and the effort to advance civil rights involves many uncertainties. PLF has litigated cases—and won—where a Supreme Court victory was needed to vindicate the right at issue. *See, e.g., Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2080 (2021) (reversing Ninth Circuit and trial court decisions in concluding regulation which invaded

employer's property was a taking); *Sackett v. E.P.A.*, 566 U.S. 120, 131 (2012) (reversing Ninth Circuit and trial court decisions in finding compliance order reviewable under the APA). Aggressive constitutional litigation is made possible only if the Supreme Court's frivolousness standard for attorneys' fee shifting is rigorously maintained. The district court's erroneous decision threatens that balance.

II. PLF's Amicus Brief Will Be Helpful to the Court in Its Deliberations

PLF is ideally placed to assist the Court on the issue outlined above. PLF has expertise in civil rights litigation, First Amendment litigation, and frequently deals with attorneys' fees issues under 42 U.S.C. § 1988.

Furthermore, the attached brief is limited to addressing this issue of attorneys' fees. In its brief, PLF explains how the district court committed legal error in its application of the "frivolous, unreasonable, or groundless" standard of *Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n*, 434 U.S. 412, 422 (1978), because it was purely post-hoc reasoning, and how the court's mistake threatens pro-bono civil rights litigation by raising the costs for an already costly and risky enterprise. The briefing of this issue will be helpful to the Court in its deliberations.

III. Conclusion

For the foregoing reasons, PLF respectfully asks the Court to grant its motion for leave to file the attached brief.

DATED: May 19, 2023.

Respectfully submitted,

/s/ Joshua P. Thompson

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Western District of Missouri, Southern Division
Case No. 6:21-cv-03219 (Harpool, J.)

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN
SUPPORT OF PLAINTIFFS—APPELLANTS**

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INTERESTS OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded over 50 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark Supreme Court cases defending the constitutional right (i) to equal protection under the law and (ii) to free exercise of speech. *See, e.g., Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1892 (2018) (declaring unconstitutional Minnesota statute banning certain clothing or items near polling places); *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990) (compulsory dues collected by legal association could not be used to subsidize ideological activities)

PLF has offices in California, Florida, and Virginia and regularly litigates matters affecting the right to equal protection in courts across the nation. Here, as a nonprofit legal organization PLF has an interest in the outcome of this litigation, particularly concerning the district court's award of fees to the defendants in a Section 1983 civil rights action.

STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

Amicus Curiae states:

1. No party's counsel has authored this brief in whole or in part.
2. No party or party's counsel has contributed money that was intended to fund the preparation or the submission of this brief.
3. No person—other than the amicus curiae or the amicus curiae's counsel—contributed money intended to fund the preparation or the submission of this brief.

ISSUE PRESENTED

Whether the district court erred in determining that several novel claims in Plaintiffs' First Amendment Section 1983 civil rights action were "frivolous," subsequently resulting in an unlawful award of substantial attorneys' fees and costs in favor of the defense.

ARGUMENT

I. Factual Background and Summary of Argument.

Plaintiffs are employees of Defendant Springfield Public Schools, a public school district in Springfield, Missouri. In October 2020, the school district required Plaintiffs' participation in what it terms a professional development training program—under the auspices of “Diversity, Equity, and Inclusion” (DEI)—which included the distribution of written handouts, videos, and group discussions. *Henderson v. Sch. Dist. of Springfield R-12*, No. 6:21-CV-03219-MDH, 2023 WL 170594, at *2 (W.D. Mo. Jan. 12, 2023). Following the training, the school district also required Plaintiff Henderson's participation in an online learning module, after which followed multiple choice questions. Plaintiffs objected to what they argue is highly controversial and forced political indoctrination.

Plaintiffs are represented by a nonprofit organization, the Southeastern Legal Foundation. Plaintiffs alleged that the training sessions violated the First Amendment in three ways: (1) Defendants discriminated against Plaintiffs' speech on the basis of viewpoint; (2) the mandatory DEI programs chilled Plaintiffs' speech; and (3) Plaintiffs were compelled to speak by affirming and associating with an ideology foisted unwillingly upon them in the mandatory DEI training.

The district court held that Plaintiffs did not suffer an injury-in-fact and thus lacked standing, dismissing the action for lack of jurisdiction. The court explained

in the order on the motions for summary judgment that Plaintiffs were permitted to vocally object during the DEI training sessions and had neither suffered discipline nor any other concrete adverse employment action.

The district court further held that, under these facts, Plaintiffs had a “total” lack of injury that “suggest[ed] a groundlessness that trivializes the important work of the federal judiciary” and concluded that the claims were frivolous. Then, at the court’s behest, Defendants moved for attorneys’ fees and costs, and the court took the unusual step of granting Defendants a significant attorneys’ fee and costs well in excess of \$300,000.

II. The Plaintiffs Had an “Arguable” Basis for Alleging Article III Standing.

As the Appellants explain, in *Christiansburg Garment Co. v EEOC*, 434 U.S. 412, 421 (1978), the Supreme Court set forth a demanding standard required to grant a defendant an attorney’s fee in a Title VII case. Under the *Christiansburg Garment* standard, attorneys’ fees may only be awarded against a plaintiff if the court finds that the plaintiff’s action is frivolous, unreasonable, or without foundation, even if not brought in subjective bad faith. The Supreme Court cautioned that in applying these criteria, a lower court must resist the temptation to engage in *post hoc* reasoning, such as concluding that because a plaintiff failed to ultimately prevail, his or her action must have been unreasonable or without foundation: “Even when the law or the facts appear questionable or unfavorable at

the outset, a party may have an entirely reasonable ground for bringing suit.” *Id.* at 422. In *Hughes v. Rowe*, 449 U.S. 5, 14 (1980), the Court extended this test to section 1983. In *Hughes* the Court reaffirmed that “[t]he plaintiff’s action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees.” *Id.*

Under this standard, fee awards against Plaintiffs are only warranted in “rare circumstances.” *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1581 (10th Cir. 1995). A claim must lack an “arguable basis” in either law or in fact, *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), and a claim lacks an arguable legal basis only when it “is based on an indisputably meritless legal theory.” *Martinez v. Turner*, 977 F.2d 421, 423 (8th Cir. 1992). *See also Khan v. Gallitano*, 180 F.3d 829, 837 (7th Cir. 1999) (“There is a significant difference between making a weak argument with little chance of success—what Khan did—and making a frivolous argument with no chance of success.”).

Here, the district court failed to apply the “arguable basis” standard, deciding instead—in a conclusory fashion void of reasoning—that, because it determined Plaintiffs had not suffered an injury, there was a “total” lack of injury. The court also emphasized the “significant costs” Defendants expended defending the claims. At no point did the court attempt to explain why this “total” lack of injury was

different than the *post hoc* reasoning forbidden in *Christiansburg Garment* or try to explain how Plaintiffs' claims were not at least "arguable."

A court deciding whether a claim is frivolous must at least discuss and explain why Plaintiffs' theory is "indisputably meritless." An argument that a claim should extend to a novel situation (where not foreclosed by binding precedent) is, by definition, an "arguable" legal theory. *See Legal Servs. of N. Cal., Inc. v. Arnett*, 114 F.3d 135, 141 (9th Cir. 1997) (declining to find plaintiff's action frivolous, even where it "must have known that [its] position was unsupported by existing precedent," because it was possible that the plaintiff "was launching a good faith effort to advance a novel theory under [section] 1983 jurisprudence"); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 563 (9th Cir. 1995) (declining to award attorneys' fees because the plaintiff's claim was not "wholly without merit," albeit that the relevant law had "been clearly established not only by the Supreme Court but seven other courts of appeal"). *See also Buckler v. MacGregor*, 634 F. App'x 694, 697 (11th Cir. 2015) ("While the plaintiffs' claim was ultimately unsuccessful, it is not clear that it was based on a legal theory that had no reasonable chance of success.") (cleaned up).

Indeed, the district court's opinion shows that Plaintiffs had at least an *arguable* basis on which to proceed with their claims. For example, as it explained, Plaintiffs' claim of injury from compelled speech relied on a case in which the court

struck a policy that required videographers to “speak favorably about same-sex marriage if they choose to speak favorably about opposite-sex marriage.” *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). Plaintiffs also argued that their participation in the DEI training was analogous to unconstitutional state laws that had required drivers to display vehicle license plates with state mottos or images. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *Cressman v. Thompson*, 719 F.3d 1139, 1156 (10th Cir. 2013).

The district court distinguished these cases, observing that Plaintiffs disagreed openly in the training and were not subject to adverse action (except berating from colleagues). But this is precisely the argument of Justice Rehnquist’s dissent in *Wooley*. 430 U.S. at 722 (“[A]ppellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto ... and that they violently disagree.”). The district court may be correct that *Wooley* is distinguishable along these or other lines, but the fact that the court had to make such an argument, had to parse and distinguish seemingly on-point cases, and a Supreme Court justice made a similar point all demonstrate that the Plaintiffs’ case is at least “arguable.” More is not needed. Other circuits have recognized that this sort of support in caselaw warranting “close attention” to an argument makes a claim unlikely to be frivolous. *See, e.g., Beach Blitz Co. v. City of Miami Beach*, 13 F.4th 1289, 1302 (11th Cir. 2021) (district court abused

discretion in granting attorneys' fees on First Amendment retaliation claim where claim had at least some support in caselaw, even where claim ultimately failed); *Gallitano*, 180 F.3d at 837 (claim not frivolous when controlling case “did involve somewhat analogous facts, but they were not identical” so that claims were not squarely foreclosed).

III. The District Court’s Decision Chills Novel Claims and Stunts the Advance of Civil Rights.

While it may be debatable whether Plaintiffs have standing, the nonprofit that supports the Plaintiffs and whose counsel have advanced these theories is engaged in a valuable American tradition of advancing civil rights through litigation. Public-interest litigants across the political spectrum pursue their ideological goals in court by suing the government for failure to comply with constitutional mandates or statutory requirements. *See* David Marcus, *The Public Interest Class Action*, 104 *Geo. L.J.* 777, 784–85 (2016) (noting public-interest litigation brought by prisoners, immigrants, and same-sex couples); Kelly Davis, *Levying Attorney Fees Against Citizen Groups: Towards the Ends of Justice?*, 39 *Tex. Env'tl. L.J.* 39 (2008) (detailing environmental lawsuits brought and funded by nonprofit organizations). *Christiansburg Garment* itself explained that Plaintiffs in such cases were performing a public service, acting as a “private attorney general, vindicating a policy that Congress considered of the highest priority.” *Christiansburg Garment*, 434 U.S. at 416. Plaintiffs undertaking a “good faith effort” to argue a novel

constitutional theory in the hope of extending the protection of civil rights laws in an increasingly politically frayed and fast-paced society is vital work that benefits the public on a whole and holds those in power accountable. By contrast, in public interest cases where the court rules in favor of defendants to uphold the challenged governmental action, the plaintiffs from whom defendant may seek fees had no role whatsoever in causing any potential violation of constitutional or statutory rights. *See Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) (fee-shifting statutes “encourag[e] victims to make the *wrongdoers* pay at law”).

Furthermore, impact litigation of the kind undertaken by Southeastern Legal Foundation, is essential if civil rights law is to “keep up with the times.” The program at issue in this case is new and had never been reviewed by a court. Any award against a losing plaintiff in a civil rights action threatens the ability of pro bono civil litigants to deal with such novel situations. Such awards are an extreme sanction and must be limited to truly egregious cases of conduct because a more aggressive standard would risk chilling this process and grinding the advancement of civil rights and constitutional law to a halt. *See Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc) (“innovative theories and vigorous advocacy ... bring about vital and positive changes in the law”); *Friedman v. Dozorc*, 412 Mich. 1, 27 (1981) (courts do not want to “unduly inhibit attorneys from bringing close cases or advancing innovative theories”). *See also Geyer v. Millner*, 673 F.

Supp. 773, 776 (W.D. Va. 1987) (“Although the plaintiff was confronted with substantial opposing authority, the legal issues he sought to advance had, arguably, some legal support. This court understands profoundly that the advancement and evolution of the law requires the presentation of novel, or indeterminate, legal theories.”).

In fact, several of amicus curiae Pacific Legal Foundation’s cases illustrate how important it is that Plaintiffs are not deterred from proceeding with “arguable” standing claims. For example, in *Barilla v. City of Houston*, 13 F.4th 427, 430 (5th Cir. 2021), a musician sought to challenge several Houston ordinances which made it illegal for him to busk outside the Theater District or within the District without a permit. The district court had dismissed the case for lack of standing, holding that Barilla could not show injury because he had not been cited for violating the Busking Ordinances, or even shown to be in immediate danger of arrest. *Id.* The Fifth Circuit reversed, allowing Barilla to proceed with his claims. *Id.* at 434. Significantly, after remand, Barilla prevailed on the merits of his claims, and the district court struck down the busking ordinances as unconstitutional. *See* Order Granting in Part Motion for Summary Judgment, *Barilla v. City of Houston*, No. 4:20-CV-00145 (S.D. Tex. Dec. 20, 2022). This shows that even plaintiffs with challenging standing arguments can make an important difference to the advancement of civil rights. *See also* *Abad v. Bonham*, 562 F. Supp. 3d 1144, 1150

(E.D. Cal. 2022) (plaintiffs have standing to pursue injunction against California fishing permit law notwithstanding that they were not threatened with prosecution under that law).

Finally, the district court failed to consider that public interest cases like the Plaintiffs’ often involve considerable financial risk and expense on the part of the Plaintiffs already. Numerous social and financial impediments exist to nearly every public interest lawsuit, as they often involve no financial reward and considerable social, professional, and reputational risk—particularly in First Amendment cases. For example, Plaintiffs here were seeking only nominal damages, and put their jobs and reputations at risk to bring this suit, challenging a program imposed on them by their employers and popular in their industry. To add on top of these obstacles, as the district court’s decision does, a lowered standard for the award of attorneys’ fees could cause plaintiffs to fear they would end up bankrupt or severely strained financially. This would work against the spirit of the civil rights laws and the “American Rule” on costs and fees, and for very little public gain.

CONCLUSION

Because Plaintiffs advanced plausible, not frivolous, theories in their attempt to obtain redress for perceived constitutional violations, this Court should reverse the decision below and hold that the district court abused its discretion by awarding attorneys’ fees.

DATED: May 19, 2023.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
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I hereby certify that on May xx, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Joshua P. Thompson
JOSHUA P. THOMPSON