No. 21-1756

In The

United States Court of Appeals

For the Fourth Circuit

DAMIAN STINNIE, MELISSA ADAMS; ADRAINNE JOHNSON; WILLIEST BANDY; BRIANNA MORGAN, individually, and on behalf of all others similarly situated

Plaintiffs – Appellants

v.

RICHARD D. HOLCOMB, in his official capacity as the Commissioner of the Virginia Department of Motor Vehicles

Defendant – Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA AT CHARLOTTESVILLE
(Honorable Norman K. Moon Presiding)

BRIEF FOR THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4), the Institute for Justice ("IJ") is a private, nonprofit civil liberties law firm. IJ is not a publicly held corporation and does not have any parent corporation. No publicly held corporation holds owns 10 percent or more of its stock. No publicly held corporation has a direct financial interest in the outcome of this litigation.

/s/ William R. Maurer

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INTEREST OF THE *AMICUS*[1]

The Institute for Justice ("IJ") is a nonprofit, public interest law firm that litigates to uphold individuals' constitutional rights.[2] Specifically, IJ sues governmental bodies on behalf of its clients pursuant to, among other statutes, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and seeks to recover fees pursuant to the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988 ("Section 1988"). Like other public interest law firms across the country, IJ supplements the amounts donated to it with attorney's fees awards pursuant to Section 1988. The fee-shifting provisions of Section 1988 thus mitigate IJ's cost of bringing civil rights claims. These costs can and often do include considerable expenditures involved in obtaining preliminary injunctions, which can involve lengthy hearings and testimony like a trial and briefing and argument like a motion for summary judgment. IJ also has considerable experience in dealing with government

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[1] No person other than *amicus*, its counsel, or its members contributed money intended to fund the preparation and submission of this brief. In addition, no party or party's counsel authored this brief in whole or in part or contributed money intended to fund the preparation or submission of this brief.

[2] IJ filed an amicus brief in support of Appellants on the merits before this Court. *See* Brief for the Institute for Justice as *Amicus Curiae* in Support of Plaintiffs-Appellants, *Stinnie v. Holcomb*, 734 F. App'x 858 (2018) (No. 17-1740), ECF No. 22-1.

defendants who engage in various strategies to continue to violate constitutional rights for as long as possible while seeking to avoid paying attorney's fee awards.

The panel decision here undermines the fee-shifting provisions of Section 1988 and is inconsistent with Congress's intent in passing Section 1988 in the first instance. The continued viability of the panel decision, and the case upon which the panel relied, *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002), undercuts Congress's goals, and leaves many attorneys unable or less likely to represent those whose civil rights have been violated. This circuit's rule also gives governmental bodies in the Fourth Circuit a strong incentive to litigate even meritless defenses through the preliminary injunction stage, thereby draining the resources of plaintiffs and their attorneys and while leaving them without the ability to recover fees. IJ has a direct, substantial, and immediate interest in urging this Court to grant Appellants' petition and reverse the holding of the panel.

ARGUMENT

This case presents the following question: Does a plaintiff in a civil rights case who obtains a preliminary injunction and whose case is then mooted by a repeal of the law at issue qualify as a "prevailing party" entitled to attorney's fees pursuant to Section 1988? *See* Pet. Reh'g En Banc 1. As Appellants' Petition and Judge Harris's concurrence note, ten circuit courts have answered this question "yes," while this court alone has answered it "no." *See id.* 2-3; *Stinnie v. Holcomb*,

37 F.4th 977, 984 (4th Cir. 2022) (Harris, J., concurring). However, this Court's interpretation of "prevailing party" leaves out a crucial consideration, namely, that the meaning of that term is a matter of statutory construction, the aim of which is to "give effect to the intent of Congress," *U.S. Army Eng'r Ctr. v. Fed. Lab. Rels. Auth.*, 762 F.2d 409, 413 (4th Cir. 1985) (quoting *United States v. Am. Trucking Ass'n,* 310 U.S. 534, 542 (1940)). Despite the primacy of this consideration, however, neither the panel decision nor *Smyth* discussed Congress's goals in passing Section 1988 in the first instance.

The first section of this brief addresses how Congress passed Section 1988 to encourage plaintiffs to accomplish Congress's goal of protecting federal rights. The second section describes how governments can use the panel's decision to frustrate the ability of plaintiffs to bring and maintain civil rights cases. The failure to consider Congress's intent in deciding the scope of one of the most important civil rights laws in U.S. history alone means that Appellants' petition raises a question of exceptional importance pursuant to Fed. R. App. P. 35(b). This Court should grant the Petition, reconsider the question raised here with a full appreciation of what Congress set out to do when it passed Section 1988, and ultimately hold that Appellants are "prevailing parties" entitled to attorney's fees.

1. Congress Passed Section 1988 to Further Its Goal of Ensuring that Plaintiffs Could Bring Suits to Protect Federal Rights.

Section 1988 provides that "[i]n any action or proceeding to enforce [the federal civil rights laws], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Section 1988 was Congress's reaction to the U.S. Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 269 (1975), where the Court rejected the long-standing equitable practice by which federal courts would award attorney's fees to the prevailing party in certain civil rights cases. Specifically, Congress passed Section 1988 "to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes." 121 Cong. Rec. 26806 (Aug. 1, 1975) (statement of Sen. Tunney); *see also Farrar v. Hobby*, 506 U.S. 103, 118 (1992) (O'Connor, J., concurring) ("Section 1988 was enacted for a specific purpose: to restore the former equitable practice of awarding attorney's fees to the prevailing party in certain civil rights cases . . . .).

While Congress's actions certainly demonstrated an interest in making successful plaintiffs whole, it also recognized that fee shifting in civil rights cases had implications beyond just the private litigant's interests. Congress specifically

designed the fee shifting to further Congress's own interest in protecting federal civil rights.

> Long experience has demonstrated, however, that Government enforcement alone cannot accomplish [compliance with federal civil rights laws]. Private enforcement of these laws by those most directly affected must continue to receive full congressional support. Fee shifting provides a mechanism which can give full effect to our civil rights laws, at no added cost to the Government.

122 Cong. Rec. 31472 (Sept. 21, 1976) (statement of Sen. Kennedy). Indeed, Congress viewed the interests of private litigants as secondary to its own: "We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance." S. Rep. 94-1011, at 5 (1976); *see also Hensley v. Eckerhart*, 461 U.S. 424, 444 n.4 (1983) (Brennan, J., concurring in part and dissenting in part) ("[I]n enacting § 1988, Congress determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff. Simply put, Congress decided that it would be better to have more vigorous enforcement of civil rights laws than would result if plaintiffs were left to finance their own cases.").

This approach arose from Congress's recognition that the federal government could not prosecute every violation of civil rights and if Congress wanted widespread enforcement of civil rights laws, it needed to make

enforcement of the federal civil rights laws less dependent on the availability of governmental prosecution. *See* 122 Cong. Rec. 31471 (Sept. 21, 1976) (statement of Sen. Scott) ("Such a provision would greatly aid the cause of human rights in this country, would cost the Government nothing, and would make the civil rights laws almost self-enforcing."); 122 Cong. Rec. 33314 (Sept. 29, 1976) (statement of Sen. Abourezk) ("All of these laws depend heavily upon private parties for enforcement. If Congress wants these laws enforced—and I assume we would not have passed them if we did not—then we must provide some mechanism for insuring their enforcement. The fee-shifting mechanism has proved a particularly equitable and efficient means of enforcing the law by enlisting private citizens as law enforcement officials. It is a mechanism which increases law enforcement without increasing the Federal budget or bureaucracy."); 122 Cong. Rec. 35128 (Oct. 1, 1976) (statement of Rep. Seiberling) ("Mr. Speaker, neither the Constitution nor the civil rights laws are self-executing. Instead, they rely both on public or governmental and on private enforcement. The Government obviously does not have the resources to investigate and prosecute all possible violations of the Constitution, so a great burden falls directly on the victims to enforce their own rights."). To achieve this private enforcement, Congress transformed the civil rights plaintiff from being just a self-interested litigant into an enforcer of important Congressional policy. *City of Riverside v. Rivera*, 477 U.S. 561, 575

(1986) (plurality opinion); *see also Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 759 (1989) (noting that civil rights plaintiffs are not just private litigants, but the "chosen instrument[s] of Congress" (internal quotation marks and citation omitted)); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam) ("If he [the plaintiff] obtains an injunction, he does so not for himself but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."); S. Rep. 94-1011, at 6 (1976) ("Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.").

Congress therefore viewed the civil rights plaintiff as the main enforcer of civil rights laws. As Section 1988's Senate sponsor phrased it:

> When Congress calls upon citizens—either explicitly or by construction of its statutes—to go to court to vindicate its policies and benefit the entire Nation, Congress must also ensure that they have the means to go to court, and to be effective once they get there. No one expects a policeman, or an officeholder, to pay for the privilege of enforcing the law. It should be no different for a private citizen . . . .

122 Cong. Rec. 33313 (Sept. 29, 1976) (statement of Sen. Tunney).

Because civil rights plaintiffs serve this important function, the legislative history indicates that these plaintiffs should not be impoverished for their role in

carrying out Congress's intent. *See* 122 Cong. Rec. 31471 (Sept. 21, 1976) (statement of Sen. Scott) ("Recently, spiraling court costs have created an absolute necessity of attorney's fee provisions in those civil rights statutes which contain citizen suit provisions. Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights. To do so, Congress must ensure that they have the means to go to court and to be effective once they get there. This is particularly true in the civil rights area, where those men and women whom the law protects are rarely, if ever, in a financial position to undertake the costly task of enforcement of their rights.").

In short, Congress wanted to accomplish something it deemed enormously important: the enforcement and protection of federal rights. It chose the private civil rights plaintiff to achieve this goal. It sought to protect and empower these individuals to achieve this goal by ensuring that they would recover attorney's fees when they achieved Congress's goal.

2. The Panel Decision Frustrates Congress's Goal by Giving Governments the Ability to Deplete the Resources of Civil Rights Plaintiffs and Then Quit the Field.

With this context in mind, the question then becomes: does the panel's decision interpret "prevailing party" in a manner that gives effect to Congress's goals? The answer to that question is "no." As Judge Harris noted in her

concurrence, this outcome seems ready-made to deplete the resources of—and discourage suits by—civil rights plaintiffs:

> Our circuit rule, by contrast, allows defendants to game the system. Faced with a suit against a potentially or even very probably illegal provision or practice, there is no downside to litigating through the preliminary injunction stage: If and when a court confirms the likely merit of the plaintiff's claim, there will be time enough for the defendant to cease the challenged conduct (or persuade the legislature to do so), moot the case, and avoid the payment of fees. And the plaintiff, who almost certainly will have devoted considerable effort and resources to obtaining a preliminary injunction, is left holding the bag, with no way to recover those costs. The predictable result is fewer attorneys willing to take on even the most meritorious civil rights suits on behalf of indigent plaintiffs—a result in direct contravention of the whole point of § 1988, which is to ensure "effective access" to the judicial system for all persons with civil rights grievances.

Stinnie, 37 F.4th at 985-86 (Harris, J., concurring).

In other words, the panel decision permits the government to bleed the plaintiff and his or her attorneys dry and then strategically quit the game. It sends a clear message to government defendants: "You may keep violating a plaintiff's rights for as long as you can with no downside." It also sends a clear message to civil rights plaintiffs: "You may demonstrate a likelihood of success on the merits and get the government to rescind its policy, but it will cost you dearly." That is certainly not what Congress sought to accomplish when it passed Section 1988.

CONCLUSION

Only this Court sitting en banc can bring this circuit into conformity with every other circuit to have considered this question. Doing so would finally make this circuit's approach to attorney's fees consistent with Congress's intent when it passed Section 1988. For these reasons, and the reasons stated in Appellants' Petition and Judge Harris's concurrence, this Court should grant the Petition, rehear this case en banc, overturn the panel decision, overrule *Smyth*, and hold that Appellants are prevailing parties entitled to attorney's fees under Section 1988.

Dated: July 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments) this brief contains 2336 words.

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Dated: July 18, 2022

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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