No. 08-1086

In the Supreme Court of the United States

YVONNE G. TROUT, ET AL., PETITIONERS

v.

B.J. PENN, ACTING SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals' holding—consistent with every other court of appeals to consider the question—that Section 114(2) of the Civil Rights Act of 1991 (1991 Act) does not provide for prejudgment interest on a settlement award relating to conduct that preceded the 1991 Act's effective date conflicts with this Court's decision in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), interpreting the temporal reach of the Foreign Sovereign Immunities Act of 1976.

2. Whether petitioners should recover attorney's fees for unsuccessfully litigating their claim that Section 114(2) of the 1991 Act permitted an award of such prejudgment interest.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 540 F.3d 442. The opinion of the district court (Pet. App. 15a-34a) is reported at 464 F. Supp. 2d 25.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2008. A petition for rehearing was denied on November 19, 2008 (Pet. App. 41a). The petition for a writ of certiorari was filed on February 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1973, petitioners brought a class action lawsuit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that respondents had engaged in

gender discrimination. Pet. App. 2a-3a. After extensive litigation, the parties reached a settlement, which the district court approved on November 22, 1993. Under this 1993 consent decree, respondents agreed to pay petitioners backpay for the period 1970 to 1992. *Id.* at 3a. Under a 1995 stipulation, the parties explicitly reserved the issue of whether petitioners were entitled to an award of prejudgment interest on back pay and on attorney's fees for the period before November 21, 1991, the effective date of the Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, 105 Stat. 1071. Pet. App. 18a. Section 114(2) of the 1991 Act (105 Stat. 1079) provides for the same award of prejudgment interest against the federal government in Title VII cases "to compensate for delay in payment * * * [as is available] in cases involving nonpublic parties." 42 U.S.C. 2000e-16(d). Before the passage of the 1991 Act, this Court had held that interest on attorney's fees was *not* available in actions brought against the government under Title VII, because Congress had not expressly waived the United States' sovereign immunity to such a claim. See *Library of Cong.* v. *Shaw*, 478 U.S. 310, 318 (1986).

In orders issued in 1998, the district court concluded that respondents were required to pay prejudgment interest on back pay and on attorney's fees for the period prior to the passage of the 1991 Act. Pet. App. 18a. In 2001, the district court entered a final judgment awarding petitioners $8,627,276.50 in interest on back pay and $1,477,020.90 in interest on attorney's fees. *Id.* at 16a.

The court of appeals reversed. *Trout* v. *Secretary of Navy*, 317 F.3d 286, 292-293 (D.C. Cir.), cert. denied, 540 U.S. 981 (2003) (*Trout IV*). It concluded that its decision in *Brown* v. *Secretary of Army*, 78 F.3d 645 (D.C. Cir.), cert. denied, 519 U.S. 1040 (1996), was "dis-

positive" of petitioners' assertion that Section 114(2) required the Navy to pay prejudgment interest on backpay and on attorney's fees for the period before November 21, 1991. *Trout IV*, 317 F.3d at 287-288. The court noted the dual considerations motivating *Brown*: the rule of strict construction of waivers of sovereign immunity and the "rule of no-interest against the sovereign." *Id.* at 287. The latter, the court reasoned, "provides an important backdrop against which Congress acts when it waives sovereign immunity," and thus, courts "must presume that when Congress promulgates a waiver of sovereign immunity, it knows which principles will govern [courts'] interpretation of the waiver." *Id.* at 290 (citing *Brown*, 78 F.3d at 650). *Brown* was further informed, the court of appeals noted, by this Court's holding in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), which affirmed the "traditional presumption * * * 'against applying statutes affecting substantive rights, liabilities, or duties to *conduct* arising before their enactment.'" *Trout IV*, 317 F.3d at 291 (quoting *Landgraf*, 511 U.S. at 278).

The court of appeals rejected petitioners' attempt to distinguish *Brown* on the ground that respondents' liability here was not finally determined until the 1993 consent decree, which was after Section 114(2) became effective. *Trout IV*, 317 F.3d at 287-288. The court concluded that "the conduct underlying the complaint" rather than the procedural posture of the case governed whether *Landgraf*'s general presumption against retroactivity applied. *Id.* at 291. The court of appeals also reiterated its conclusion in *Brown* that there was "no evidence of congressional intent to apply [Section] 114(2) retroactively." *Id.* at 292. Thus, noting "the Supreme Court's instruction that a 'statement that a statute will become effective on a certain date does not sug-

gest that it has any application to conduct that occurred at an earlier date,'" the court of appeals held that the "district court erred in awarding prejudgment interest under [Section] 114(2) on backpay and attorneys' fees for periods prior to November 21, 1991." *Id.* at 292-293 (quoting *Landgraf*, 511 U.S. at 257).

Accordingly, because respondents had paid "interim attorneys' fees to counsel for the Trout class that is attributable to litigation of the prejudgment interest dispute, and because the final amount of costs and fees remains to be determined," the court of appeals remanded "for final determination of the costs and fees owed to the Trout class." *Trout IV*, 317 F.3d at 293.

Petitioners filed a petition for a writ of certiorari, which this Court denied. 540 U.S. 981 (2003). This Court also denied petitioners' motion for leave to file a petition for rehearing, which articulated petitioners' theory that this Court's intervening decision in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004) controlled the disposition of this case. 543 U.S. 976 (2004).

On remand to the district court and after the denial of petitioners' previous petition for a writ of certiorari, respondents moved for final determination of the attorney's fees and costs owed to the plaintiff class. Pet. App. 21a. Respondents also requested that the district court order petitioners and their counsel to refund the excess interim fees and costs, with interest. *Ibid.* Notwithstanding the decision in *Trout IV*, petitioners again sought prejudgment interest on back pay and on attorney's fees for periods prior to November 21, 1991, arguing—as they had in their unsuccessful motion to this Court—that *Altmann* demonstrated that *Trout IV* was wrongly decided. *Id.* at 22a.

The district court denied petitioners' motion, and granted respondents' motion for final determination of

the fees and costs owed to petitioners. Pet. App. 29a-31a. The district court further ordered petitioners to "refund $106,375.45 of the interim attorneys' fees and costs previously paid by the government in this action plus interest on that amount." *Id.* at 32a. The refunded attorney's fees and costs "relate[d] exclusively to the time spent and costs incurred [by petitioners] in connection with litigating the issue of the right to prejudgment interest for the period prior to the enactment of the Civil Rights Act of 1991." *Id.* at 22a.

The court of appeals affirmed. Pet. App. 1a-14a. The court rejected petitioners' assertion that because this Court held in *Altmann* that the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, was applicable to conduct before its enactment, "*Altmann* now controls statutes that concern waivers of sovereign immunity" more generally. Pet. App. 6a. "It is clear," the court of appeals concluded, "that the Court's decision in *Altmann* was specific to the statute in that case." *Id.* at 9a (pointing to this Court's reliance in *Altmann* on "the history of foreign sovereign immunity" and Congress' language in the FSIA's preamble). The court of appeals noted that this Court has since observed that its conclusion in *Altmann* that the usual presumption against retroactivity announced in *Landgraf* did not apply to the FSIA "turned on the peculiarities" of the FSIA. *Id.* at 10a (quoting *Fernandez-Vargas* v. *Gonzalez*, 548 U.S. 30, 38 n.6 (2006)).

The court of appeals further determined that petitioners were not entitled to attorney's fees for unsuccessfully litigating their claim that Section 114(2) applied retroactively and entitled them to claim prejudgment interest on the settlement award for conduct before the 1991 Act's enactment. Applying *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), the court concluded that

petitioners' unsuccessful interest claim was distinct from their successful sex discrimination litigation, and was thus not eligible for an attorney's fee award. Pet. App. 13a. The court of appeals declined to resolve whether its review of the district court's distinctness determination was *de novo* or for abuse of discretion, concluding that under either standard, the claims were distinct. *Ibid.*

ARGUMENT

The petition for a writ of certiorari should be denied. The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant further review.

1. This Court previously denied petitioners' petition for a writ of certiorari seeking review of the court of appeals' determination that Section 114(2) of the 1991 Act does not give them a claim for prejudgment interest on backpay and on attorney's fees for any period before November 21, 1991, the effective date of the 1991 Act. *Trout* v. *Secretary of Navy*, 317 F.3d 286, 292-293 (D.C. Cir.), cert. denied, 540 U.S. 981 (2003); 1991 Act Pmbl., 105 Stat. 1071; § 402(a), 105 Stat. 1099. The issue did not warrant this Court's review then, and it does not now.

a. At the time of petitioners' earlier petition for a writ of certiorari, every court of appeals to consider the question had concluded that Section 114(2) affords no claim for prejudgment interest for conduct occurring before its effective date. Br. in Opp. at 5-6, *Trout* v. *Secretary of Navy*, 540 U.S. 981 (2003) (No. 03-22) (discussing *Brown* v. *Secretary of Army*, 78 F.3d 645 (D.C. Cir. 1996), cert. denied, 519 U.S. 1040 (1997); *Arneson* v. *Callahan*, 128 F.3d 1243 (8th Cir. 1997), cert. denied, 524 U.S. 926 (1998); *Woolf* v. *Bowles*, 57 F.3d 407 (4th

Cir. 1995); *Huey* v. *Sullivan*, 971 F.2d 1362 (8th Cir. 1992), cert. denied, 511 U.S. 1068 (1994); *Edwards* v. *Lujan*, 40 F.3d 1152 (10th Cir. 1994), cert. denied, 516 U.S. 963 (1995)). Since then, it appears no court of appeals has had reason to address the temporal reach of Section 114(2), which is unsurprising given that the issue can arise only where there is proven discrimination from decades ago, and only in cases against the government. There is not now, has never been, and is unlikely to be, a split of authority in the circuits on the question.

b. Petitioners claim that *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), marked such a departure in the Court's retroactivity analysis that the courts of appeals are now entirely mistaken in their uniform view about Section 114(2)'s retroactivity. This argument is incorrect on the merits.

As an initial matter, this Court saw nothing in the court of appeals' earlier application of *Brown* or *Landgraf* to this case that merited this Court's attention. Recognizing that, petitioners focus on the court of appeals' perceived misapplication of *Altmann*. See, *e.g.*, Pet. i (Questions Presented). But *Altmann* announced no principle that undermines these authorities, or makes the application of them to this case incorrect, or otherwise warrants further review by this Court.

As the court of appeals explained in the decision below, *Altmann* reaffirmed—rather than undermined—the "default rule of no retroactive effect of congressional enactments announced in *Landgraf*." Pet. App. 6a-7a (citing *Altmann*, 541 U.S. at 692-694). In particular, this Court noted that where a "statute affects rights, liabilities, or duties with respect to past conduct," the statute is not to have retroactive effect absent an explicit congressional directive. *Id.* at 7a (citing *Altmann*, 541 U.S. at 693-694). Where a statute "merely confers or ousts

jurisdiction," however, "application of a statute to * * * pending cases would be sanctioned." *Ibid.* This Court's determination in *Altmann* that the FSIA applies to pre-enactment conduct turned on its conclusion that the FSIA fell into neither category. *Ibid.*; see *Altmann*, 541 U.S. at 694 ("Though seemingly comprehensive, this inquiry [under *Landgraf*] does not provide a clear answer in this case."); *id.* at 696 ("*Landgraf*'s default rule does not definitively resolve this case."). Because *Landgraf*'s presumption against retroactivity was inconclusive in the "*sui generis* context" of the FSIA, this Court looked to the FSIA itself and the "circumstances surrounding its enactment," and found "clear evidence that Congress intended the Act to apply to preenactment conduct." *Id.* at 696-697.

This analysis of the FSIA certainly does not alter the basic rule of *Landgraf*. And in contrast to the peculiarities of the FSIA that confronted this Court in *Altmann*, the D.C. Circuit here found the traditional *Landgraf* retroactivity analysis readily applicable to Section 114(2). That section contains no indication that Congress intended it to apply retroactively to respondents' conduct in this case. See *Trout IV*, 317 F.3d at 290; *Brown*, 78 F.3d at 648. Moreover, by allowing a claim for prejudgment interest on awards issued for Title VII violations, Section 114(2) clearly increases the federal government's liabilities for past conduct. Cf. *Altmann*, 541 U.S. at 695 (stating that the "FSIA merely opens United States courts to plaintiffs with pre-existing claims against foreign states" and that it "neither increases those states' liability for past conduct nor imposes new duties with respect to transactions already completed" (internal brackets and quotation marks omitted)). Petitioners do not argue otherwise. Thus, Section 114(2) falls squarely within *Landgraf*'s pre-

sumption against retroactivity, and recourse to the methods this Court utilized in *Altmann* to determine congressional intent is wholly unnecessary.

Petitioners are likewise mistaken in asserting that *Altmann* stands for the proposition that *Landgraf*'s antiretroactivity presumption no longer applies to any case involving any post-enactment assertion of immunity. Most obviously, *Altmann* has nothing to do with the United States' sovereign immunity. It is well-established that "foreign sovereigns have no right to immunity in our courts." *Altmann*, 541 U.S. at 688 (citing *Schooner Exch.* v. *McFaddon*, 7 U.S. (3 Cranch) 116 (1812)). By contrast, waivers of the United States' own sovereign immunity must be strictly construed, *e.g.*, *Department of Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999), and so any ambiguity regarding the temporal scope of that immunity must be resolved in favor of the United States.

Nor, contrary to petitioners' suggestion, does *Altmann* suggest that the "relevant retroactivity event" in all cases involving any form of immunity is the assertion of that immunity. Pet. 14. This Court's conclusion that "assertions of [a foreign state's] immunity to suits" rather than the conduct underlying the assertion of immunity "are the relevant conduct regulated by the" FSIA did not inhere in the nature of an assertion of immunity. *Altmann*, 541 U.S. at 697. Rather, this conclusion stemmed from the FSIA's particular language and purposes. *Ibid.* ("*Claims* of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.") (quoting 28 U.S.C.

1602).[1] Section 114(2) has no such reference to the federal government's *invocation* of immunity, and thus does not signal Congress's intent to make the invocation of immunity—rather than the government's underlying conduct at which Title VII and Section 114(2) are targeted—the "relevant conduct regulated by the" 1991 Act. *Ibid.*

c. Even if the Court believed petitioners' novel interpretation of *Altmann* might have merit, the Court's review of the issue would be better informed by awaiting additional decisions from other courts of appeals on *Altmann*'s relevance to retroactivity analysis of waivers of sovereign immunity. Petitioners do not identify—and the United States is unaware of—any split of authority in lower courts on the application of *Altmann* to statutes that waive the United States' sovereign immunity. Indeed, the decision below may well be the only court of appeals opinion addressing the issue in any detail. In such a sensitive area, with such a wide range of statutes

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[1] In so deciding, this Court noted that its "approach to retroactivity *in this case* thus parallels that advocated by Justice Scalia in his concurrence in *Landgraf*." *Altmann*, 541 U.S. at 697 n.17 (emphasis added). This Court did not suggest, as petitioners claim (Pet. 24), that it was abandoning the *Landgraf* presumption in all cases involving an assertion of immunity in favor of Justice Scalia's concurrence. Rather, the Court simply observed that its interpretation of the FSIA's particular language and purposes tracked Justice Scalia's views in *Landgraf*.

Moreover, even if Justice Scalia's *Landgraf* concurrence were controlling, his focus on "relevant activity that the rule regulates" would support the court of appeals' conclusion here, *Altmann*, 541 U.S. at 697 n.17 (quoting *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring)), because the "relevant retroactivity event" for Section 114(2) is the conduct underlying the putative Title VII violation. See *Trout IV*, 317 F.3d at 291-292 (concluding that "the conduct underlying the complaint, rather than the procedural posture of the litigation, has significance in" determining whether Section 114(2)'s application is retroactive).

permitting the imposition of liability on the government, this Court may benefit from the views and experience of the lower courts in other cases.

Finally, the retroactivity of the statute involved here is of diminishing—if not already vanished—importance. As petitioners admit, their case is of almost uniquely "Jarndyceian" duration. Pet. 7. The proper interpretation of Section 114(2)'s temporal reach may have been significant in a substantial number of cases around the time of the 1991 Act's passage, as evidenced by the cluster of court of appeals cases from the mid-1990s. See pp. 6-7, *supra.* But today, the issue is irrelevant except in the rare case that reaches back to discrimination nearly two decades past. The singular nature of petitioners' case is underscored by the fact that the Eighth Circuit's 1997 decision in *Arneson* appears to be the last time anyone besides these petitioners raised the issue. An issue with such limited relevance does not merit this Court's attention.

2. The court of appeals' determination that petitioners were not entitled to attorney's fees as a prevailing party for unsuccessfully litigating the prejudgment interest issue also does not merit further review. The decision is correct, does not conflict with the decisions of this Court or any other court of appeals, and arises in an unusual context that would allow the Court to offer, at most, limited guidance on the legal issue petitioners assert is presented by their case.

a. In *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), this Court held that attorney's fees should not be awarded for work performed on an unsuccessful "claim that is distinct in all respects from [a plaintiff's] successful claims." *Id.* at 440. Both the district court and the court of appeals determined that under the factors set out in *Hensley*, petitioners' unsuccessful prejudgment interest

litigation was "distinct" from its litigation on the underlying merits. Pet. App. 10a-13a, 26a-28a. This Court explained in *Hensley* that the only unsuccessful claims for which a plaintiff may still be eligible for attorney's fees are those related to successful claims. 461 U.S. at 435. Such related claims "involve a common core of facts" or are "based on related legal theories." *Ibid.* It is this sort of lawsuit that "cannot be viewed as a series of discrete claims" for the purpose of determining attorney's fees to a prevailing party. *Ibid.*

As the court of appeals and district court correctly concluded, under *Hensley*, petitioners' unsuccessful litigation on the prejudgment interest issue is distinct from their earlier, successful litigation on the merits that culminated in the consent decree. The retroactivity of Section 114(2) shares no common facts or legal theories with petitioners' underlying claims of sex discrimination. Nor was "[l]itigation of the interest issue * * * inextricably intertwined with the sex discrimination litigation—it was not necessary to obtain or protect any relief awarded, nor was it necessary to preserve the integrity of the Consent Decree as a whole." Pet. App. 13a; cf. *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 556 (1986) (attorney's fees could be awarded for work during post-judgment proceedings if such work is "useful" and of a type "ordinarily necessary" to secure the litigation's final result). Thus, the lower courts correctly applied *Hensley*, and petitioners' assertion that the court of appeals "disregarded" this Court's precedent (Pet. i) is incorrect.

Petitioners contend that *Hensley* drew a bright line between "claim[s]"—which petitioners equate to "cause[s] of action" (Pet. 30-31)—on the one hand, and "contentions," "grounds," and "issues" on the other, and that attorney's fees should "be awarded to a prevailing plain-

tiff on a per 'claim' basis" except where several claims together might be seen as part of "one large claim." Pet. 27, 28, 29.

Hensley created no rule that a proper attorney's fee award must include time spent litigating unsuccessful "'issues' or 'contentions' or 'grounds.'" Pet. 29. Such a formalistic use of the words "claim" and "issue" would be inconsistent with *Hensley* itself. In *Hensley*, this Court indicated that only a partial award would be warranted on a single constitutional cause of action about plaintiffs' treatment and conditions at the defendant hospital if plaintiffs there had "prevailed on only one of their six general claims, for example the claim that petitioners' visitation, mail, and telephone policies were overly restrictive." 461 U.S. at 436. Moreover, without comment, this Court discussed circuit court holdings using the word "issues" as synonymous with petitioner's conception of "claims." See *id.* at 438 n.14 (discussing the focus on the "particular legal issue on which relief had been granted") (citing *Brown* v. *Bathke*, 588 F.2d 634 (8th Cir. 1978)); *id*. at 433 (discussing the typical analysis of success on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit") (quoting *Nadeau* v. *Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978)).

Moreover, on petitioners' logic, a plaintiff's pursuit of all forms of relief related to a single cause of action would be compensable, no matter how unrelated or disproportionate to the success actually achieved. Such a rule would conflict with this Court's emphasis on setting fee awards in proportion to the success a plaintiff obtains. Rather than creating a formal distinction between claims and issues, this Court emphasized a district court's "discretion in determining the amount of a fee award" by examining the relief obtained "in compari-

son to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 437, 440. Indeed, this Court stressed that "[t]here is no precise rule or formula" in determining a fee award, and that district courts "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for" a plaintiff's "limited success." *Id.* at 436-437. The touchstone is that the work for which a fee is awarded must be proportional to the relief obtained. See *id.* at 436 (requiring a determination that "expenditure of counsel's [compensated] time was reasonable in relation to the success achieved"). The lower courts here correctly recognized that they need not—and ought not—award petitioners fees for work performed on the Section 114(2) issue, which did not contribute in any way to the success obtained in the consent decree.

b. Nor does the court of appeals' application of *Hensley* to this case conflict with any other precedent of this Court or other courts of appeals. The court of appeals' decision is consistent with *Commissioner* v. *Jean*, 496 U.S. 154 (1990). Petitioners suggest that *Jean* stands for the proposition that once a party prevails in any aspect of litigation, it is entitled to fees "for the entire action." Pet. 33. But this Court reiterated in *Jean* its earlier holding in *Hensley* that the "prevailing party" requirement "brings the plaintiff only across the statutory threshold" and that "[i]t remains for the district court to determine what fee is 'reasonable'" under the success-focused inquiry set out in *Hensley*. *Jean*, 496 U.S. at 160-161 (citation omitted).

Notwithstanding petitioners' string citation to ten other courts of appeals, Pet. 30-31, not a single case petitioners cite stands for the proposition that all work associated with a single cause of action must be compensated if a plaintiff wins any relief in connection

with that cause of action.[2] Thus, there is no conflict in

[2] Most of these cases do not even use the phrase "cause of action," and none suggests that every issue unsuccessfully litigated in association with a particular cause of action must be included in the calculation of a fee award. See *Green* v. *Torres*, 361 F.3d 96, 98 (2d Cir. 2004) (noting that under *Hensley* where claims "involve a common core of facts or are based on related legal theories," and are therefore not severable, "attorney's fees may be awarded for unsuccessful claims as well as successful ones") (internal citation and brackets omitted); *Williams* v. *Tri-County Growers, Inc.*, 747 F.2d 121, 137 (3d Cir. 1984) (remanding where a district court had "fail[ed] to consider the interrelated nature of the lawsuit as a whole"); *Johnson* v. *Hugo's Skateway*, 949 F.2d 1338, 1352 (4th Cir. 1991) (affirming district court's refusal to award fees against one defendant for successful claims brought against a different defendant); *Pruett* v. *Harris County Bail Bond Bd.*, 499 F.3d 403, 418 (5th Cir. 2007) (remanding to allow the district court to award fees appropriate to plaintiffs' partial success), cert. denied, 128 S. Ct. 1227, and 128 S. Ct. 1290 (2008); *Imwalle* v. *Reliance Med. Prods., Inc.*, 515 F.3d 531, 555 (6th Cir. 2008) (noting the relevance to the fee award that "[c]ommon facts" underlay plaintiff's claims, which also had "significant overlap in the legal theories"); *Ustrak* v. *Fairman*, 851 F.2d 983, 988 (7th Cir. 1988) ("A partially prevailing plaintiff should be compensated for the legal expenses he would have borne if his suit had been confined to the ground on which he prevailed plus related grounds within the meaning of *Hensley*."); *Minnesota Supply Co.* v. *Raymond Corp.*, 472 F.3d 524, 545 (8th Cir. 2006) (remanding to determine whether claims "are distinct or whether they are related in such a way that much of the time of counsel was devoted to the litigation as a whole," and if the latter, "to consider the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation") (internal quotation marks omitted); *McCown* v. *City of Fontana*, 550 F.3d 918, 924 (9th Cir. 2008) (holding that "attorney's fees awarded under 42 U.S.C. § 1988 must be adjusted downward where the plaintiff has obtained limited success on his pleaded claims"); *Browder* v. *City of Moab*, 427 F.3d 717, 723 (10th Cir. 2005) (remanding to district court because it "gave no rationale for its decision" in awarding reduced fees); *Quintana* v. *Jenne*, 414 F.3d 1306, 1312 (11th Cir. 2005) (concluding that where a plaintiff's arguments supporting each claim were distinct, a district court could "weigh and assess the amount of attor-

the circuits to be resolved by this Court's review of this case.

Petitioners' assertion that the court of appeals' decision raises "troubling public policy and ethical concerns" because it does not compensate petitioners' counsel "for services they were ethically obligated to provide after the entry of the Consent Decree," Pet. 35, is unavailing. Congress's provision that fees are awarded only for a plaintiff's successes necessarily means that some work that counsel is ethically obligated to do, having agreed to represent a plaintiff, may go uncompensated. See *Hensley*, 461 U.S. at 436 (stating that "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill" and that "the most critical factor is the degree of success obtained").

c. Even if this issue were otherwise worthy of this Court's attention, this case would be an undesirable vehicle for addressing the question petitioners present.

First, disputes about the retroactivity of certain incremental claims for relief are quite unusual, and disputes about the attendant attorney's fee award rarer still. Given the unusual factual context of this case, review here would be expected to give only limited guidance to lower courts.

Second, the court of appeals found it unnecessary to decide the applicable standard of appellate review, holding that it would have reached the same result on *de*

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ney's fees attributable exclusively to [plaintiff's] frivolous retaliation claim"); *Andrews* v. *United States*, 122 F.3d 1367, 1376 (11th Cir. 1997) (remanding for a recalculation of fees where a "district court did not consider that plaintiffs prevailed on only one of their three [Comprehensive Environmental Response, Compensation, and Liability Act of 1980] claims and their monetary award on that claim was quite small").

novo review or review for abuse of discretion. Pet. App. 13a. This is a threshold issue the Court might have to decide before reaching the merits, and it would do so without the benefit of a reasoned decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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