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 INSTITUTE FOR FREE SPEECH, SOUTHEASTERN LEGAL FOUNDATION, CATO INSTITUTE, NEW CIVIL LIBERTIES ALLIANCE, LIBERTY JUSTICE CENTER, SECOND AMENDMENT FOUNDATION, AND NATIONAL RIFLE ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici Institute for Free Speech, Southeastern Legal Foundation, Cato Institute, New Civil Liberties Alliance, Liberty Justice Center, Second Amendment Foundation, and the National Rifle Association of America are non-profit public interest law firms and organizations that primarily or largely exist to develop and shape the law in order to secure individual liberties.

Amici file this brief to urge the Court to better align its prevailing party precedent with the generally acknowledged understanding that civil rights litigation is designed to impact the law, an understanding this Court shares in other contexts. When people obtain a precedential opinion that changes the law in their favor, they "prevail" in every sense of that concept—and in the way that matters most to all parties.

This Court should thus adopt a bright-line rule holding that a party who wins relief at a preliminary stage of litigation "prevails" if it obtains an opinion that materially alters the law in its favor. *Amici* rarely seek relief that would have no impact beyond benefiting a particular plaintiff. More critically, the desire to improve the law is every bit as much of their clients' litigation goal as obtaining money or some other specific benefit, and it is no less tangible. This case matters to *amici* because acknowledging that their clients prevail when they alter

1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* or their counsel have made a monetary contribution to the preparation or submission of this brief.

legal doctrine in a way that can impact future cases would help ensure that they have the funding to continue to protect civil rights, and also because attorney-fee awards can positively influence the government's behavior.

INTRODUCTION

Did Otis McDonald "prevail" against the City of Chicago?

No reasonable person would doubt it. McDonald obtained this Court's holding that the Second Amendment secures fundamental rights, which control the relationship between people and their state and local governments through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Of course he "prevailed"—in every sense of the word.

But the district court in McDonald's case didn't think so. Broadly reading *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), it denied his motion for attorney fees and costs. *McDonald v. City of Chicago*, No. 08-C-3645, 2011 WL 13755, 2011 U.S. Dist. LEXIS 349 (N.D. Ill. Jan. 3, 2011); *see also NRA of Am., Inc. v. Vill. of Oak Park*, 755 F. Supp. 2d 982 (N.D. Ill. 2010). After all, this Court merely opined about the Constitution and ordered that the case be remanded for further proceedings. *McDonald*, 561 U.S. at 791. Understanding its prospects, Chicago repealed the challenged law before the proverbial ink dried on this Court's opinion. Indeed, on the case's way back to the district court, the Seventh Circuit declined "to express any opinion" as to

whether Chicago's repeal "before the Supreme Court's decision could be implemented on remand, affect[ed] the availability of fees" under *Buckhannon*. *NRA of Am., Inc. v. City of Chicago*, 393 F. App'x 390, 390 (7th Cir. 2010).

Eventually, however, the Seventh Circuit took the more practical view. "If a favorable decision of the Supreme Court does not count as 'the necessary judicial *imprimatur*' on the plaintiffs' position, what would?" *NRA of Am., Inc. v. City of Chicago*, 646 F.3d 992, 994 (7th Cir. 2011) (quoting *Buckhannon*, 532 U.S. at 605).

McDonald's fee saga revealed two truths about attorney fee litigation. First, civil rights plaintiffs can very much "prevail" by establishing meaningful precedent, regardless of how their cases end. At one level, the case asked whether Mr. McDonald could own a handgun in Chicago; but establishing a broader legal principle securing the rights of all Americans was his bigger victory. Nobody doubts that. Second, that *Buckhannon* could arguably allow a city to fight a civil rights plaintiff all the way to this Court, lose a landmark decision that profoundly shapes the law, and still avoid liability under 42 U.S.C. § 1988, suggests that something is very wrong with *Buckhannon*.

Even under *Buckhannon*, however, the decision below should be affirmed. Intervening mootness did not change the fact that Respondents' preliminary victory altered not only the legal relationship between the parties, but the relationship between future parties who would be guided by the decision as well. Even so, rather than further cement a parsimonious and unrealistic vision of what it means to "prevail," the Court should take this opportunity to re-examine *Buckhannon*—and overrule it.

SUMMARY OF ARGUMENT

Parties prevail under Section 1988 when they obtain a court opinion that materially develops, clarifies, or alters the law. Legal precedents change the relationships of parties in the future. Often, they are more enduring and of far greater value than the resolution of specific disputes.

Moreover, the history surrounding Section 1988's enactment, including cases decided prior to the measure's adoption and cases reflecting its immediate reception, demonstrates that the catalyst theory of prevailing party status is correct. Under the original meaning of Section 1988, a civil rights plaintiff prevails when its lawsuit causes the government to grant at least some of the benefit that the lawsuit sought. Because civil rights plaintiffs serve as private attorneys general, the costs of their lawsuits—like the benefits of the precedents these suits generate—should be shared among the public at large.

Buckhannon erred in abandoning the catalyst theory. But even if this Court retains *Buckhannon*, it should not extend that erroneous precedent as Petitioner requests. Even under *Buckhannon*'s own terms, preliminary injunctions are an enduring form of court-ordered relief that changes the legal relationship between parties. And the precedents that these injunctions generate are often more momentous and more enduring than the injunctions themselves.

ARGUMENT

I. Parties prevail when they leave their mark upon the law.

A. Precedents change the legal relationship between parties.

1. Even under *Buckhannon*'s terms, a party that wins a preliminary injunction that is not reversed by any later court order has prevailed. *Cf. Stinnie v. Holcomb*, 77 F.4th 200, 216 (4th Cir. 2023). After all, both the injunction and the precedent constitute "judicially sanctioned change[s] in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605.

A precedent-setting preliminary injunction provides real relief that is often more enduring and of far greater value than the resolution of any specific dispute. Judicial opinions create binding, or at least persuasive, authority impacting future disputes, including those involving the parties in the original suit. And precedent can help establish circuit law for qualified immunity purposes.

Public interest litigation firms regularly take cases with the primary goal of developing favorable precedents. On the other side of the equation, governments often manufacture mootness even before preliminary relief is granted to avoid preclusive or precedent-setting losses. *See* Joseph C. Davis & Nicholas R. Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L.J. 325, 336-37 (2019). Governments "have stronger incentives and a greater ability to engage in the strategic mooting

of cases . . . because of their status as repeat litigants with a powerful interest in curating precedent, and . . . because governments are often immune from damages claims that would otherwise preclude mootness." *Id.* at 328. Developing favorable law is a form of prevailing.

2. Respondents' injunction was never vacated. They still retain the benefit of that decision, reported as *Stinnie v. Holcomb*, 355 F. Supp. 3d 514 (W.D. Va. 2018). Future courts may find it persuasive, as might others considering their litigation prospects or regulatory behavior. The state's time to appeal and seek vacatur of this victory has passed. *See Karcher v. May*, 484 U.S. 72, 82-88 (1987). The opinion stands as a testament to the fact that Respondents "prevailed."

B. This Court's vacatur doctrine confirms that legislative repeal cannot undo a plaintiff's preliminary injunction victory.

Litigation over whether to vacate preliminary decisions in mooted cases demonstrates that these decisions have substantive value and are won by "prevailing" parties. Parties fight over vacatur because precedent matters. In considering vacatur, this Court uses the verb "prevailed" to describe what the plaintiff did in obtaining preliminary relief. *See*, *e.g.*, *Azar v. Garza*, 584 U.S. 726, 729 (2018) (per curiam); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994). Indeed, this Court's vacatur doctrine, and the practices of various circuits, often bar governments that legislatively moot cases from thereby erasing adverse decisions.

1. "[T]he established practice of the Court in dealing with a civil case from a [federal] court . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). After all, parties on the losing end of preliminary opinions would be "prejudiced" by leaving in place a binding decision, the "review of which was prevented through happenstance." *Id.* at 40.

But "happenstance" is absent when a party deliberately moots a case. In considering whether to order vacatur, "[t]he principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, 513 U.S. at 24 (citations omitted).

Accordingly, appellate courts must grant vacatur "when mootness results from the unilateral action of the party who *prevailed* below." *Id.* at 25 (citation omitted) (emphasis added). In *Azar*, for example, it was "undisputed that [plaintiff] and her lawyers *prevailed* in the D.C. Circuit" by winning an en banc decision affirming a temporary restraining order that allowed her to have an abortion. *Azar*, 584 U.S. at 729 (emphasis added). Because the plaintiff mooted the case by quickly taking advantage of the TRO and terminating her pregnancy, this Court ordered vacatur. *Id.* at 730.

Likewise, "[w]here mootness results from settlement, . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 25.

2. Case-mooting legislative repeals are the kind of intentional, voluntary acts that may warrant denial of vacatur. To be sure, some courts are predisposed to view legislative mootness as benign. Acknowledging that "[c]learly, the passage of new legislation represents voluntary action," the D.C. Circuit nonetheless held that "[t]he mere fact that a legislature has enacted legislation that moots an appeal, *without more*, provides no grounds for assuming that the legislature was motivated by . . . a manipulative purpose." *National Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 351-52 (D.C. Cir. 1997) (emphasis added); *see also Khodara Envtl., Inc. ex rel. Eagle Envtl., L.P. v. Beckman*, 237 F.3d 186, 195 (3d Cir. 2001). But not all courts agree. The Fifth Circuit denied vacatur where "the City [had] not shown its repealing the Ordinance provisions was not in response to the district court judgment." *Houston Chronicle Publ. Co. v. City of League City*, 488 F.3d 613, 620 (5th Cir. 2007).

Courts appear particularly skeptical of legislative mootness as a basis for vacatur where the government actors repealing the law are also the defendants. *See, e.g.*, *Ford v. Wilder*, 469 F.3d 500, 506 n.10 (6th Cir. 2006) ("voluntary action of the defendants occurred soon after the district court granted declaratory relief against those very parties, raising the inference" of intentional mootness); *19 Solid Waste Dep't Mechanics v. City of Albuquerque*, 76 F.3d 1142, 1145 (10th Cir. 1996) ("This one-sided use of the mootness doctrine does not appear to serve any interest other than the City's own."). Courts granting vacatur because of legislative mootness typically stress that the repealing legislature is a different governmental actor than the executive defendants. *See, e.g.*, *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 452 (1st

Cir. 2009); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 121 (4th Cir. 2000).

3. In sum, vacatur precedent confirms that plaintiffs who win relief only to see their cases mooted have "prevailed," and when the government defendants strategically cause that mootness by legislative repeal, the plaintiffs' relief will prove enduring. It would be incongruous to now hold that for fee-shifting purposes, these same plaintiffs have somehow not "prevailed."[2]

C. Many landmark precedents plainly meriting fee-shifting for "prevailing" plaintiffs never reached a final merits decision.

Some of the most influential civil rights decisions in history never reached final judgment. Instead, they reached this Court upon a Rule 12 motion or a motion for preliminary injunction and became moot due to a change in the law before summary judgment.

McDonald, which made its way here on a motion for judgment on the pleadings, is hardly the only recent example of a plaintiff's undeniable, unequivocal yet technically preliminary victory. *See, e.g.*, *Biden v. Nebraska*, 600 U.S. 477, 488-89 (2023) (appeal of preliminary injunction grant); *Fulton v. City of Philadelphia*, 593 U.S. 522, 531-32 (2021) (appeal of preliminary injunction denial); *Roman Catholic Diocese*

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2. To be sure, Petitioner is not the legislature; he did not repeal the challenged law. Had he timely moved for vacatur, he might well have obtained it under the fiction that a different arm of the government mooted the case. But he didn't seek that relief, and it is thus too late for Petitioner to deny that Respondents prevailed.

v. Cuomo, 592 U.S. 14, 15 (2020) (request for emergency injunctive relief); *Nat'l Inst. of Family Life Advocates v. Becerra*, 585 U.S. 755, 765 (2018) (appeal of preliminary injunction denial); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 704 (2014) (appeal of decision reversing and remanding preliminary injunctive denial). Often, the only practical course of action following this Court's decision in such cases is to settle. *See, e.g.*, *Nebraska v. Biden*, Case No. 4:22-cv-01040, Dkt. 75 (E.D. Mo. Aug. 15, 2023) (joint stipulation of dismissal); *Fulton v. City of Philadelphia*, No. 2:18-cv-02075-PBT, Dkt. 79 (E.D. Pa. Sept. 24, 2021) (consent judgment); *Nat'l Inst. of Family Life Advocates v. Becerra*, No. 3:15-cv-02277-JAH-RNB, Dkt. 76 (S.D. Cal. Oct. 26, 2018) (consent judgment). These court-approved settlements typically ensure that the victorious plaintiff receives fees.

Yet under Petitioner's interpretation of Section 1988, plaintiffs do not "prevail" when this Court rules in their favor. According to Petitioner, the plaintiffs in these cases deserved no fees, unless they would have won further victories on remand. And if the governments had chosen to moot the cases rather than settle, the plaintiffs should have recovered nothing as they did not prevail.

As the Seventh Circuit recognized in *McDonald*, that argument elevates a narrow, technical, and idiosyncratic connotation over the more generic, common-sense public meaning of "prevailing," resulting in absurdity. *NRA of Am.*, 646 F.3d at 994. Other courts agree, grasping this almost intuitively. In 2005, for instance, a group of nonprofit organizations successfully challenged the Postal Service's ban on collecting referenda signatures on the sidewalks around post offices. *Initiative & Referendum*

Inst. v. United States Postal Serv., 417 F.3d 1299, 1303, 1305 (D.C. Cir. 2005). Reversing the district court's grant of summary judgment to the government, the D.C. Circuit held that the Postal Service's regulation chilled plaintiffs' First Amendment rights and remanded for further proceedings. *Id.* at 1317-18. The Postal Service, however, amended its regulation before any court ordered it to do so and then convinced the district court that the plaintiffs were not entitled to fees because it acted voluntarily. *Initiative & Referendum Inst. v. United States Postal Serv.*, 181 F. Supp. 3d 3, 12 (D.D.C. 2014).

The D.C. Circuit again reversed, observing that the Postal Service's voluntariness argument "ignores the reality of" the Circuit's 2005 decision. *Initiative & Referendum Inst. v. United States Postal Serv.*, 794 F.3d 21, 24 (D.C. Cir. 2015) (Kavanaugh, J.). After the 2005 decision, the court explained, "[o]ne of two outcomes was necessary and inevitable." *Id.* at 25. "Either the Postal Service would amend its regulation, or the District Court would order it to do so." *Id.* Which one occurred made no difference. The D.C. Circuit's opinion was "a favorable, court-ordered change in their legal relationship" entitling the plaintiffs to fees simply because the Circuit "remanded for further proceedings consistent with [that] opinion." *Id.* Remand on a favorable precedent itself was "judicial relief." *Id.*

District courts are also skeptical of fee evasion via strategic mootness. A West Virginia court, for example, awarded fees when the state legislature repealed a statute shortly after the court preliminarily enjoined it. *Marietta Mem'l Hosp. v. W. Va. Health Care Auth.*, No. 2:16-cv-08603, 2018 U.S. Dist. LEXIS 245384, at *2-3

(S.D. W. Va. Feb. 23, 2018). The repeal was "a direct result of [the court's] rulings and discussion on the likely unconstitutionality of the law," for the preliminary injunction "cause[d] the legislature to react and correct its error." *Id.* at 8 & n.2. Accordingly, the court granted fees because "a preliminary injunction that provides some relief on the merits of the plaintiff's claim may be sufficient to establish prevailing-party status, if subsequent events render the remainder of the plaintiff's claim moot." *Id.* at *6 (quoting 10 Moore's Federal Practice § 54.171[3][c] (3d ed. 2017)).

The issue is recurring. Last year, five physicians represented by *amicus* New Civil Liberties Alliance won a preliminary injunction against a California statute which prohibited them from providing their patients Covid-19 advice that was "contradicted by contemporary scientific consensus contrary to the standard of care." *Hoeg v. Newsom*, 652 F. Supp.3d 1172, 1179 (E.D. Cal. 2023) (quoting Cal. Bus. & Prof. Code § 2270(b)(4) (*repealed* by Stats. 2023, c. 294 (S.B. 815), § 19, eff. Jan. 1, 2024)). The district court concluded that the physicians would likely succeed on the merits of their vagueness challenge. *Id.* at 1191. However, a different set of challengers represented by *amicus* Liberty Justice Center lost their preliminary injunction motion, *McDonald v. Lawson*, No. 8:22-cv-1805-FWS-ADS, 2022 WL 181452454, 2022 U.S. Dist. LEXIS 232798 (C.D. Cal. Dec. 28, 2022), and appealed. Following its skeptical reception by the Ninth Circuit panel, the state repealed the law, mooting that appeal, *McDonald v. Lawson*, 94 F.4th 864 (9th Cir. 2024), as well as the *Hoeg* case, *Hoeg v. Newsom*, No. 2:22-cv-1980-WBS-AC, 2024 U.S. Dist. LEXIS 60500 (E.D. Cal. Apr. 2, 2024).

Yet, neither the change in the law, nor the dismissal of the pending cases in light of that amendment, undermine the fact that the district court's opinion in *Hoeg* materially improved the plaintiffs' legal position. In every practical and commonsense way, the *Hoeg* plaintiffs were "prevailing parties." Whether the courts will acknowledge this fact may turn on the outcome here.

As these cases demonstrate, preliminary rulings often render cases *faits accomplis* by creating a precedent on the merits that guarantees the plaintiff victory. In reality, the plaintiff has prevailed, even if a quick-working defendant can change its policies or amend its laws before the inevitable final judgment. The enduring precedent itself was all the relief that the plaintiff needed.

II. This Court should overrule *Buckhannon*.

A. The catalyst theory best fits Section 1988's text and history.

1. Before 2001, nearly every circuit had adopted the "catalyst theory" of fee awards, holding that plaintiffs prevail under Section 1988 when their lawsuits cause the government to provide at least some of the benefits they sought. *Buckhannon*, 532 U.S. at 625-27 (Ginsburg, J., dissenting) (collecting cases). "[I]n litigation as in battle one may prevail by persuading one's adversary to retire from the field." *Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316, 317 (7th Cir. 1994) (citations omitted); *cf. Dist. of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) (when interpreting text, "[n]ormal meaning may of course include an idiomatic meaning").

Buckhannon broke this consensus by requiring a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605. Absent judicial "imprimatur," *Buckhannon* deemed any such change voluntary and thus insufficient to count as the plaintiff's win. *Id.*

Moreover, not all favorable judicial determinations sufficed, even if they induced a great practical change in the defendant's behavior and thus, the legal relationship of the parties. A plaintiff could defeat a motion to dismiss, for instance, without prevailing. *Id.* at 605-06.

2. Section 1988 does not define "prevailing party." It merely provides that prevailing parties may obtain attorney fees. Accordingly, *Buckhannon* and earlier decisions looked largely to the provision's legislative history to interpret the term "prevailing party." *See Buckhannon*, 532 U.S. at 607; *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1980); *cf.* Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 Geo. Wash. L. Rev. 1610, 1616 (2012) (describing legislative history as "informative rather than authoritative" evidence for public meaning, as history often "declares what the committee or sponsor intends a word or phrase to mean").

Alas, *Buckhannon* did not properly credit the historical record, which demonstrates that when it enacted Section 1988, Congress had a broader understanding of what it meant to "prevail." The Senate Report for Section 1988, for example, stated that parties would prevail under the act "when they vindicate rights through a consent

judgment or *without formally obtaining relief*." S. Rep. No. 94-1011, at 5 (1976) (emphasis added). The House Report likewise noted that "[t]he 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," and it warned that "[a] 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." H. R. Rep. No. 94-1558, at 7 (1976) (citations omitted).

Additionally, the House Report stressed that "after a complaint is filed, a defendant might *voluntarily cease* the unlawful practice. A court *should still award fees* even though it might conclude . . . that no formal relief, such as an injunction, is needed." *Id.* (emphasis added). Both houses of Congress expressly understood the statutory language to permit—or even *require*—courts to award fees absent a formal judicial determination, even when the government changed its behavior voluntarily.

3. Congress did not conjure this meaning of "prevailing" from nothing. The House and Senate reports approvingly cited many lower court cases from the preceding decade as examples of proper fee awards, which revealed a widespread public understanding that parties could "prevail" without ever receiving a final judicial determination on the merits. *See* S. Rep. No. 94-1011, at 5; H. R. Rep. No. 94-1558, at 7-8.

The Eighth Circuit first described the catalyst theory in *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). Despite affirming the denial of individual relief, the court granted fees under Title VII's

fee-shifting provision as the plaintiff "performed a valuable public service in bringing this action" and "prevailed" on behalf of his class by proving "his contentions of racial discrimination against blacks generally"—just not against himself personally. *Id.* at 430. Because the "lawsuit acted as a catalyst which prompted the appellee to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII," the law authorized fees. *Id.* at 429-30. A decision that catalyzed the defendant to voluntarily change sufficed to merit fees.

Parham was far from an outlier. "There [was] no question . . . that federal courts may award counsel fees based on benefits resulting from litigation efforts even where adjudication on the merits is never reached." *Kopet v. Esquire Realty Co.*, 523 F.2d 1005, 1008 (2d Cir. 1975); *see, e.g.*, *Peltier v. Fargo*, 533 F.2d 374, 380 (8th Cir. 1976) (fee award, although no Title VII relief, as suit "served as a catalyst" for voluntary affirmative action procedures); *Brown v. Gaston Cnty. Dyeing Mach. Co.*, 457 F.2d 1377, 1383 (4th Cir. 1972) (fee award and case retained on docket, without injunction, to ensure voluntary policy changes persist); *Parker v. Matthews*, 411 F. Supp. 1059, 1061, 1064-65 (D.D.C. 1976) (fees awarded when case settled after complaint without court action); *Fogg v. New England Tel. & Tel. Co.*, 346 F. Supp. 645, 649, 651 (D.N.H. 1972) (fee award, although no proof of discrimination, as suit "opened the eyes of the defendant" and caused voluntary change of policy); *see also Richards v. Griffith Rubber Mills*, 300 F. Supp. 338, 341 (D. Or. 1969) (granting, a year before *Parham*, fees without other relief).

Unsurprisingly, the two decades following Section 1988's enactment saw virtually every court of appeal adopt *Parham*'s catalyst theory. *See Buckhannon*, 532 U.S. at 625-26 (Ginsburg, J., dissenting).

B. *Buckhannon* was an outlier among Supreme Court and circuit precedents.

When *Buckhannon* repudiated over thirty years of consensus on the catalyst theory, it did so with minimal historical analysis. Policy concerns, rather than text or history, dominated the Court's analysis. *See Buckhannon*, 532 U.S. at 608-10; *id.* at 638-40 (Ginsburg, J., dissenting) (criticizing the Court's policy arguments).

Although *Buckhannon* invoked *Black's Law Dictionary* and language from some prior decisions, *id.* at 603-04, it acknowledged that precedent was far from clear in supporting its new take on what it means to prevail, *id.* at 605. Indeed, several of this Court's earlier opinions had apparently accepted the catalyst theory. Just four years after the provision's enactment, for instance, this Court agreed that "[n]othing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or *on a judicial determination* that the plaintiff's rights have been violated." *Maher*, 448 U.S. at 129 (emphasis added). A few years later, this Court stressed that "[i]t is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988," for if a suit "produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought" because of "a change in conduct that redresses the plaintiff's grievances," then "the plaintiff is deemed to have prevailed despite the absence of a

formal judgment in his favor." *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987); *see also Buckhannon*, 532 U.S. at 626 n.4 (Ginsburg, J., dissenting) (collecting twelve appellate decisions—predating *Hewitt*—demonstrating that the catalyst theory was settled law by 1987). These decisions left no doubt that practical changes in a party's legal position on the ground—rather than judicial sanction—bestowed prevailing party status.

The *Buckhannon* majority, however, rejected this language as non-binding dicta, even while admitting that appellate courts had relied upon it when adopting the catalyst theory. 532 U.S. at 605; *see also id.* at 621-22 (Scalia, J., concurring) (lamenting that the Supreme Court's "*own misleading dicta*" in *Hewitt* and other cases "misled" the courts). The majority thus admitted that not only circuit precedents but even this Court's own prior opinions disproportionately supported the catalyst theory.

C. *Buckhannon* has undermined public interest litigation and encouraged strategic mootness.

1. The unsuccessful petitioners in *Buckhannon* warned that abandoning the catalyst theory would waste judicial resources, discourage civil rights litigation, and permit defendants to strategically moot cases to avoid paying fees. 532 U.S. at 608-09; *id.* at 638-40 (Ginsburg, J., dissenting) (agreeing with petitioners' warnings). The majority rejected these fears as "entirely speculative and unsupported by any empirical evidence." *Id.* at 608.

These fears are no longer speculative. Empirical evidence over the two decades since *Buckhannon* demonstrates the harm it wreaked on civil rights litigation. "*Buckhannon* has had a chilling effect on the very forms of public interest litigation that Congress intended to encourage through fee-shifting provisions." Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. Rev. 1087, 1092 (2007). According to one quantitative analysis, over a third of the public interest organizations reported that *Buckhannon* makes impact litigation harder. *Id.* at 1121. The incentives to settle decreased, strategic capitulation became more common, and local counsel grew harder to find. *Id.* at 1128-30. Organizations that litigate against states were especially hard hit. They were seven times more likely to report problems stemming from the *Buckhannon* decision. *Id.* at 1130.

Focused scholarship on particular areas of law confirmed these trends. One analysis of special education law, for instance, found that "*Buckhannon* has dramatically limited the ability of parents to privately enforce the IDEA" by "increas[ing] the financial risks to parents." Stefan R. Hanson, Buckhannon, *Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2 BYU Educ. & L. J. 519, 547-49 (2003). Another study found that civil rights filings dropped 17% between 1997 and 2008 (after previously growing rapidly), although it could not trace this decline to *Buckhannon* specifically. Paul D. Reingold, *Requiem for Section 1983*, 3 Duke J. Const. L. & Pub. Pol'y 3, 41 (2008). Nonetheless, lower courts often treat "*Buckhannon*'s unsupported empirical assumptions" about costs and administrability

as facts controlling their decisions. Landyn Wm. Rookard, *Don't Let the Facts Get in the Way of the Truth: Revisiting How* Buckhannon *and* Alyeska Pipeline *Messed Up the American Rule*, 92 Ind. L.J. 1247, 1277, 1280 (2017).

2. States are adept at manufacturing mootness to avoid paying fees—as Virginia attempted to do in this case. *See Stinnie*, 77 F.4th at 210, 213 n.10. State prison systems, for instance, frequently litigate pro se claims completely—expecting to win—while changing their behavior to moot suits brought by represented inmates. Davis & Reaves, *supra*, at 329-31. The goal is avoiding both fees and precedent-setting losses. *Id.*

The *Buckhannon* majority predicted that the voluntary cessation doctrine would prevent strategic mootness. 532 U.S. at 609. But courts apply this doctrine to government entities inconsistently. Davis & Reaves, *supra*, at 333-35. And although the *Buckhannon* majority wanted to avoid satellite litigation on fees, 532 U.S. at 609, courts often end up in exactly such unnecessary litigation because the voluntary cessation doctrine is fact intensive. Michael Ashton, Note, *Recovering Attorneys' Fees with the Voluntary Cessation Exception to Mootness Doctrine after* Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 2002 Wis. L. Rev. 965, 968, 981-83 (2002).

Recently, this Court clarified the voluntary cessation doctrine and stressed that "[i]n all cases," whether the defendant is a government entity or not, "it is the defendant's burden to establish that it cannot reasonably be expected to resume *its* challenged conduct." *FBI v. Fikre*, 601 U.S. 234, 243 (2024) (internal quotation marks

omitted). This Court should further constrain the ability of governments and other repeat litigants to manufacture mootness by restoring the catalyst theory of prevailing party status.

D. Denying fees freezes the law and discourages private attorneys general.

1. Congress created Section 1988 with the express purpose of encouraging civil rights plaintiffs to improve the law for all Americans through private lawsuits.

Civil rights litigation is a classic example of a mechanism by which concentrated costs produce diffuse benefits. The public as a whole gains the positive externality, but—in the absence of a fee-sharing statute—the plaintiff alone bears the costs. As a result, the House and Senate Reports, *see* S. Rep. No. 94-1011, at 3, 5; H. R. Rep. No. 94-1558, at 7, approvingly cited cases that justified fee awards as a way to spread costs to the public, *see, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968); *Incarcerated Men of Allen Cnty. Jail v. Fair*, 507 F.2d 281, 284-85 (6th Cir. 1974); *Lea v. Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971). Because civil rights "depend heavily on private enforcement," S. Rep. No. 94-1011 at 3, fee awards were necessary.

The nation "ha[s] to rely in part upon private litigation as a means of securing broad compliance with [civil rights] law." *Newman*, 390 U.S. at 401. "When a plaintiff . . . obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.* at 402 (citations omitted). Fees should be reimbursed "to spread litigation costs among all who benefit from

litigation undertaken by only a few." *Incarcerated Men*, 507 F.2d at 284. "Without reimbursement for attorney fees, private litigants often could not protect the rights the law grants them. There should be no price tag on the enjoyment of constitutionally guaranteed freedoms." *Id.* at 285.

2. Judicial relief is party specific. An injunction or declaratory judgment disapproving of a statute cannot veto a law in general. It can only prevent a specific defendant from enforcing that law. *Murphy v. NCAA*, 584 U.S. 453, 489 (2018) (Thomas, J., concurring) ("Remedies operate with respect to specific parties, not on legal rules in the abstract.") (citation and internal quotation marks omitted); *see also* Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933 (2018).

Judicial opinions, in contrast, are persuasive or even binding on all future cases. The development of legal precedents, thus, brings more benefits to the public as a whole than a narrow injunction or nominal damage award restricted to the parties. A party winning such a precedent is a private attorney general, whose costs should be shared. Refusing to grant prevailing party status contradicts the original reasoning for Section 1988, as sources from the time demonstrate.

3. Fee awards also have a salutary impact on the government's behavior by impacting insurance underwriting practices. Many government entities, particularly municipalities, rely on insurers to guard them against the cost of civil rights violations. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144,

1149, 1163 (2016). Those insurers wish to limit their exposure to future litigation, including damages and, not insignificantly, attorney fee awards. *See id.* at 1152 n.24, 1189-90. Government decisions to adopt "best practices" in the treatment of constitutional rights "are increasingly being driven by these insurers, which demand departmental policy shifts to minimize perceived liability" and "pass[] along the costs of riskier practices . . . in the form of higher premiums." Noah Smith-Drelich, *The Constitutional Tort System*, 96 Ind. L.J. 571, 593-94 (2021). Because suits can yield "several multiples of what compensatory damages alone would provide (once attorney's fees are included)," insurers take fee awards into account when assessing risk. *See id.* at 590, 594.

4. Finally, this Court should always be cognizant of the fact that fee-shifting under Section 1988 "is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected." *Riverside v. Rivera*, 477 U.S. 561, 577 (1986) (quotation omitted); *cf. Comm'r, INS v. Jean*, 496 U.S. 154, 163 & n.11 (1990) (EAJA's purpose was to "eliminate" deterrent effect individuals face when challenging unreasonable governmental action); *Hall v. Cole*, 412 U.S. 1, 13 (1973) (lack of fees under 29 U.S.C. § 412 "frustrat[es] its basic purpose" and renders the "grant of federal jurisdiction . . . but a gesture").

Simply put, this Court cannot fulfill its function without proficiently litigated, quality lawsuits that enable it to clarify and shape the law. Those lawsuits cannot all be handled pro bono, and the money necessary to fund them can be scarce and difficult to raise. Under Section 1988, much of it comes from the governments who violate

Americans' civil rights—and Congress acted well within its prerogative to codify this policy. Adopting ever-more narrow, strained, and unnatural readings of "prevailing" is not just bad statutory interpretation. It deprives this Court of cases that enable it to do some of its most important work.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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