No. 23-621

IN THE

Supreme Court of the United States

GERALD F. LACKEY, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

DAMIAN STINNIE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, CAMPAIGN LEGAL CENTER, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., SOUTHERN POVERTY LAW CENTER, NATIONAL WOMEN'S LAW CENTER, AND SOUTHERN COALITION FOR SOCIAL JUSTICE IN SUPPORT OF RESPONDENTS

NEIL A. STEINER
BIAUNCA S. MORRIS
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036

ANGELA M. LIU
DECHERT LLP
35 West Wacker Drive, Suite 3400
Chicago, IL 60601

CHRISTOPHER J. MERKEN
LUKE D. YAMULLA
DECHERT LLP
2020 Arch Street
Philadelphia, PA 19104

DAMON T. HEWITT*
ED CASPAR
DARIELY RODRIGUEZ
EZRA D. ROSENBERG
THOMAS SILVERSTEIN
POOJA CHAUDHURI
Counsel of Record
ALEXANDER S. DAVIS
HEATHER SZILAGYI
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street, NW, Suite 900
Washington, DC 20005
(202) 662-8600
pchaudhuri@lawyerscommittee.org

**Admitted in Pennsylvania only. Practice limited to matters before federal courts.*

Counsel for Amici Curiae

August 12, 2024

130240

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

Page

STATUTES

Page

LEGISLATIVE MATERIALS

Page

OTHER SOURCES

STATEMENT OF INTEREST[1]

Amici are nonpartisan, nonprofit public interest organizations dedicated to protecting civil rights through the courts. Amici have a strong interest in the correct statutory interpretation of "prevailing party" under 42 U.S.C. § 1988. Section 1988 fee awards help make our work possible. Civil rights and public interest cases may be successfully resolved at the preliminary injunction stage. Thus, entirely barring the availability of fee awards to winners of preliminary injunctions will limit the ability of civil rights litigants to retain counsel.

For sixty years, the Lawyers' Committee for Civil Rights Under Law has used legal advocacy to achieve racial justice to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. The Lawyers' Committee is intimately familiar with the legislative history and context that led to the passage of Section 1988. In 1976, the organization's representatives participated in hearings before Congress testifying at length as to the devastating impact of *Aleyska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), on civil rights litigants. For the half century that the statute has been in existence, the Lawyers' Committee has represented clients in suits eligible for fee awards under Section 1988 and routinely secured preliminary injunction victories.

---

1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this Brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this Brief.

Campaign Legal Center is a nonpartisan, nonprofit organization whose mission is to advance democracy through law by advocating for every American's right to meaningfully participate in the democratic process. To advance that mission, Campaign Legal Center regularly serves as counsel or *amicus curiae* in election-related litigation in this Court, including *Shelby County* v. *Holder*, 570 U.S. 529 (2013), *Gill* v. *Whitford*, 138 S. Ct. 1916 (2018), *Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019), and *Allen* v. *Milligan*, 599 U.S. 1 (2023). Campaign Legal Center frequently represents clients in fee-eligible cases where relief is often obtained by securing a preliminary injunction.

The NAACP Legal Defense and Educational Fund, Inc., (LDF) is the nation's first and foremost civil rights legal organization. Since its founding in 1940, LDF has strived to secure equal justice under the law for all Americans and to break down barriers that prevent Black people from realizing their basic civil and human rights. LDF regularly serves as counsel and *amicus curiae* in cases where civil rights plaintiffs seek to vindicate their rights under federal law, the kinds of cases where Congress recognized the importance of attorney's fees being available when it enacted Section 1988.

The Southern Poverty Law Center (SPLC) is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. SPLC has participated as counsel or *amicus curiae* in a range of cases before the U.S. Supreme Court, federal appellate and district courts, and state courts focused on eradicating poverty, decarcerating and decriminalizing Black and

Brown communities, promoting voting rights and civic engagement, and dismantling hate and extremism.

The National Women's Law Center (NWLC) fights for gender justice — in the courts, in public policy, and in our society — working across the issues that are central to the lives of women and girls. NWLC uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us — especially women of color, LGBTQ people, and low-income women and families. Since its founding in 1972, NWLC has worked to advance workplace justice, income security, educational opportunities, and health and reproductive rights for women and girls and has participated as counsel or amicus curiae in a range of cases in the U.S. Supreme Court and the lower courts.

Southern Coalition for Social Justice (SCSJ) is a 501(c)(3) nonprofit organization founded in 2007 in Durham, North Carolina. SCSJ partners with communities of color and economically disadvantaged communities across the South to defend and advance their political, social, and economic rights through legal advocacy, research, and communications. Since its founding, SCSJ has represented clients in civil rights cases across the South in which preliminary injunctions are sought and attorney's fee awards are available. This case therefore presents issues directly tied to SCSJ's work.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner urges this Court to adopt a rule that would, under no circumstances, bestow "prevailing party" status for purposes of an award of attorney's fees under 42 U.S.C. § 1988 when a plaintiff obtains enduring judicial relief by way of a preliminary injunction. The plain language of the statute, its legislative history, almost a half century of nearly unanimous judicial construction, public policy, and common sense all run counter to Petitioner's arguments.

Contrary to Petitioner's argument, the plain meaning of "prevailing party" hardly ends the discussion in their favor. By any definition, "prevailing party" means a person who has won something by way of a judicial order. *Buckhannon Bd. & Care Home, Inc.* v. *Dep't of Health and Human Res.*, 532 U.S. 598, 618 (2001). Or as this Court put it, "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989). This Court has set forth a clear formulation to govern "prevailing party" status: "judicial imprimatur" that changes the "legal relationship" of the parties, *Buckhannon*, 532 U.S. at 605, and is not "reversed, dissolved, or otherwise undone by the final decision in the same case," *Sole* v. *Wyner*, 551 U.S. 74, 86 (2007). Respondents easily meet that standard. They won a preliminary injunction that removed a statutory suspension on their driver's licenses, and shortly thereafter, the legislature repealed the disputed law thereby mooting out the case. J.A. 350–381, 389. Petitioner says that Respondents are precluded from a fee award because they won only "preliminary" relief,

not "final" relief on the merits. Not so. Respondents won an enduring change in the legal relationship of the parties by virtue of a court order. By the plain language of the statute, and as construed by this Court in that is sufficient.

Petitioner's view is also unsupported by the legislative history behind Section 1988 and the ample jurisprudence interpreting the statute in various contexts. Below, *amici* provide the Court with a history of the statute to demonstrate why Congress did not endorse the rule pressed by Petitioner. Congress enacted the Civil Rights Attorney's Fees Award Act of 1976 (revising 42 U.S.C. § 1988) to promote private enforcement of important Reconstruction-era civil rights statutes. Before Congress enacted Section 1988, courts had no formal mechanism for awarding attorney's fees under Reconstruction-era civil rights statutes. But after Section 1988's enactment, low-income parties who had experienced violations of their civil rights had more opportunity to vindicate those rights because they were more likely to find attorneys who would represent them.

In light of this history, *amici* show that a rule that encourages defendants to strategically moot cases so as to avoid having to pay attorney's fees would frustrate the purpose of Section 1988. Congress, in fact, expressly stated that the word "prevailing" was not intended to require the entry of a final order before fees were awarded. Part of the reason Congress intended the winners of interim orders to receive attorney's fees was to expedite the resolution of a suit and limit the overall resources needed to continue long, protracted litigation.

Buckhannon's interpretation of Section 1988, therefore, makes sense. It is one thing to deny fees to a party whose complaint, standing alone, is the catalyst to the case becoming moot, an event that typically occurs early in the litigation. It is quite another thing to construct a model that encourages litigation for years, perhaps even through trial, and gives the defendant the unilateral right to end the challenged practice at any time in the litigation and escape payment of attorney's fees.

Accepting Petitioner's constricted view of Section 1988 threatens the enforcement of our most important civil rights laws. It may incentivize defendants to run out the clock, even after seeing the writing on the wall: a court order on the likelihood of success on the merits. Rather than viewing the court's order as a signal to settle early, defendants may be encouraged to engage in a long and costly waiting game, knowing they have the unilateral ability to pull the plug before entry of final judgment. This is not only likely to increase the burdens on our courts, but, worse, to make it harder for civil rights victims to find advocates for their cause. This is not what Congress intended.

For all the reasons in Respondents' Brief and this Brief, the Court should affirm the en banc ruling of the Fourth Circuit. The Court should rule that prevailing party status may be bestowed upon a plaintiff who has obtained a preliminary injunction but not a final judgment—as Respondents did here—so long as there is no adverse finding on the merits underlying the preliminary injunction.

ARGUMENT

I. A FAIR READING OF SECTION 1988 COMPELS A CONSTRUCTION THAT PREVAILING PARTY STATUS MAY BE BESTOWED ON THE BASIS OF A PRELIMINARY INJUNCTION

Prior to 1976, there existed no consistent, statutory mechanism for awarding attorney's fees to prevailing parties who sued and won under Reconstruction-era civil rights laws like 42 U.S.C. § 1983. Courts sometimes awarded fees under the "private attorney general doctrine" exception to the general American Rule that each party, winner or loser, bear his or her own fees and costs. Under this exception, private attorneys working to vindicate the civil rights of injured parties were seen as advancing the public interest and effectuating good public policy and therefore entitled to fee awards. See R. Dreyfus, Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 347–50 (1980).

That changed with this Court's decision in *Aleyska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), which rejected the private attorney general theory as an invasion of "the legislature's province." *Id.* at 271. Without specific statutory authorization, the Court explained, the American Rule applies, and each side must bear its own costs. *Id.* at 269–70. After *Alyeska*, attorneys were largely prohibited from collecting attorney's fees under Reconstruction-era laws. See M. Slater, Note, *Civil Rights Attorney's Fees Awards in Moot Cases*, 49 U. Chi. L. Rev. 819, 822 (1982).

Congress acted swiftly to remedy the impact of *Aleyska*. In 1976, Congress passed the Civil Rights Attorney's Fees Award Act, revising 42 U.S.C. Section 1988, "to remedy anomalous gaps in our civil rights laws created by ... *Alyeska*." S. Rep. No. 1011, 94th Cong., 2d Sess. 1 (1976) (Senate Report). By including only Reconstruction-era civil rights laws in the statute,[2] Congress elevated the enforcement of these laws above all others. Congress observed, "[t]he remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven." *Id.* at 3.

Congress also sought to "to achieve consistency in our civil rights laws." *Id.* at 1. Unlike the old civil rights laws, the modern statutes, for example, the Civil Rights Act of 1964 and the Voting Rights Act of 1965, had attorney's fees provisions built into their statutory schemes. Congress recognized the lack of parity and sought to remedy that. *Id.* at 1. Accordingly, Section 1988 authorizes "reasonable" attorney's fee awards at the court's discretion, to "the prevailing party" in certain civil rights actions that do not in themselves contain fees provisions. In pertinent part, the statute reads,

---

2. 42 U.S.C. § 1981 (equal rights under law to all persons within United States); 42 U.S.C. § 1982 (equal property rights to all citizens); 42 U.S.C. § 1983 (any person who, under color of state law, deprives a citizen rights secured by the Constitution or laws is liable at law or in equity); 42 U.S.C. § 1985 (conspirators who prevent citizens from securing privileges of citizenship liable for damages); 42 U.S.C. § 1986 (officers who do not enforce Section 1985 liable for damages); 20 U.S.C. §§ 1681–1686 (Title IX) (discrimination based on sex or blindness in educational programs receiving federal financial assistance prohibited); 42 U.S.C. §§ 2000(d)–(d-6) (Title VI) (discrimination based on race, color, or national origin in programs receiving federal financial assistance prohibited).

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, 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.

42 U.S.C. § 1988.[3]

Although the statute does not expressly define "prevailing party," the plain meaning of that term has never been as circumscribed as that suggested by Petitioner. Not one of the dictionary definitions of prevailing party cited by Petitioner excludes preliminary injunctions. Pet. Br. 17–18; see also U.S. Br. 12–13. A party who "successfully prosecutes the action or successfully defends against it," *Black's Law Dictionary* 1352 (rev. 4th ed. 1968), or "the party who has made a claim against the other[]and has successfully maintained it," *Black's Law Dictionary* 1069 (5th ed. 1979), could fairly include

3. Section 1988 created "no startling new remedy" and instead met "the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding fees which had been going on for years prior to the Court's decision" in *Aleyska*. Senate Report 6. Section 1988 "track[ed] the language of the counsel fee provisions of Titles II and VII of the Civil Rights Act of 1964, and Section 402 of the Voting Rights Act Amendments of 1975." H. R. Rep. 1558, 94th Cong., 2d Sess. 5 (1976) (House Report).

a party who has obtained a final judgment on the merits as well as a party who has not. The type of order is not so important so long as the party has obtained meaningful judicial relief, preliminarily or otherwise, of some kind.

Indeed, this Court has already interpreted the statute in this manner. Early in the history of Section 1988, this Court held that merits adjudication is not a *sine qua non* to prevailing party status. For example, in *Maher* v. *Gagne*, 448 U.S. 122 (1980), this Court concluded that a consent decree, although it "did not purport to adjudicate respondent's statutory or constitutional claims," gave the plaintiff prevailing party status. *Id.* at 126 n. 8. And in *Farrar* v. *Hobby*, 506 U.S. 103 (1992), the Court similarly concluded that a plaintiff who had won nominal damages and no other relief was a prevailing party under Section 1988. *Id.* at 112. The reason the winner of nominal damages was a prevailing party was because the order "modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Id.* at 113. The *Farrar* Court therefore rightly focused on the "touchstone" of the prevailing inquiry," that the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 111 (quoting *Texas State Teachers Ass'n*, 489 U.S. at 792).

Any doubt on the issue was dispelled by this Court's opinion in *Buckhannon*. That decision reaffirmed the Court's precedent that resolution of a dispute need not come by way of a formal and final adjudication on the merits. 532 U.S. at 603–04. In *Buckhannon*, this Court concluded that the "catalyst theory,"—or the mere filing of a lawsuit without any court order that results in a change

in relationship between the parties—was not a permissible basis for a party to recover attorney's fees. *Id.* at 605. The Court laid down a two-part test for prevailing party status: (1) "judicial imprimatur" in favor of the plaintiff that (2) results in a change of the parties' legal relationship in accordance with the plaintiff's claim. *Id.* And in *Sole*, the Court left open the issue of whether prevailing party status can be based on a preliminary injunction that is not otherwise undone on the merits. 551 U.S. at 86.

Throughout the existence of Section 1988, moreover, numerous lower courts had ruled that a preliminary injunction, standing alone, could support prevailing party status under Section 1988 so long as there was no adverse merits determination. Such decisions were issued both before[4] and after[5] *Buckhannon*.

---

4. See, *e.g.*, *Coal. for Basic Human Needs* v. *King*, 691 F.2d 597, 601 (1982) (preliminary injunction order was "close to a final judgment" because it gave plaintiffs relief they sought); *Haley* v. *Pataki*, 106 F.3d 478, 483–84 (2d Cir. 1997) (preliminary injunction was sufficient to bestow prevailing party status); *Williams* v. *Alioto*, 625 F.2d 845, 847–48 (9th Cir. 1980) (same); *Doe* v. *Marshall*, 622 F.2d 118, 119–20 (5th Cir. 1980) (same); *Smith* v. *Univ. of N.C.*, 632 F.2d 316, 352–53 (4th Cir. 1980) (no award of fees where plaintiff won preliminary injunction but lost at trial); *Parks* v. *Grayton Park Assocs.*, 531 F. Supp. 77, 78–79 (E.D. Mich. 1982) (same).

5. See, *e.g.*, *Tri-City Cmty. Action Program, Inc.* v. *City of Malden*, 680 F. Supp. 2d 306, 314–15 (D. Mass. 2010) (preliminary injunction materially altered legal relationship between plaintiff and defendant and was not reversed, dissolved, or otherwise undone by final decision in same case); *HomeAway.com, Inc.* v. *City of New York*, 523 F. Supp. 3d 573, 584–86 (S.D.N.Y. 2021) (same); *Chrysafis* v. *Marks*, 2023 WL 6158537, at *3 (E.D.N.Y. Sept. 21, 2023) (same); *Estiverne* v. *Esernio-Jenssen*, 908 F. Supp. 2d 305, 308–10 (E.D.N.Y.

Courts in the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have all concluded post-*Buckhannon* that a plaintiff is entitled to attorney's fees when a state actor agrees to cease its illegal conduct after the issuance of a preliminary injunction. See n. 4, *supra*. Indeed, the one Circuit Court, the Fourth, to have held otherwise, see *Smyth ex rel. Smyth* v. *Rivero*, 282 F.3d 268 (4th Cir. 2002), reversed course en banc, leading to this appeal. That every Court of Appeals to have considered the issue has expressly held that a preliminary injunction may bestow

---

2012) (same); *People Against Police Violence* v. *Pittsburgh*, 520 F.3d 226, 232–34 (3d Cir. 2008) (*PAPV*) (same); *Buck* v. *Stankovic*, 2008 WL 4072656, at *2 (M.D. Pa. Aug. 27, 2008) (same); *Dearmore* v. *Garland*, 519 F.3d 517, 521–26 (5th Cir. 2008) (same); *McQueary* v. *Conway*, 614 F.3d 591, 601 (6th Cir. 2010) (same); *Tennessee State Conf. of the NAACP* v. *Hargett*, 53 F.4th 406, 410–11 (6th Cir. 2019) (same); *Miller* v. *Caudill*, 936 F.3d 442, 449–50 (6th Cir. 2019) (same); *Planned Parenthood Sw. Ohio Region* v. *DeWine*, 931 F.3d 530, 541–42 (6th Cir. 2019) (same); *Consolidated Paving, Inc.* v. *Peoria*, 2013 WL 916212, at *5 (C.D. Ill. Mar. 8, 2013) (same); *Tay* v. *Dennison*, 2020 WL 6270954, at *2 (S.D. Ill. Oct. 26, 2020) (same); *Rogers Grp., Inc.* v. *Fayetteville*, 683 F.3d 903, 910–11 (8th Cir. 2012); *Planned Parenthood Minn., N.D.* v. *Daugaard*, 946 F. Supp. 2d 913, 921 (D.S.D. 2013) (same); *Higher Taste, Inc.* v. *City of Tacoma*, 717 F.3d 712, 716–18 (9th Cir. 2013) (same); *McMillen* v. *Clark Cnty.*, 2016 WL 8735673, at *3–6 (D. Nev. Sept. 23, 2016) (same); *Diaz* v. *Brewer*, 2015 WL 3555282, at *2–4 (D. Ariz. June 5, 2015) (same); *Kansas Jud. Watch* v. *Stout*, 653 F.3d 1230, 1239–40 (10th Cir. 2011) (same); *Inst. for Just.* v. *Laster*, 2022 WL 17903784, at *2–3, n. 3 (W.D. Okla. Dec. 23, 2022) (same); *Common Cause/Ga.* v. *Billups*, 554 F.3d 1340, 1355–56 (11th Cir. 2009) (same); *Common Cause Ga.* v. *Sec'y State of Ga.*, 17 F.4th 102, 107–8 (11th Cir. 2021) (same); *Bird* v. *Sumter Cnty. Bd. of Educ.*, 2014 WL 1340677, at *1–3 (M.D. Ga. Apr. 3, 2014) (same); *Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939, 944–50 (D.C. Cir. 2005) (*Buckhannon's* construction applied to EAJA).

prevailing party status undercuts Petitioner's argument that the plain language of the statute points in the opposite direction. Had there been any doubt as to the meaning of "prevailing party" in this context, more than half-a-century of precedent might have given way to something less than the unanimity among the circuits.

In sum "prevailing party" means precisely what the Court in *Buckhannon* says it means—a party who has obtained judicial relief. 532 U.S. at 605–06. Respondents in this case have done so.

II. THE LEGISLATIVE HISTORY OF SECTION 1988 SUPPORTS AVAILABILITY OF PREVAILING PARTY STATUS BASED ON THE ISSUANCE OF A PRELIMINARY INJUNCTION ALONE

The legislative history of Section 1988 demonstrates that Congress expressly authorized attorney's fees in circumstances that fall short of a final adjudication on the merits.

Both the House and Senate Reports identify circumstances in which fees may be awarded either "pendente lite," or such as where a suit ends in an out-of-court settlement or a consent decree. The House Report expressly states, "the word 'prevailing' is not intended to require the entry of a *final* order before fees may be recovered." House Report 8 (italics in original). The Report reiterates,

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the

> merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or a jury. If litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen County v. Fair*, 507 F.2d 281 (6th Cir. 1981); *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976); *Aspira of New York Inc v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975). A "prevailing party" should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion.

Id. at 7.

The House Report makes clear that Congress intended winners of injunctive relief, including non-final preliminary injunctive relief, to qualify as "the prevailing party." The Senate Report corroborates this understanding, "'[i] n appropriate circumstances, counsel fees . . . may be awarded pendente lite" or during the course of litigation. Senate Report 5. The Senate Report further explains that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Id.* See also *Hanrahan* v. *Hampton*, 446 U.S. 754, 757–58 (1980) (analyzing legislative history to ascertain congressional intent).

Petitioner attempts to distinguish consent decrees from preliminary injunctions on the basis that the former demonstrates a defendant's waiver of adjudication by consent to a final judgment while the latter shows that the

defendant has not consented to any such judgment. Pet. Br. 21–22. If anything, the distinction between consent decrees on the one hand and preliminary injunctions on the other is that the latter are predicated on a more searching judicial inquiry into the merits of the case than the former. In the specific factual scenario where the defendant chooses to moot a suit after the issuance of a preliminary injunction, that choice is arguably the functional equivalent of waiving adjudication by consent.

Congress's intent to make fee awards available to plaintiffs in circumstances in which they obtained judicial relief short of final judgment is apparent from the primary purposes behind the enactment of Section 1988. First, Congress wanted to promote the enforcement of important civil rights. It therefore recognized that "effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens" because government agencies' "authority and resources are limited." House Report 1. The prospect of fees, Congress reasoned, is designed to attract competent legal counsel to the "vast majority of the victims of civil rights violations [who] cannot afford legal counsel" and "are unable to present their cases to the courts." *Id.* Quoting from a decision of this Court, Congress observed that "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." Senate Report 3 (quoting *Newman* v. *Piggie Park, Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). That was the result Congress sought to avoid when it enacted Section 1988.

Second, and perhaps most important, Congress wished to encourage speedy resolution of civil rights cases by authorizing fee awards *during* litigation before a final judgment on the merits. See House Report 7–8; Senate Report 5. As such, Congress sought to remove incentives to prolong litigation after the plaintiffs had obtained the requested relief.

Congress's clear policy objectives would be thwarted if this Court were to adopt Petitioner's construction of Section 1988. It is one thing to encourage the quick resolution of civil rights litigation by allowing defendants to avoid payment of attorney's fees when a court has not adjudicated the merits. It is quite another to allow defendants to avoid payment of attorney's fees by mooting out claims a court has ruled is likely to succeed on the merits. That does not comport with the clear congressional intent behind Section 1988. See M. Slater, *Civil Rights Attorney's Fees Awards in Moot Cases*, *supra*.

III. ALLOWING PREVAILING PARTY STATUS BASED ON PRELIMINARY RELIEF MINIMIZES OPPORTUNITIES FOR GAMESMANSHIP AND ENCOURAGES CONTINUED ENFORCEMENT OF CIVIL RIGHTS

Litigating through final decision on the merits can be costly and take years. A preliminary injunction provides relief early on. Furthermore, learning that the court believes the plaintiffs have a likelihood of success on the merits may— especially in cases where the defendant ceases its unlawful practice shortly after the issuance of a preliminary injunction and before burdensome discovery—help both parties avoid costly litigation. See,

e.g., *Dearmore*, 519 F.3d at 520 (ordinance amended twelve days after preliminary injunction order issued); *Tennessee State Conf. of the NAACP*, 52 F.4th at 409 (statute repealed seven months after issuance of preliminary order); *Common Cause/Ga.*, 554 F.3d at 1346 (statute repealed less than one year after preliminary injunction); see also *Higher Taste*, 717 F.3d at 715 (after issuance of preliminary relief, parties agreed to suspend discovery while they engaged in settlement discussions). There is also, of course, a concomitant benefit on the courts.

On the other hand, changing the practice of allowing for an award of attorney's fees to a plaintiff who has obtained preliminary relief may discourage swift resolution of meritorious cases. It is not far-fetched that a natural consequence of Petitioner's rule Such a holding could encourage defendants to prolong litigation after the issuance of a preliminary injunction knowing they have the unilateral ability to avoid attorney's fees by mooting the case. See, *e.g.*, *PAPV*, 520 F.3d at 230 (after issuance of preliminary injunction defendant resisted amending challenged law several times leading to contentious and protracted meet and confer process before finally amending law); *HomeAway.com, Inc.*, 523 F. Supp. 3d at 582 (defendant amended challenged ordinance two years after issuance of preliminary injunction and costly discovery process).

Limiting attorney's fees under Section 1988 to situations where a case must be fully litigated to victory will seriously undermine civil rights enforcement. It will place civil rights plaintiffs and advocates between a rock and a hard place. If advocates file a civil rights case, they risk unnecessarily protracted and costly litigation, where

the defendants possess all the leverage and ultimately determine whether plaintiffs get paid for the time spent litigating the case. And if the severe reduction in the likelihood of a fee award inhibits advocates from taking on such cases, it is inevitable that civil rights protections will abate. This is true particularly for individuals with limited means who seek the help of solo practitioners and small firms to enforce their constitutional rights. See S. Schwab & T. Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 767–69 (1988); C. Tobias, *Rule 11 & Civil Rights Litigation*, 37 Buff. L. Rev. 485, 486 n. 41 (1989). See also Senate Report 2 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nations's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."). It is not possible that Congress intended such a result when it enacted Section 1988.

Petitioner would strip the word "prevailing" of any sensible meaning. At the very least, a "prevailing party" is a party who has won. Petitioner lost in the district court and Respondents won. J.A. 350–381. Petitioner then gave up because the constitutional violation was so obvious it was not worth continuing forward. To deny Respondents an award of attorney's fees in this circumstance would be to wholesale abandon any commitment to the plain meaning of the statute and Congress's intent in adopting it.

CONCLUSION

For the reasons in this Brief and in Respondents' Brief, this Court should affirm the en banc Fourth Circuit's decision.

Respectfully submitted,

Neil A. Steiner
Biaunca S. Morris
Dechert LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036

Angela M. Liu
Dechert LLP
35 West Wacker Drive, Suite 3400
Chicago, IL 60601

Christopher J. Merken
Luke D. Yamulla
Dechert LLP
2020 Arch Street
Philadelphia, PA 19104

Damon T. Hewitt*
Ed Caspar
Dariely Rodriguez
Ezra D. Rosenberg
Thomas Silverstein
Pooja Chaudhuri
Counsel of Record
Alexander S. Davis
Heather Szilagyi
Lawyers' Committee for Civil Rights under Law
1500 K Street, NW, Suite 900
Washington, DC 20005
(202) 662-8600
pchaudhuri@lawyerscommittee.org

**Admitted in Pennsylvania only. Practice limited to matters before federal courts.*

Counsel for Amici Curiae

APPENDIX

TABLE OF APPENDICES

APPENDIX — LIST OF ADDITIONAL *AMICI CURIAE*

Advancement Project

Asian Americans Advancing Justice - Southern California

Bazelon Center for Mental Health Law

Center for Public Representation

Impact Fund

Justice in Aging

NAACP

National Consumer Law Center (on behalf of its low-income clients)

National Health Law Project

Poverty & Race Research Action Council

Pregnancy Justice

Public Counsel

Western Center on Law and Poverty