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 AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE BUCKEYE INSTITUTE, THE GOLDWATER INSTITUTE, INSTITUTE FOR JUSTICE, PUBLIC CITIZEN, THE RODERICK & SOLANGE MACARTHUR JUSTICE CENTER, AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

Amici are public interest organizations that litigate in federal court on behalf of plaintiffs whose constitutional or statutory rights are violated by federal, state, and local governments.[1]

The **American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The **American Civil Liberties Union of Virginia** is a state affiliate of the national organization. The ACLU and its affiliates have frequently appeared in civil rights and civil liberties cases in this Court, both as direct counsel and as *amici curiae*. As a nonprofit organization, the ACLU does not charge its clients, and is dependent upon attorney's fees where it prevails to support its work.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is dedicated to protecting the right of individuals and religious communities to worship as they see fit and to preserving the separation of church and state as a vital component of democratic government. Americans United files lawsuits in federal court to promote these principles and often seeks preliminary injunctions in these cases. Americans United does not charge its clients for its services and regularly seeks attorney's fees under fee-shifting statutes.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission.

The Buckeye Institute is an independent research and educational institution—a think tank—that formulates and promotes free-market policy in the states. Additionally, The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits *amicus* briefs. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by Internal Revenue Code § 501(c)(3). As it pertains to this case, The Buckeye Institute supports the fee shifting statutes that encourage lawyers and their clients to take legal action to vindicate important constitutional and statutory rights.

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual liberty through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and files *amicus* briefs when its or its clients' objectives are implicated. This includes providing pro bono representation and filing public interest cases in federal court, where it may seek attorney fees under 42 U.S.C. § 1988.

The Institute for Justice (IJ) is a nonprofit, public interest law firm that litigates for individuals' constitutional rights. IJ sues governmental bodies on behalf of its clients pursuant to 42 U.S.C. § 1983 and recovers fees pursuant to 42 U.S.C. § 1988. Fee-shifting mitigates IJ's cost of bringing claims, which can include significant expenditures involved in obtaining preliminary injunctions, including hearings, testimony, briefing, and argument. IJ also often deals

with defendants who violate constitutional rights for as long as possible while avoiding paying attorney's fees. IJ has a substantial interest in this Court affirming the ruling below.

Public Citizen is a nonprofit consumer advocacy organization with members in all 50 states. Public Citizen appears before Congress, administrative agencies, and courts on a wide range of issues, and works for the enactment and enforcement of laws protecting consumers, workers, and the public. Reflecting its longstanding interest in preserving access to the courts in civil litigation, Public Citizen has filed many briefs in this Court and the lower courts addressing issues arising under civil rights statutes. Public Citizen submits this brief because it believes that a plaintiff's eligibility for attorney's fees under 42 U.S.C. § 1988 plays a critical role in securing civil rights.

The Roderick & Solange MacArthur Justice Center (MJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. MJC attorneys have played a key role in important civil rights battles, and understand the meaningful role that preliminary injunctions play in litigation. Indeed, MJC has obtained numerous preliminary injunctions in its cases, and the availability of attorney's fees is what allows MJC to continue its important work.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and

educates the public about constitutional and human rights issues affecting their freedoms.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici frequently find themselves on opposite sides of cases involving the interpretation of the Constitution and federal statutes. But they agree on the proper resolution of the question presented here: attorney's fees are available under 42 U.S.C. § 1988 to plaintiffs who prevail in litigation by obtaining a preliminary injunction when that injunction materially alters the legal relationship between the parties, provides the plaintiff with court-ordered relief sought in the complaint, and is never reversed on the merits.

Amici also agree that precluding fees in that situation would dramatically narrow current law, burden the federal courts with lengthier and more costly litigation designed solely to establish a right to fees, and significantly chill the enforcement of constitutional and statutory rights.

This Court has identified two factors that determine whether a plaintiff's success in litigation confers prevailing party status, permitting an award of attorney's fees. First, the relief obtained by the plaintiff must change the legal relationship between the parties. Second, the plaintiff must obtain enforceable *judicial* relief. *CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 422 (2016). Preliminary injunctions often satisfy both criteria.

In a variety of situations, a district court issues a preliminary injunction granting relief to the plaintiff but the case ends without a final judgment on the merits. For example, a defendant that loses at the preliminary injunction stage may capitulate by adopting

new regulations or practices that moot the case or eliminate the plaintiff's need to proceed. Here, for example, after the state legislature changed the law in response to the preliminary injunction, the case was dismissed as moot—on petitioner's own motion and over respondents' objection—foreclosing respondents' ability to obtain a final judgment on the merits. A preliminary injunction may also vindicate the plaintiff's claim with respect to a one-time event—such as a parade or meeting—and the case may end because the plaintiff obtained all of the relief sought. Likewise, intervening factors—including just the passage of time—may moot a case after the issuance of a preliminary injunction but before the case is finally adjudicated.

In these situations, fees should be available to the plaintiff who obtained a preliminary injunction. The preliminary injunction awards judicially enforceable relief that changes the parties' legal relationship while it is in effect, and the preliminary injunction, and underlying judicial determinations, are never reversed on the merits.

Awarding fees for a preliminary injunction in these circumstances is consistent with the ordinary meaning of "prevailing party," promotes efficient resolution of claims, and avoids perverse incentives to continue litigation solely to recover fees. Moreover, Congress intended fee-shifting to create incentives for attorneys to represent plaintiffs in cases vindicating important constitutional and statutory rights. Many such plaintiffs are represented by solo and small-firm practitioners and by public interest law firms, all of whom rely, at least in part, on fee-shifting to be able to provide or supplement their ability to provide representation in these cases. Categorically denying fees

to those who prevail at the preliminary injunction stage would dramatically undermine Congress's purpose and run counter to the statute's plain meaning.

ARGUMENT

A Plaintiff Who Obtains A Preliminary Injunction Generally Will Qualify As A Prevailing Party When The Case Ends Without A Final Ruling On The Merits.

In *Sole* v. *Wyner*, 551 U.S. 74 (2007), this Court held that a plaintiff who loses a case on the merits cannot qualify as a "prevailing party," even if the plaintiff obtained a preliminary injunction earlier in the case. *Id.* at 86. But *Sole* left open the question whether "in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." *Ibid.*

This case requires the Court to address that question. The Court should hold that a plaintiff who obtained a preliminary injunction is a "prevailing party" entitled to attorney's fees when that injunction materially alters the legal relationship between the parties by providing the plaintiff with some of the relief sought in the complaint and is not reversed on the merits.

We first explain the varied factual settings in which this issue can, and does, arise. We then demonstrate that the text of Section 1988 and this Court's precedents make clear that a plaintiff typically "prevail[s]" when the plaintiff obtains a preliminary injunction that provides specific relief requested in the complaint and is not reversed on final judgment. Finally, we discuss the greatly diminished incentives for enforcement of constitutional and statutory rights,

and the increased litigation burden on the federal courts, that would result from barring awards of attorney's fees in these situations.

A. The Issue Here Arises In a Variety of Settings In Which Circumstances Prevent the District Court From Making a Final Merits Decision.

In many cases brought to vindicate constitutional and statutory rights, the dispute can end following entry of a preliminary injunction in the plaintiff's favor—without a final judgment on the merits. In these cases, the plaintiffs have prevailed by obtaining court-ordered relief sought in the complaint that materially altered the legal relationship of the parties. They therefore qualify as "prevailing parties."

1. The defendant capitulates. Defendants that lose at the preliminary injunction stage often reassess the strength of their position and choose to cease the challenged conduct rather than continue litigating. That action may moot the case; or, as a practical matter, it may eliminate any need for the plaintiff to proceed with the litigation. In such cases, the plaintiffs clearly "prevailed" because they obtained relief sought in their complaint as a result of a judicial decision in their favor.

For example, in *Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939 (D.C. Cir. 2005), milk marketing cooperatives obtained a preliminary injunction prohibiting implementation of a new price regulation. Before final adjudication, the defendant withdrew the challenged rule, rendering the case moot. The D.C. Circuit held that the plaintiffs were prevailing parties entitled to attorney's fees because the "preliminary injunction effected a substantial change in the legal

relationship between the parties and provided plaintiffs with concrete and irreversible relief." *Id.* at 946.

In *Benham* v. *City of Jackson*, No. 19-cv-911, 2022 WL 2033333 (S.D. Miss. June 5, 2022), the plaintiff challenged a city ordinance that outlawed protesting activities near health care facilities. The district court granted a preliminary injunction and enjoined the ordinance. Before final adjudication, however, the defendant repealed the challenged ordinance, and the case became moot.

In *HomeAway.com, Inc.* v. *City of New York*, 523 F. Supp. 3d 573 (S.D.N.Y. 2021), an online home-sharing platform challenged under the Fourth Amendment a city ordinance that required the platform to produce data about its users to the city. The district court issued a preliminary injunction, and the city subsequently repealed the ordinance. The district court dismissed the case as moot but awarded attorney's fees to the plaintiff as the "prevailing party."

And in *Higher Taste, Inc.* v. *City of Tacoma*, 717 F.3d 712 (9th Cir. 2013), the plaintiff was a non-profit religious organization that sought to sell apparel near a public zoo "adorned with messages related to its spiritual mission." *Id.* at 714. The city adopted an ordinance that banned the organization from selling apparel near zoo grounds. The district court granted a preliminary injunction enjoining the ordinance. Before final adjudication, the city capitulated and executed a settlement agreement with the plaintiff in which the city agreed to allow the plaintiff to sell its apparel near the public zoo, mooting the case. The court of appeals affirmed an award of attorney's fees to the plaintiff because the preliminary injunction provided the plaintiff with the relief it sought: the ability to sell apparel near the public zoo.

Similarly, a state may capitulate by repealing a law after a court preliminarily enjoins state officials from enforcing that law but before the court issues a final judgment—as Virginia did here. Thus, in *Tennessee State Conference of NAACP* v. *Hargett*, 53 F.4th 406 (6th Cir. 2022), cert. denied, 143 S. Ct. 2609 (2023), the plaintiffs brought suit against state election officials and the district court issued a preliminary injunction prohibiting those officials from enforcing a statute that imposed requirements on voter-registration activities. Following the issuance of the preliminary injunction, the state legislature repealed the challenged law "so as to render the case moot." *Id.* at 411. But "as a result of the preliminary injunction in [that] case, plaintiffs were able to conduct voter-registration drives for seven months during the run-up to the 2020 election, unburdened by the requirements of" the challenged statute. *Id.* at 410-411.

And in *Veasey* v. *Wilkins*, 158 F. Supp. 3d 466 (E.D.N.C. 2016), the plaintiff obtained a preliminary injunction prohibiting a county sheriff from enforcing against lawful permanent residents a state law that required applicants to demonstrate American citizenship in order to obtain a concealed carry permit. The plaintiff then applied for and obtained a concealed carry permit from the county sheriff. Thereafter, the state legislature repealed the challenged statute, and the district court subsequently dismissed the case as moot. But the plaintiff had successfully obtained through litigation the desired relief: to have the county sheriff assess her application for a concealed carry permit without conditioning approval on a citizenship requirement.

2. Plaintiffs seek relief for a one-time event. Plaintiffs often file suit seeking judicial relief with

respect to a specific event that requires an injunction on an expedited basis. For example, a student may seek to require a school to permit a religious group to meet or to prevent a school-sponsored prayer at a public-school graduation; or citizens may seek a permit to gather to protest current events. The plaintiff may learn that a defendant plans to prevent the planned activity only a short time before the event is scheduled to occur. In such a case the preliminary injunction ruling fully determines the plaintiff's rights—there is no time for a trial or summary judgment proceeding. And once the event has taken place, the case is often moot or neither party may have an ongoing interest in pressing it forward.

For example, in *Jersey Central Power & Light Co.* v. *New Jersey,* 772 F.2d 35 (3d Cir. 1985), a public utility sought a preliminary injunction after being denied permission to ship nuclear fuel through New Jersey. The district court found that the state had violated the Hazardous Materials Transportation Act and granted the utility a preliminary injunction, allowing the shipment to go forward. At that point, "[t]he offending conduct and thus the case for a[] [permanent] injunction dissolved with the subsequent completion of this unique shipment." *Id.* at 40. The public utility secured the entire relief sought through the preliminary injunction: the ability to ship the nuclear fuel.

A similar situation occurs when an organization seeks a preliminary injunction to obtain a permit for a demonstration. In *Davis* v. *City & County of San Francisco*, 135 F. Supp. 3d 1053 (N.D. Cal. 2015), for instance, the plaintiffs won a preliminary injunction requiring the city to issue a previously denied parade permit. Following the event, the parties voluntarily dismissed the case.

Likewise, in *Worldwide Street Preachers' Fellowship* v. *Peterson*, 388 F.3d 555 (7th Cir. 2004), a religious organization obtained a preliminary injunction preventing a municipality from restricting its preaching activities during a then-upcoming parade. Once the parade was over, the suit no longer presented a live controversy and was dismissed as moot. Again, the injunction changed the plaintiff organization's members' legal relationship vis-à-vis the municipality by allowing them to preach at the parade. Once they had done so, further relief was unnecessary. The plaintiff had "prevailed."

A plaintiff may also seek time-limited preliminary injunctive relief in the run-up to an election. In *Garbett* v. *Herbert*, 458 F. Supp. 3d 1328 (D. Utah 2020), the plaintiff, a candidate seeking her party's nomination for Utah's 2020 gubernatorial election, obtained a preliminary injunction—"[o]nly as to [the plaintiff] and only for the current election cycle"—that reduced the number of signatures needed to appear on the primary ballot. *Id.* at 1353. The district court dismissed the case as moot after the 2020 election.

3. Changed circumstances resulting from the passage of time. A preliminary injunction may remain in effect until the passage of time, or a change in factual circumstances, either moots the case or renders permanent injunctive relief unnecessary.

For example, a case brought by a student plaintiff may become moot when the student graduates. In *Dahlem by Dahlem* v. *Board of Education of Denver Public Schools*, 901 F.2d 1508 (10th Cir. 1990), the plaintiff obtained a preliminary injunction that ordered the board of education to allow him to play on his high school's gymnastics team. The board of education appealed the preliminary injunction, but

during the pendency of the appeal, the gymnastics season ended, and the plaintiff graduated. Although the case became moot, the district court had granted the plaintiff all the relief that he sought in his lawsuit.

Other intervening factors may have a similar effect. In *Fleming* v. *Gutierrez*, 785 F.3d 442 (10th Cir. 2015), the plaintiffs obtained a preliminary injunction that required the county to increase the number of voter centers and voting machines during the 2014 election. The county appealed, but the Tenth Circuit dismissed the case as moot because "the issues raised by the grant of the preliminary injunction ha[d] been mooted by the passage of the 2014 election." *Id.* at 443. The preliminary injunction had provided the plaintiffs with all the relief that they sought: the 2014 election "went off without a hitch." *Ibid.*

In *Watson* v. *County of Riverside,* 300 F.3d 1092 (9th Cir. 2002), the plaintiff police officer was ordered to write a report about an incident in which he was accused of using excessive force. He requested a consultation with an attorney prior to writing the report, but his request was denied, and he was subsequently fired. The officer filed suit and obtained a preliminary injunction to prevent the county from using his report during the administrative appeal of his termination. *Ibid.* Nearly two years later, the district court dismissed his claims for damages, and, because the administrative process had long since concluded, the court held that the claim for permanent injunctive relief was moot. Nevertheless, the preliminary injunction provided the entire injunctive relief the plaintiff sought: his report had been excluded from the administrative proceeding.

In *Pasaye* v. *Dzurenda*, No. 17-cv-2574, 2019 WL 2905044 (D. Nev. July 5, 2019), the plaintiff was

incarcerated and obtained a preliminary injunction compelling prison officials to allow him to participate in Native American religious ceremonies. Later, the plaintiff was released on parole. The district court then dissolved the preliminary injunction as moot. The preliminary injunction, however, had allowed the plaintiff to participate in those ceremonies until the last day he was incarcerated.

And in *Estiverne* v. *Esernio-Jenssen*, 908 F. Supp. 2d 305 (E.D.N.Y. 2012), the plaintiff sued state officials, alleging that they violated her due process rights by failing to provide her with a "name-clearing hearing" concerning a complaint of child abuse in advance of a prospective employer's inquiry. *Id.* at 308. The plaintiff successfully moved for a preliminary injunction requiring the defendants to hold the hearing. After the hearing, the state agency concluded that the allegation of child abuse was unfounded and sealed the report of abuse. Although the district court then dismissed the action as moot, the preliminary injunction provided the relief sought: a name-clearing hearing in advance of an employer inquiry.

* * *

In each of these situations, the preliminary injunction gave the plaintiffs relief sought in the complaint that materially altered the legal relationship of the parties—and permanent relief was not necessary because the dispute between the parties ended after the preliminary injunction issued. By obtaining judicial relief never reversed on the merits, these plaintiffs "prevailed" and therefore qualified for attorney's fees under Section 1988.

B. A Plaintiff Who Obtains A Preliminary Injunction Is A Prevailing Party When The Injunction Alters The Parties' Legal Relationship And Provides The Plaintiff With Relief Sought In The Complaint.

"The touchstone of the prevailing party inquiry" is "the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Sole*, 551 U.S. at 82 (citation omitted). Preliminary injunctions generally do just that: they provide the plaintiff with meaningful, concrete, judicially enforceable relief that changes the parties' legal relationship.

That a case ends without a final judgment on the merits for either party does not alter the reality that the plaintiff "prevailed." The preliminary injunction still effected a change in the parties' relationship that, in virtually every case, will have provided the plaintiff with some of the relief sought in the complaint. And that judicial determination was not negated by a subsequent adverse court decision. The plaintiff should therefore be eligible for a fee award.

1. A plaintiff "prevails" when the plaintiff wins a preliminary injunction based on a judicial determination that the plaintiff is likely to succeed on the merits, even though the case ends without a final merits determination.

Section 1988 authorizes awards of attorney's fees to a "prevailing party." Respondents here and similarly situated plaintiffs are "prevailing parties" under the plain meaning of those words.

As respondents explain, "prevail[]" in ordinary parlance means "to succeed." Resp. Br. 15 (citing dictionary definitions). A plaintiff who has been awarded judicial relief based on a likely-to-prevail determination that is never reversed has certainly "succeeded."

Petitioner and the Solicitor General seek to avoid that obvious conclusion by pointing to legal definitions that suggest a specialized, narrower meaning of that term. Pet. Br. 16-18; U.S. Br. 12-13. But they fail to acknowledge other definitions from legal dictionaries that define "prevailing party" far more broadly, including as one "who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, *even though not necessarily to the extent of his original contention*." Black's Law Dictionary (5th rev. ed. 1979) (emphasis added); see also *ibid.* ("The party ultimately prevailing when the matter is finally set at rest."). That definition plainly encompasses cases like this one, in which a plaintiff obtains significant relief sought in the complaint but, because the defendant moved to dismiss the case for mootness, the plaintiff could not pursue the case to final judgment.

In any event, "although dictionary definitions of" words in a statute "bear consideration," they often are "not dispositive of the meaning" of those words. *Yates* v. *United States*, 574 U.S. 528, 538 (2015). That is particularly true when, as here, this Court's decisions define the term differently. *Sole*, 551 U.S. at 82; see *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.,* 532 U.S. 598, 616 (2001) (Scalia, J., concurring) (discussing cases in which this Court "rejected Black's definition" of a term "because it conflicted with our precedent.").

The Court has explained that the "touchstone of the prevailing party inquiry" is "the material

alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Sole*, 551 U.S. at 82 (citation omitted). Plaintiffs who secure a preliminary injunction virtually always satisfy that test: they have prevailed on their claim for preliminary relief and obtained a court order that altered the legal relationship of the parties, albeit not a final ruling on the merits. And that success has not been negated by a subsequent adverse merits ruling.

Importantly, this Court has already made clear that a plaintiff may be a "'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'" *Hanrahan* v. *Hampton*, 446 U.S. 754, 756-757 (1980) (quoting H.R. Rep. No. 94-1558, at 7 (1976)). Thus, a consent decree—which, by definition, is not a judicial determination of the merits of a plaintiff's claim—makes the plaintiff a "prevailing party" eligible for a fee award. See *Maher* v. *Gagne*, 448 U.S. 122, 129-130 (1980); see also *Buckhannon*, 532 U.S. at 604. These precedents foreclose petitioner's attempt to add the additional requirement that a plaintiff must obtain a final merits determination in order to qualify as a prevailing party. See Pet. Br. 15-32.

Petitioner relies on this Court's decision in *Buckhannon*, but the Court's reasoning there supports respondents. The Court held that a plaintiff challenging a state law did not qualify as a prevailing party when the state legislature repealed the law after the plaintiff filed its complaint. *Buckhannon*, 532 U.S. at 600-602. Critically, the law was repealed without the plaintiff obtaining a preliminary injunction or any comparable judicially ordered relief based on a finding that the plaintiff was likely to succeed on the merits.

Id. at 601. Here, by contrast, respondents did "prevail"—they won significant relief *from the court*. And that victory was not negated by a subsequent adverse court decision. Rather, the case ended on mootness grounds.

Finally, the situation here—where the preliminary injunction is terminated because the litigation ends without a merits decision—is fundamentally different from *Sole*, where the district court ultimately ruled for the defendants. 551 U.S. at 80. In the latter situation, the plaintiff's preliminary victory is overturned and final judgment is entered for the defendant. A plaintiff that loses a case has not "prevailed." But where the preliminary injunction is *not* overturned on the merits and the case ends because it is moot, no subsequent ruling has negated the plaintiff's victory. Because the court's only grant of relief was to the plaintiff, the plaintiff "prevailed."

This Court therefore should hold that a plaintiff "prevails" when the plaintiff wins a preliminary injunction with a judicial finding that the plaintiff is likely to succeed on the merits that is never reversed, even when the case is dismissed before final judgment.

2. *Preliminary injunctions generally change the parties' legal relationship and give the plaintiff enforceable judicial relief.*

To be fee-eligible, the plaintiff's success must also change the legal relationship between the parties and provide the plaintiff with enforceable judicial relief. See *CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 422 (2016).

Some litigation victories—such as securing a favorable ruling on a discovery issue or defeating a motion to dismiss—do not satisfy those requirements because they fail to alter the legal relationship between the parties or to provide the plaintiff with judicially enforceable relief sought in the complaint. See *Hanrahan,* 446 U.S. at 758-759. By contrast, preliminary injunctions generally alter the legal relationship between the parties and provide judicially enforceable relief. They therefore provide a proper basis for awards of attorney's fees, unless they are subsequently reversed on the merits.

a. Altering the parties' legal relationship. To qualify as a prevailing party, a plaintiff must obtain a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Sole*, 551 U.S. at 82 (citation omitted). Concurring in *Buckhannon,* Justice Scalia explained that the Court's holding in that case focused on this alteration of the parties' legal relationship:

> The Court today concludes that a party cannot be deemed to have prevailed, for purposes of fee-shifting statutes such as 42 U.S.C. [§ 1988], unless there has been an enforceable "alteration of the legal relationship of the parties." That is the normal meaning of "prevailing party" in litigation, and there is no proper basis for departing from that normal meaning.

532 U.S. at 622 (Scalia, J., concurring).

To determine whether a judicial order alters the relationship between the parties, this Court has instructed courts to examine the order's effect:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the

> rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. * * * The real value of the judicial pronouncement—what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*

Hewitt v. *Helms,* 482 U.S. 755, 761 (1987).

Preliminary injunctions satisfy this standard when the award of preliminary relief is not negated by a subsequent reversal on the merits. Preliminary injunctions allow plaintiffs to take some action that they otherwise could not take, or preclude defendants from taking some action that they otherwise would take. And because the injunction is issued by a judge, it carries the "judicial *imprimatur"* required by *Buckhannon.* 532 U.S. at 605. A plaintiff who obtains a preliminary injunction does not leave "the courthouse emptyhanded." *Id.* at 614 (Scalia, J., concurring).

To be sure, there can be rare situations in which an injunction does not alter the legal relationship between the parties. In *Rhodes* v. *Stewart,* 488 U.S. 1 (1988), for instance, two prisoners sought injunctive relief claiming that they had a constitutional right to a particular magazine subscription. The district court ultimately granted some relief—"order[ing] compliance" with "the proper procedural and substantive standards." *Id.* at 2. At the time that the district court issued its order, however, it was not aware that one of the plaintiffs had died and that the

other had been released from prison. *Id.* at 3. In light of those facts, this Court denied a request for attorney's fees, explaining that the district court's order failed to "affect[] the behavior of the defendant towards the plaintiff[s]." *Id.* at 4 (quoting *Hewitt,* 482 U.S. at 761).

Hanrahan, on which petitioner and the Solicitor General rely, did not address preliminary injunctions. The district court in *Hanrahan* had directed a verdict for the defendants, but the court of appeals reversed and remanded, allowing the case to proceed. 446 U.S. at 755. The court of appeals awarded attorney's fees to the plaintiffs. *Ibid.* But because reversal of the directed verdict did not alter the legal relationship between the parties, this Court reversed the fee award. *Id.* at 758-759. By contrast, a preliminary injunction generally *does* alter the legal relationship between the parties.

Finally, petitioner argues that a plaintiff who obtains a preliminary injunction is not "prevailing" because the relief is not "enduring" when the case ends without issuance of a permanent injunction. Pet. Br. 33. But the judicial relief "endures" while the case lasts and only ends because there is no longer a live dispute to be addressed by continuing the injunctive relief. That is particularly true here, because it is petitioner that ensured that the district court's preliminary injunction could never be reversed by moving to dismiss the case as moot—over the objection of respondents, who wished to proceed to trial on the merits.

Petitioner attempts to ground his argument in *Sole*, but the cases are fundamentally different: The preliminary injunction in *Sole* was reversed, and therefore the plaintiffs did not prevail. In holding that

the plaintiffs there were not "prevailing parties," this Court explained that the plaintiffs' "initial victory was ephemeral" and not "enduring" because "[a]t the end of the fray"—that is, after the district court ultimately rejected the plaintiffs' claims and entered final judgment on the merits in favor of the defendants—the challenged law "remained intact." *Sole*, 551 U.S. at 86.

When a case ends because, sometime after entry of a preliminary injunction, there is no longer a live dispute between the parties, the plaintiff has benefitted from a change in the legal relationship of the parties that was ordered, *and not thereafter undone*, by the court. Indeed, as was the case here, the only reason many plaintiffs do not have the opportunity to obtain a final judgment is because defendants cut off the plaintiffs' ability to do so. As the Fourth Circuit put it, "the plaintiff's victory is now sure to be enduring, as there is no longer any risk that the court-ordered relief will lose its judicial *imprimatur*." Pet. App. 35a (footnote omitted).

b. Court-ordered relief sought in the complaint. In addition to altering the legal relationship between the parties, a plaintiff, to be eligible for fees as a prevailing party, must obtain some of the relief sought in the complaint from a court that is never reversed on the merits. "[R]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Buckhannon,* 532 U.S. at 603-604 (quoting *Hewitt,* 482 U.S. at 760).

Thus, in *Hewitt,* the plaintiff who had obtained a judicial statement that his rights were violated, but had not obtained either injunctive relief or damages, was not a prevailing party. 482 U.S. at 760; see also

Coal. for Basic Human Needs v. *King*, 691 F.2d 597, 600 (1st Cir. 1982) (Breyer, J.) ("The requirement that the legal success 'achieve some of the benefit the parties sought' merely distinguishes cases in which plaintiffs obtain some substantive relief from those in which the 'victories' are purely procedural.").

Preliminary injunctions—like the injunction here—generally provide the plaintiff with some concrete relief sought in the complaint. They also qualify as enforceable, judicial relief: "[A] preliminary injunction has all of the force of a permanent injunction during its period of effectiveness. * * * [T]he sanctions of civil and criminal contempt * * * are available to punish any violation of a preliminary injunction." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure 3d § 2947 (2024).

Indeed, Congress has recognized the significant effect of preliminary injunctions by authorizing interlocutory appeals as of right from a district court's decision granting or denying a preliminary injunction. 28 U.S.C. § 1292(a)(1). And to grant a preliminary injunction, a court must conclude that the plaintiff made a "clear showing that he is likely to succeed on the merits." *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024) (citation and internal quotation marks omitted).

The relief provided by preliminary injunctions is therefore categorically different from the "catalyst" scenario rejected in *Buckhannon.* As noted, the state legislature there repealed the challenged law *before* the district court granted the plaintiff any relief sought in the complaint based on a finding that the plaintiff was likely to succeed on the merits. *Buckhannon,* 532 U.S. at 601-602. This Court declined to apply the term "prevailing party" "to a plaintiff who,

by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief." *Id.* at 605-606. By contrast, what changed petitioner's behavior here was not the filing of a lawsuit, but a judicial decision.

Likewise, a defendant who *defeats* a plaintiff's motion for a preliminary injunction does not obtain any judicially enforceable relief. The Solicitor General's observations that a defendant in such a case is not eligible for attorney's fees, see U.S. Br. 9, 20, thus has no bearing on the eligibility of a plaintiff that successfully obtained a preliminary injunction that *does* provide the plaintiff with court-ordered relief sought in the complaint.

Moreover, any asymmetries in the availability of attorney's fees to plaintiffs and defendants reflect Congress's intent to encourage plaintiffs to "vindicat[e] a policy that Congress considered of the highest priority" and ensure that plaintiffs are not disincentivized from "advanc[ing] the public interest by invoking the injunctive powers of the federal courts." *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968); see *Christiansburg Garment Co.* v. *E.E.O.C.*, 434 U.S. 412, 419-422 (1978).

Of course, some preliminary injunctions may not provide judicial relief "*towards the plaintiff.*" *Hewitt,* 482 U.S. at 761. For example, in *Thomas* v. *National Science Foundation,* 330 F.3d 486 (D.C. Cir. 2003), the plaintiff claimed that an agreement between the National Science Foundation and a private contractor regarding Internet domain registration fees constituted an illegal tax because it had not been approved by Congress. The plaintiffs sought restitution of the fees, which were deposited into a fund to pay for future

projects relating to the Internet. *Id.* at 488. The district court issued a preliminary injunction temporarily preventing the defendants from spending any money from the fund. *Ibid.* Ultimately, Congress passed legislation ratifying the fee system, which mooted the case. Although the plaintiffs obtained a preliminary injunction, the D.C. Circuit denied a request for attorney's fees because the injunction did not "afford[] appellees the relief they sought in their lawsuit." *Id.* at 493. The plaintiffs' complaint sought restitution, but the injunction did no more than temporarily freeze the fund.

A district court that issues preliminary relief will have no trouble distinguishing these sorts of orders from the vast majority of preliminary injunctions that grant plaintiffs some of the relief sought in the complaint.

* * *

The courts of appeals have uniformly held that obtaining a preliminary injunction may make a plaintiff a "prevailing party" for purposes of fee-shifting—even when the case does not end with a judgment on the merits, as long as the preliminary injunction is not reversed on the merits. See, *e.g.*, *Coal. For Basic Human Needs* v. *King, supra*; *Haley* v. *Pataki,* 106 F.3d 478 (2d Cir. 1997); *People Against Police Violence* v. *City of Pittsburgh*, 520 F.3d 226 (3d Cir. 2008); *Stinnie* v. *Holcomb*, 77 F.4th 200 (4th Cir. 2023) (en banc); *Dearmore* v. *City of Garland*, 519 F.3d 517 (5th Cir. 2008); *Planned Parenthood Sw. Ohio Region* v. *Dewine*, 931 F.3d 530 (6th Cir. 2019); *Dupuy* v. *Samuels*, 423 F.3d 714 (7th Cir. 2005); *Rogers Grp., Inc.* v. *City of Fayetteville*, 683 F.3d 903 (8th Cir. 2012); *Watson* v. *County of Riverside,* 300 F.3d 1092 (9th Cir. 2002); *Kan. Jud. Watch* v. *Stout*, 653 F.3d 1230 (10th

Cir. 2011); *Common Cause/Ga.* v. *Billups*, 554 F.3d 1340 (11th Cir. 2009); *Select Milk Producers, Inc.* v. *Johanns,* 400 F.3d 939 (D.C. Cir. 2005).

There is a reason for that—it is the correct interpretation of the statute. This Court should agree, and hold that when a plaintiff wins a preliminary injunction providing court-ordered relief sought in the complaint that changes the parties' legal relationship, and the case ends without a final judgment on the merits, the plaintiff qualifies as a "prevailing party" entitled to attorney's fees.

C. Denying Fees To Plaintiffs Who Win Preliminary Injunctions Would Burden The Courts With Increased Litigation And Prevent Vindication Of Crucial Constitutional And Statutory Rights.

Recognizing that plaintiffs who obtain preliminary injunctions are eligible for attorney's fees not only gives force to the ordinary meaning of "prevailing party." It also promotes judicial economy and effectuates Congress's goal of creating incentives for attorneys to represent individuals seeking to vindicate constitutional and statutory rights.

Holding preliminary injunctions categorically insufficient to justify a fee award, on the other hand, would burden the federal courts with lengthier and more expensive litigation as well as substantially undermine the congressional determinations embodied in 42 U.S.C. § 1988 and other federal fee-shifting statutes.[2] And such a ruling would undermine the

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[2] Congress has enacted the "prevailing party" standard in many other fee-shifting provisions. See generally Cong. Res. Serv., *Awards of Attorneys' Fees by Federal Courts and Federal Agencies* 57-117 (Oct. 22, 2009), https://bit.ly/3yeKwm7.

incentives created by Congress to encourage legal representation of people whose rights are violated. Cf. *Sole*, 551 U.S. at 82 (courts should be guided by the outcomes that "Congress sought to promote in the fee statute" when undertaking the "prevailing party inquiry" (citation omitted)).

1. The unanimous view of the courts of appeals—that plaintiffs who obtain preliminary injunctions may be eligible for attorney's fees as "prevailing parties" in appropriate cases—provides incentives to resolve constitutional and statutory claims efficiently. The rule advocated by petitioner, by contrast, would produce substantial *additional* burdens on the already-strained resources of the federal courts.

Under petitioner's approach, a plaintiff who wins a preliminary injunction would be incentivized to pursue a claim for nominal damages simply to obtain attorney's fees. And plaintiffs would have incentives to refuse to stipulate to dismissals on mootness grounds to ensure that their entitlement to fees is not stripped away, which would produce additional (and often complex) follow-on motions practice about whether there is a reasonable likelihood that the challenged conduct will recur.

Not only would this approach waste judicial resources by producing scores of "second major litigation[s]," *Buckhannon*, 532 U.S. at 609 (citation omitted), but the legal fees of all parties would inevitably increase while they are litigating nominal damages or mootness. Ruling that preliminary injunctions are fee-eligible, by contrast, removes any incentive to continue litigating a case in which the legal issue has been effectively resolved, thereby decreasing the burden on the courts and the costs to parties.

Moreover, preliminary injunctions themselves are judicially efficient. They are typically decided at the outset of a lawsuit, at which point both sides have expended relatively little time and few resources on the case. Accordingly, fees incurred in connection with preliminary injunctions necessarily will be lower than fees incurred if the litigation must be pressed through final judgment.

Finally, allowing fees for preliminary injunctions encourages defendants to settle *before* a court adjudicates the preliminary injunction. As this court held in *Buckhannon,* a plaintiff is not fee-eligible if a defendant voluntarily changes its behavior following the filing of a lawsuit but before the court grants any relief based on a finding that a plaintiff is likely to succeed on the merits. When a defendant believes that the plaintiff is likely to prevail on a preliminary-injunction motion, therefore, the defendant will have an incentive to resolve the dispute before the court issues a preliminary injunction—in order to avoid liability for fees if the plaintiff wins the preliminary injunction and the defendant then capitulates.

If, however, fees are no longer available based on the issuance of a preliminary injunction, defendants have every reason to take "one free shot" at litigating the preliminary injunction: they can capitulate following entry of the preliminary injunction and still avoid liability for fees. As a result, courts will be burdened by more contested preliminary injunction actions—even in cases in which the defendant's chances of winning are remote.

2. "Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so: * * * 'If private

citizens are to be able to assert their civil rights, and if those who violate the Nation'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.'" *City of Riverside* v. *Rivera*, 477 U.S. 561, 577-578 (1986) (quoting S. Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910).

In many cases, the vindication of constitutional and statutory rights occurs solely through issuance of a preliminary injunction—these cases do not end with final judgments on the merits. Fee-shifting is particularly important in cases challenging government action because most plaintiffs are represented "by individual lawyers who are trying to make a living" and must be able to obtain attorney's fees in order to take these cases. Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 N.W. U. L. Rev. Colloquy 182, 184-85 (2007). Institutional litigators, such as *amici*, account for a minority of all constitutional cases. *Id.* at 184 (noting that "[p]ublic interest organizations tend to focus on the few large-scale law reform cases" rather than "the important day-to-day enforcement work of individual cases").

Many institutional litigators that bring suits often rely substantially on solo practitioners and small firms—who depend upon the availability of fee awards—to act as local counsel and co-counsel. See Randal S. Jeffrey, *Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees To Work,* 69 Brook. L. Rev. 281, 283 (2003) ("[E]conomic incentives play a critical role in what litigation attorneys choose to pursue."); Carl Tobias, *Rule 11 & Civil Rights Litigation,* 37 Buff. L. Rev. 485, 486 n.41 (1989) ("The civil rights bar is comprised

essentially of specialized, solo practitioners, who depend on fee shifting and contingency fees for their income.”). Moreover, many public interest organizations rely on fee-shifting statutes to make it possible to represent indigent plaintiffs in lawsuits seeking to vindicate their civil rights.

Given those realities, if a preliminary injunction is the only practical form of relief—such as in cases relating to one-time events—it may be especially difficult to obtain counsel if fees are unavailable for work undertaken in obtaining the preliminary injunction.

Further, in cases involving preliminary injunctions, plaintiffs are generally focused on obtaining equitable, rather than monetary, relief. Although a civil rights action is not rendered moot “so long as the plaintiff has a cause of action for damages,” *Buckhannon,* 532 U.S. at 608-609, suits vindicating constitutional rights—such as those involving the religion clauses, due process, free speech, and free association—often may have little or no potential for a compensatory damages award. See *Carey* v. *Piphus,* 435 U.S. 247, 266 (1978); *Memphis Cmty. Sch. Dist.* v. *Stachura,* 477 U.S. 299, 308-309 (1986).

In addition, “immunity doctrines and special defenses, available only to public officials, preclude *or severely limit the damage remedy*” in some cases. *Rivera*, 477 U.S. at 577 (quoting H.R. Rep. No. 94-1558, at 9 (1976)). A plaintiff's attorney therefore often cannot obtain fees through a percentage-of-recovery, contingency-fee agreement. The fee-shifting provisions of Section 1988 and similar statutes therefore may be the sole means for compensating attorneys in those cases. Eliminating fee awards will therefore decrease lawyers' ability to file such actions and remove a significant deterrent that prevents government officials

from committing constitutional violations in the first place.

In sum, adopting petitioner's rule and denying fees in the circumstances at issue would significantly undermine Congress's purpose in enacting Section 1988. This Court should therefore hold that a plaintiff who prevails in litigation by obtaining a preliminary injunction is fee-eligible when the injunction materially alters the legal relationship between the parties based on a finding that the plaintiff is likely to succeed on the merits, provides the plaintiff with court-ordered relief sought in the complaint, and is never reversed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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