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 FOR PETITIONER

JASON S. MIYARES
Attorney General of Virginia

MAYA M. ECKSTEIN
TREVOR S. COX
DAVID M. PARKER
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 E. Byrd Street
Richmond, Virginia 23219

ERIKA L. MALEY
Solicitor General
Counsel of Record
KEVIN M. GALLAGHER
Principal Deputy Solicitor General
GRAHAM K. BRYANT
Deputy Solicitor General
M. JORDAN MINOT
Assistant Solicitor General
OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071
EMaley@oag.state.va.us

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. § 1988.
2. Whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a nonjudicial event that moots the case, to prevail under 42 U.S.C. § 1988.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner (defendant-appellee below) is Gerald F. Lackey, in his official capacity as the Commissioner of the Virginia Department of Motor Vehicles. Mr. Lackey was automatically substituted as the defendant after the former Commissioner, Richard D. Holcomb, left office. See Fed. R. Civ. P. 25(d).

Respondents (plaintiffs-appellants below) are Damian Stinnie, Melissa Adams, Adrainne Johnson, Williest Bandy, and Brianna Morgan.

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JURISDICTIONAL STATEMENT

The *en banc* Fourth Circuit entered judgment on August 7, 2023. Petitioner timely filed a petition for certiorari by extension on November 20, 2023, which this Court granted. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Civil Rights Attorney's Fees Awards Act of 1976, as amended, provides in pertinent part:

> In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

42 U.S.C. § 1988(b).

INTRODUCTION

The plain text of Section 1988 and this Court's precedent demonstrate that a preliminary injunction does not render a party "the prevailing party" eligible for an award of attorney's fees. 42 U.S.C. § 1988(b). The Fourth Circuit erred in holding otherwise.

The plain meaning of "prevailing party" in fee-shifting statutes is the party that ultimately prevails "on the merits" in the litigation or obtains a final judgment in its favor. *Sole* v. *Wyner*, 551 U.S. 74, 77 (2007). The party must obtain an "enduring," *id.* at 86, and "judicially sanctioned change in the legal relationship of the parties," *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001).

Preliminary injunctions bear none of these hallmarks. They are not a determination on the merits or a final judgment. Rather, they merely predict the "probability of" the party's "ultimate success." *Sole*, 551 U.S. at 84. They do so at the outset of the case, based on abbreviated procedures and an incomplete evidentiary record. Such unreliable predictions of success do not justify fee awards against defendants who may well have never violated the law. "Section 1988 simply does not create fee liability where merits liability is non-existent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985). A defendant may be liable for fees only once a court has conclusively held that the defendant is liable on the merits or entered final judgment against it.

Preliminary injunctions are also not an enduring and judicially sanctioned change in the parties' legal relationship. Preliminary injunctions are, by design, "fleeting" and "ephemeral." *Sole*, 551 U.S. at 83, 86. They are intended only "to preserve the relative positions of the parties until a trial on the merits can be held." *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). This Court has rejected the "catalyst theory," which treated a plaintiff as the prevailing party if its lawsuit caused "a voluntary change in the defendant's conduct." *Buckhannon*, 532 U.S. at 601. Yet the Fourth Circuit's rule treats a plaintiff as a prevailing party when a "nonjudicial" act—such as repeal of the challenged law—moots a case. *Id.* at 606. This rule is little more than "a new spin on the catalyst theory." Pet.App.62a (Quattlebaum, J., dissenting).

A bright-line rule that preliminary injunctions do not confer prevailing-party status also comports with this Court's repeated holdings that fee-shifting standards must be readily administrable. *Buckhannon*, 532 U.S. at 609-10. The Fourth Circuit and other circuits, by contrast, have created fact-intensive and unpredictable standards that often lead to a "second major litigation" over fee eligibility. *Id.* at 609. These rules also create perverse incentives for defendants not to change challenged laws, and to continue litigating to final judgment, unnecessarily burdening the judicial system. This Court should reverse.

STATEMENT OF THE CASE

I. Respondents' challenge to Virginia Code § 46.2-395

Under Section 46.2-395 of the Virginia Code, payment of fines, court costs, restitution, and penalties assessed against defendants for violating Virginia law was a condition of driving a motor vehicle. Va. Code § 46.2-395(A) (2017) (repealed 2020). Virginia courts provided opportunity for hearings before assessing these sums and provided notice that defendants' failure to pay could result in suspension of their driver's licenses. J.A.355, 370 (citing Va. Code § 46.2-395). Defendants could petition the court to restore their driving privileges and enter a deferred or installment payment plan, based on their "financial condition." Va. Code §§ 19.2-355, 19.2-354, 19.2-354.1. Defendants could petition the court for a modification "at any time during the duration of a payment agreement." *Id.* § 19.2-354.1. Courts also notified defendants of the option to provide community service hours in lieu of payment. *Id.* § 19.2-354(C).

If the defendant failed to pay court debts, the court would "suspend the person's privilege to drive a motor vehicle on the highways in the Commonwealth." *Id.* § 46.2-395(B). The clerk of court provided notice to the defendant of "the suspension of his license . . . effective 30 days from the date of conviction, if the [debt] is not paid." *Id.* § 46.2-395(C). If the defendant failed to pay within 40 days, the court would notify Virginia's Department of Motor Vehicles of the suspension. J.A.356.

The Department automatically updated its records to reflect the license suspension and notified the driver. J.A.357. The Department's Commissioner had "no discretion" to decide whether the license should be suspended and made no determination as to the driver's ability to pay. J.A.362; see Va. Code § 46.2-395(C). The Commissioner did not provide a hearing regarding the suspension. See Va. Code § 46.2-395(C). The suspension continued until the driver paid the fines or costs, *id.* § 46.2-395(B), or entered into a payment agreement, *id.* § 19.2-354(I).

Several advocacy organizations lobbied the Virginia General Assembly for years to reform or repeal Section 46.2-395, contending that the law was poor policy. Respondents' counsel, for instance, argued that the legislature should repeal the law because "driver's license suspension is a misguided and counterproductive tool for collecting court debt." Legal Aid Justice Center, *Driven by Dollars: A State-by-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt* 10-11 (Fall 2017), https://tinyurl.com/388ravb4.

Respondents' counsel pursued litigation in addition to their lobbying strategy. They filed a putative class action lawsuit against the Commissioner of the Department of Motor Vehicles on behalf of four named plaintiffs, challenging the statute's constitutionality. *Stinnie* v. *Holcomb*, 734 Fed. Appx. 858, 860 (4th Cir. 2018). The district court dismissed the original complaint without prejudice, holding that it lacked jurisdiction because, as drafted, the complaint challenged orders issued by state courts. *Stinnie* v. *Holcomb*, No.

3:16-cv-44, 2017 WL 963234, at *1 (W.D. Va. Mar. 13, 2017). Although the dismissal was without prejudice, the plaintiffs attempted to appeal rather than amend their complaint, and the Fourth Circuit dismissed their appeal for lack of appellate jurisdiction. *Stinnie*, 734 Fed. Appx. at 858.

Respondents' counsel then filed an amended complaint on behalf of a largely new group of plaintiffs and moved for a preliminary injunction. J.A.71-76. Respondents claimed, among other things, that the Commissioner violated their procedural due process rights by not providing a hearing on their ability to pay the court debts before suspending their licenses. J.A.71-73. Respondents also claimed that the statute violated the Equal Protection Clause because it lacked an indigency exception. J.A.116-17.

The Commissioner opposed the motion, explaining that he automatically updated driving records to reflect license suspensions pursuant to state court orders. J.A.156-57. Further, the state court provided extensive procedural safeguards in issuing those orders, including the sentencing hearing and the ability to petition the court for a payment plan or alternative community service. J.A.163. An additional hearing before the Commissioner in which Respondents could raise their alleged indigency "would add virtually nothing to the procedural safeguards already in place," particularly given that indigency was not relevant to the Commissioner's obligation to update driving records to reflect the court's license suspension. *Ibid.*

The district court granted a preliminary injunction in 2018. It held that, "[b]ased on the current record," Respondents were likely to succeed on the merits of the procedural due process claim "because the Commissioner suspends licenses without an opportunity to be heard," and the other equitable factors weighed in Respondents' favor. J.A.351, 377-78. The district court noted the availability of state court hearings to "address the underlying conviction and assessment of costs," as well as "to reduce or forgive court debt." J.A.373-74. The district court, however, held that these hearings were not constitutionally adequate because the Commissioner had "no mechanisms in place that allow individuals to be heard regarding their inability to pay court fines and costs" before suspension. J.A.376. The district court pointed to *Fowler* v. *Johnson*, No. 17-11441, 2017 WL 6379676 (E.D. Mich. Dec. 14, 2017), which "grant[ed] a preliminary injunction enjoining . . . an allegedly unconstitutional license suspension scheme based only on the likelihood of success on plaintiffs' due process claim." J.A.376-77 n.9.

The district court noted that Respondents had not shown a "'certainty of success.'" J.A.367. Rather, it held that Respondents appeared "likely to succeed" on their due process claim, based on what it predicted Respondents were "likely to show" at "trial." J.A.368, 372, 376. The district court preliminarily enjoined the Commissioner to remove the suspensions of the five Respondents' driver's licenses and not to enforce the statute against Respondents without providing a hearing. J.A.381.

II. The Virginia General Assembly repeals Section 46.2-395, mooting the lawsuit

Following the 2019 election, the General Assembly repealed Section 46.2-395 in its entirety, thereby mooting Respondents' claims.

Political pressure for the repeal had been building for years. Before Respondents filed suit, the General Assembly established a joint committee to study the statute, remarking that "the possession of a valid driver's license is often essential for persons to secure and maintain employment," and therefore "the use of license suspension as a collection method may in fact adversely affect the ability to collect unpaid fines and costs." H.J. Res. 69, Va. Gen. Assemb. (Reg. Sess. 2016), https://tinyurl.com/5e3td8tt.

Both before and after the dismissal of Respondents' first complaint and appeal, the General Assembly considered bills to repeal Section 46.2-395. Despite broad support from legislators and the Governor, a 2017 repeal bill failed because the leadership of a subcommittee opposed it and indefinitely postponed its consideration. See S. Doc. No. 1, at 9, Va. Gen. Assemb. (Reg. Sess. 2017), https://tinyurl.com/5n7yx6rn; Va.'s Legis. Info. Sys., S.B. 1280 (Reg. Sess. 2017), https://tinyurl.com/2y6hkvrc. After subsequent repeal efforts also failed in subcommittee, then-Governor Ralph Northam proposed budget language, which the full General Assembly overwhelmingly passed in 2019, suspending enforcement of Section 46.2-395 for

one year. Va.'s Legis. Info. Sys., H.B. 1700 at Amendment 33 (Reg. Sess. 2019), https://tinyurl.com/2fc3v9j6.

With enforcement of the statute paused, and potential for a permanent repeal in the next legislative session, the district court stayed the case in 2019 over Respondents' objection. J.A.52. The court held that the legislature's vote to suspend enforcement "indicates political hostility towards § 46.2-395." *Stinnie* v. *Holcomb*, 396 F. Supp. 3d 653, 658 (W.D. Va. 2019). As a matter of "judicial restraint," the court concluded that it should not unnecessarily "weigh in on sensitive constitutional questions about license suspension schemes about which other courts have disagreed." *Id.* at 660.

A different political party then "took control" of the General Assembly following the 2019 election. Dave Ress, *Virginia Licenses Won't Be Suspended for Unpaid Fines*, Virginian-Pilot (Feb. 28, 2020), https://tinyurl.com/5avdbnec. The election led to new subcommittee leadership, including in the subcommittee that had repeatedly blocked prior repeal bills. *Ibid.* The General Assembly then permanently repealed Section 46.2-395 in 2020. Va.'s Legis. Info. Sys., S.B. 1 (Reg. Sess. 2020), https://tinyurl.com/msxk6x2u.

Respondents stipulated that the General Assembly's decision to "eliminate[] § 46.2-395 from the Code of Virginia" mooted their claims. Pet.App.80a. The district court dismissed the case, retaining jurisdiction only to consider attorney's fees. J.A.420-21.

III. Respondents seek attorney's fees

Respondents sought attorney's fees under 42 U.S.C. § 1988(b), claiming to be "prevailing parties" based on the preliminary injunction. J.A.422-23. The district court denied Respondents' request for attorney's fees under *Smyth ex rel. Smyth* v. *Rivero*, 282 F.3d 268, 276 (4th Cir. 2002), which established "a bright line rule that preliminary injunction awardees are not prevailing parties." Pet.App.105a. *Smyth* held that a preliminary injunction is "best understood as a prediction of a probable, but necessarily uncertain, outcome," and is an "unhelpful guide to the legal determination of whether a party has prevailed." 282 F.3d at 276-77.

The district court rejected Respondents' argument that *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), which postdated *Smyth*, directly undermined its reasoning. Pet.App.103a. *Winter* clarified that preliminary injunctions require a likelihood of success on the merits, causing the Fourth Circuit to modify its prior precedent that a particularly strong equitable showing could be sufficient. Pet.App.104a; see *Real Truth About Obama, Inc.* v. *Federal Elec. Comm'n*, 575 F.3d 342, 346-47 (4th Cir. 2009). But many preliminary injunction rulings had already required likelihood of success, and *Smyth* "clearly considered—and rejected—[Respondents'] argument that *some* preliminary injunctions are sufficiently based on the merits to serve as a basis for an award of attorneys' fees." Pet.App.103a-04a (quotation marks omitted).

Respondents appealed. A panel of the Fourth Circuit unanimously affirmed, holding that *Smyth* barred Respondents' request for attorney's fees. Pet.App.76a. It concluded that Respondents' "argument that *Smyth* is untenable considering the changed merits standard following *Winter* is unpersuasive." Pet.App.83a-84a. *Smyth* "primarily turned on the **nature** of preliminary injunctions—which remains unchanged—not the **standard** for obtaining a preliminary injunction." *Ibid.*

The Fourth Circuit then granted rehearing *en banc*, overruled *Smyth*, and reversed. Pet.App.1a-58a. In place of *Smyth*'s bright-line rule, the majority imposed a new standard: "[w]hen a preliminary injunction provides the plaintiff concrete, irreversible relief on the merits of her claim and becomes moot before final judgment because no further court-ordered assistance proves necessary, the subsequent mootness of the case does not preclude an award of attorney's fees." Pet.App.22a.

The majority remarked that *Smyth* was "a complete outlier" among the circuits. Pet.App.5a. "Every other circuit to consider the issue," the majority observed, "has held that a preliminary injunction may confer prevailing party status in appropriate circumstances." *Ibid.* The majority hypothesized that *Smyth* "allow[s] government defendants to game the system" by "freely litigat[ing] [a] case through the preliminary injunction phase" and then strategically mooting it before a merits ruling to "avoid paying fees." Pet.App.21a.

The majority then considered two "recurrent questions" that arose when departing from "*Smyth*'s bright-line rule." Pet.App.23a. *First*, the Fourth Circuit majority considered when relief from a preliminary injunction is "sufficiently *on the merits* to justify prevailing party status." Pet.App.27a. The majority held that a prediction of "likely" success suffices. Pet.App.28a. And because *all* preliminary injunctions require a "likelihood" of success under *Winter*, the court concluded that "all preliminary injunctions" should qualify as "solidly merits-based." *Ibid.*

Second, the majority considered when the "court-ordered change" from a preliminary injunction is sufficiently "enduring" to confer prevailing-party status. Pet.App.31a. It held that the change is sufficiently "enduring" when a preliminary injunction "provid[ed] concrete, irreversible . . . benefits that the plaintiffs sought" during "the time it remained in effect," if the case subsequently becomes moot. Pet.App.25a. The court stated that "status quo injunctions" do "not satisfy this standard." Pet.App.26a. It held that a preliminary injunction can confer prevailing-party status, however, regardless of whether the case becomes moot due to the "passage of time," or a nonjudicial act such as legislative repeal. Pet.App.32a-33a.

Judge Quattlebaum, joined by three other judges, dissented. The dissent explained that "the majority's decision misconstrues the meaning of 'prevailing party' under § 1988(b) and strays from Supreme Court precedent," whereas "*Smyth* is faithful to both." Pet.App.42a. And while other circuits disagreed with *Smyth*, "[t]here is no unanimity of the circuit courts":

the circuits "have announced fact-specific standards that are anything but uniform." Pet.App.68a-69a (quoting *Dearmore* v. *City of Garland*, 519 F.3d 517, 521-22 (5th Cir. 2008)).

The dissent disagreed with the majority as to both recurring questions. *First*, the dissent reasoned that to confer prevailing-party status, "the judicial decision must resolve at least one issue on the merits," which "means deciding who ultimately wins." Pet.App.57a-58a. By contrast, a "likelihood of success" ruling "only predicts the outcome of a future decision," and "does not definitively decide the merits of anything." Pet.App.61a. Therefore, "preliminary injunctions—by their very nature—are insufficient to confer prevailing party status," because "showing a likelihood of success on the merits is a far cry from the 'actual success'" required to prevail. Pet.App.60a-61a.

Second, the dissent explained that a prevailing party "must obtain enduring judicially-sanctioned relief." Pet.App.47a. A preliminary injunction is not sufficiently "enduring" because it does not order any "permanent relief." Pet.App.62a-64a. Rather, although Respondents "ultimately got what they wanted," "they did not get what they wanted because a federal court decided the merits of their challenge," but because the Virginia legislature repealed the law. Pet.App.62a. The repeal "lacks the necessary judicial *imprimatur* on the change." Pet.App.64a (quoting *Buckhannon*, 532 U.S. at 605).

This Court granted a writ of certiorari. 144 S. Ct. 1390.

SUMMARY OF ARGUMENT

Section 1988 does not permit fee awards based only on a preliminary injunction.

First, preliminary injunctions do not provide the required "relief on the merits." *Sole*, 551 U.S. at 82. The statute's plain text and this Court's precedents require that a plaintiff must obtain an actual ruling on the merits or a final judgment in its favor to "prevail" under Section 1988. A plaintiff cannot prevail based solely on an inherently unreliable prediction of "likely" future success. Because preliminary injunctions are not a conclusive merits ruling or final judgment, they cannot confer prevailing-party status. Alternatively, a preliminary injunction could confer prevailing-party status only in a rare instance in which a court could properly issue a conclusive merits ruling at that stage. See, *e.g.*, *Singer Mgmt. Consultants, Inc.* v. *Milgram*, 650 F.3d 223, 229-30 (3d Cir. 2011) (*en banc*). This is not such a rare case; the preliminary injunction here was based only on an unreliable prediction of likely future success.

Second, preliminary injunctions do not confer prevailing-party status because they do not create an "enduring change in the [parties'] legal relationship." *Sole*, 551 U.S. at 86 (alterations and quotation marks omitted). Preliminary injunctions, by their very nature, are temporary. A fee award is especially inappropriate in cases, like this one, that are mooted by "a nonjudicial alteration of actual circumstances." *Buckhannon*, 532 U.S. at 606 (quotation marks omitted).

Any enduring change comes not from the court's order, but from the legislature's decision to repeal the challenged law, and therefore lacks the required "judicial *imprimatur*." *Id.* at 605.

Third, a bright-line rule that preliminary injunctions do not confer prevailing-party status provides the necessary "ready administrability" of fee-shifting determinations. *Buckhannon*, 532 U.S. at 610. By contrast, the "factbound" standards that many circuits have adopted are complex and unpredictable, often requiring a "second major litigation." *Id.* at 609. These standards also create perverse incentives not to change a challenged law even if the government would otherwise prefer to do so. Further, the Fourth Circuit's concerns about "gamesmanship" are misplaced: strategic attempts to moot a case between a preliminary injunction ruling and a merits ruling are generally impracticable, particularly where the case becomes moot because an independent branch of government repeals the challenged law.

ARGUMENT

I. Respondents did not prevail "on the merits"

A. The statute's plain language and this Court's precedents demonstrate that Section 1988 requires a conclusive ruling on the merits or final judgment

1. To prevail, a party must obtain a conclusive ruling on the merits of at least one claim, or a final judg-

ment, not merely a prediction of "likely" future success. This is the "clear meaning of 'prevailing party.'" *Buckhannon*, 532 U.S. at 610.

Under the "bedrock principle known as the American Rule," which "has roots in our common law reaching back to at least the 18th century," each party "pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts L.L.P.* v. *ASARCO LLC*, 576 U.S. 121, 126 (2015). Congress has authorized the award of attorney's fees to the "prevailing party" in numerous statutes, including Section 1988.[1]

The key statutory language is "'prevailing party,' a legal term of art." *Buckhannon*, 532 U.S. at 603; see *id.* at 610 (Scalia, J., concurring) ("'Prevailing party' is not some newfangled legal term invented for use in late-20th-century fee-shifting statutes."). Legal "terms of art '*depart* from ordinary meaning'" when used in a statute and are thus interpreted according to their "distinctly legal meaning." *Borden* v. *United States*, 593 U.S. 420, 434-35 (2021) (quoting *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 92 n. 5 (1991)).

When Congress enacted Section 1988, the term of art "prevailing party" was consistently defined to re-

[1] See also, *e.g.*, Equal Access to Justice Act, 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(b); Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3117(a); Fair Housing Act, 42 U.S.C. § 3612(p).

quire a conclusive ruling on the merits or final judgment. Black's Law Dictionary contemporaneously defined "prevailing party" as "[t]he party *ultimately* prevailing when the matter is *finally set at rest*." Black's Law Dictionary 1352 (4th rev. ed. 1968) (emphasis added); see *Buckhannon*, 532 U.S. at 603 (relying on Black's Law Dictionary definition of "prevailing party").[2] Black's Law Dictionary further explained that whether a party prevails "does not depend upon the degree of success at different stages of the suit," but on the outcome "at the end of the suit." Black's Law Dictionary 1352 (4th rev. ed. 1968). Thus, the prevailing party is "[t]hat one of the parties to a suit who successfully prosecutes the action . . . . The one in whose favor the decision or verdict is rendered and judgment entered." *Ibid.* Interlocutory or preliminary victories, however significant, do not confer prevailing-party status.

Other contemporary legal dictionaries set forth substantially the same definition. For instance, Ballentine's provided that "[t]o be a prevailing party does not depend upon the degree of success at different stages of the suit; but upon whether at the end of the suit or other proceeding, the party, who has made a claim against the other, has successfully maintained

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[2] *Buckhannon* considered a different edition of Black's, applicable when the statute at issue there was enacted. 532 U.S. at 603. That edition similarly defines "prevailing party" as "a party in whose favor a judgment is rendered, regardless of the amount of damages awarded." *Ibid.* (alteration omitted) (quoting Black's Law Dictionary 1145 (7th ed. 1999)).

it." Ballentine's Law Dictionary 985 (3d ed. 1969). Bouvier's likewise limited "prevailing party" to the party who, "at the end of the suit," had "successfully maintained" its claim. 3 Bouvier's Law Dictionary 2682 (8th ed. 1914).[3] Contemporary legal dictionaries therefore demonstrate that when Congress enacted Section 1988, the "prevailing party" was the party who had obtained a conclusive ruling on the merits or a final judgment in its favor.

The statute's use of the phrase "*the* prevailing party"—rather than *a* prevailing party—provides a further textual indication that the prevailing party must obtain a conclusive victory. 42 U.S.C. 1988(b). The definite article "the" further shows that only *one* side can "prevail" on a claim. See Merriam-Webster's Collegiate Dictionary 1221 (10th ed. 1993) ("the" indicates "that a following noun . . . is a unique or particular member of its class"); 2 The Compact Edition of the Oxford English Dictionary 3279 (1971) ("the" ordinarily "refer[s] to an individual object"). Thus, the plain meaning of "the prevailing party" is the party who obtains a conclusive merits ruling or final judgment in its favor.

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[3] This Court has relied upon Ballentine's and Bouvier's Law Dictionaries as authorities on the meaning of legal terms of art. See, *e.g.*, *Kellogg Brown & Root Servs., Inc.* v. *United States ex rel. Carter*, 575 U.S. 650, 659 (2015) (citing Ballentine's); *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 567 (2012) (citing Ballentine's); *United States* v. *Hansen*, 599 U.S. 762, 772 (2023) (citing Bouvier's); *Cuomo* v. *Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 526 (2009) (citing Bouvier's).

2. This same plain meaning can also be "distilled from [this Court's] prior cases." *Buckhannon*, 532 U.S. at 603. A substantial body of this Court's precedent defines when a litigant is the prevailing party. The "touchstone" requirement is a "material alteration of the legal relationship of the parties." *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989). This "material alteration" must result from "relief on the merits" or a final judgment. *Sole*, 551 U.S. at 82. This Court has held that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604 (quoting *Garland*, 489 U.S. at 792-93); see *Farrar* v. *Hobby*, 506 U.S. 103, 113 (1992) ("No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.").[4]

This Court has also consistently held that "liability on the merits and responsibility for fees go hand in hand." *Graham*, 473 U.S. at 165; see *Farrar*, 506 U.S. at 109 (same); *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 763 (1989) (same). "Section 1988 simply does not create fee liability where merits

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[4] *Buckhannon* clarified that only "settlement agreements *enforced through a consent decree* may serve as the basis for an award of attorney's fees." 532 U.S. at 604 (emphasis added). "Private settlements do not entail the judicial approval and oversight involved in consent decrees," and thus lack the necessary judicial imprimatur. *Id.* at 604 n.7.

liability is non-existent." *Graham*, 473 U.S. at 168; *Supreme Ct. of Va.* v. *Consumers Union of the U.S., Inc.*, 446 U.S. 719, 738-39 (1980) (denying fees where immunity barred consideration of merits). Precedents have repeatedly "emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees." *Zipes*, 491 U.S. at 762.

Accordingly, this Court has consistently held that fees are not appropriate in cases where a court has not resolved the merits. *Buckhannon* rejected the "catalyst theory," under which a plaintiff "prevailed" if its lawsuit caused "a voluntary change in the defendant's conduct." 532 U.S. at 601. "[M]ost Courts of Appeals"—all but one—had adopted the catalyst theory. *Id.* at 602. But the Court explained that the theory would erroneously "abrogate the 'merit' requirement of [this Court's] prior cases." *Id.* at 606. For these reasons, *Buckhannon* could not "agree that the term 'prevailing party' authorizes federal courts to award attorney's fees" to a plaintiff who files a "nonfrivolous" lawsuit in which the merits "will never be determined." *Id.* at 606.

Similarly, *Hewitt* v. *Helms*, 482 U.S. 755 (1987), held that a favorable "interlocutory ruling" does not confer prevailing-party status. *Id.* at 760. There, the plaintiff successfully reversed on appeal a ruling that dismissed his complaint. *Id.* at 757-58. The plaintiff obtained no conclusive ruling on the merits; rather, "[t]he most that he obtained was an interlocutory ruling that his complaint should not have been dismissed." *Id.* at 760. And "[t]hat is not the stuff of which legal victories are made." *Ibid.*

Likewise, *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980), held that Section 1988 allows interim fee awards "only to a party who has established his entitlement to some relief on the merits." *Id.* at 757. The legislative history of Section 1988 "described what were considered to be appropriate circumstances for such an award by reference to" *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), and *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). See *Hanrahan*, 446 U.S. at 757. And "[i]n each of those cases the party to whom fees were awarded had established the liability of the opposing party, although final remedial orders had not been entered." *Ibid.* Thus, "a determination of the 'substantial rights of the parties' . . . was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney." *Id.* at 758.

Accordingly, decades of this Court's precedent show that a prevailing party "must obtain at least some relief on the merits of the claim" or "comparable relief." *Farrar*, 506 U.S. at 111. And the only relief this Court has held to be "comparable" to a conclusive ruling on the merits is a "consent decree." *Ibid.* In holding that the statute allowed fees for consent decrees, this Court relied "entirely on language in a [Senate] Report" which specifically mentioned consent decrees. *Buckhannon*, 532 U.S. at 618 (Scalia, J., concurring); see also *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980); S. Rep. 94-1011, at 5, reprinted in 1976 U.S.C.C.A.N. 5908, 5912. Although consent decrees "do[] not always include an admission of liability," they are comparable to a judgment on the merits because they constitute a

final "court-ordered 'change in the legal relationship between the plaintiff and the defendant.'" *Buckhannon*, 532 U.S. at 604 (quoting *Garland*, 489 U.S. at 792) (cleaned up)). The parties are no longer free to dispute the merits—the defendant has conclusively consented to a final, judicially sanctioned judgment against it.

This Court has also long held that courts must consider the "judicial administration of § 1988" in "defining the term 'prevailing party.'" *Garland*, 489 U.S. at 791. The Court has accordingly rejected glosses on the term that would "[c]reat[e] . . . an unstable threshold to fee eligibility" and "provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension." *Ibid.* It has defined the term in light of this critical "interest in ready administrability," and "the related interest in avoiding burdensome satellite litigation." *City of Burlington* v. *Dague*, 505 U.S. 557, 566 (1992). Here, as discussed further below, the bright-line rule that preliminary injunctions do not confer prevailing-party status is a rule of "'ready administrability.'" *Buckhannon*, 532 U.S. at 610 (quoting *City of Burlington*, 505 U.S. at 566). By contrast, the contrary approaches the circuits have adopted are far from readily administrable, and frequently provoke prolonged litigation. See Section II.B, *infra*.

Thus, both the text of the statute and this Court's precedents demonstrate that a "prevailing party" must obtain a conclusive ruling on the merits or final judgment in its favor as to at least one claim.

B. A likelihood-of-success ruling cannot confer prevailing-party status

1. Preliminary injunctions do not provide the conclusive ruling on the merits or final judgment required to confer prevailing-party status within the meaning of Section 1988.

A preliminary injunction is a non-binding prediction about the merits, made merely to "preserve the relative positions of the parties until a trial on the merits can be held." *Camenisch*, 451 U.S. at 395. These predictions are "not binding at trial on the merits." *Ibid*. A preliminary injunction "neither replaces the trial nor represents an adjudication of the merits." 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2949 (3d. ed. 2024) [hereinafter Wright & Miller].

Further, courts award preliminary injunctions at the beginning of a case, based on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Camenisch*, 451 U.S. at 395. Discovery is limited (or foreclosed altogether), see *Stanley* v. *University of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994), and Seventh Amendment jury trial rights are unavailable, see *Federal Sav. & Loan Ins. Corp.* v. *Dixon*, 835 F.2d 554, 558 (5th Cir. 1987). Courts also "routinely consider hearsay" or other inadmissible evidence when deciding whether a preliminary injunction is warranted. See *Mullins* v. *City of New York*, 626 F.3d 47, 52 (2d Cir. 2010) (collecting cases). And because preliminary injunctions are designed to avoid

imminent irreparable harm, the parties and court are often under severe time pressure. Accordingly, the parties lack "a full opportunity to present their cases," *Camenisch*, 451 U.S. at 396, and the court often must employ "hasty and abbreviated" procedures, *Sole*, 551 U.S. at 84. For these reasons, this "preliminary, incomplete examination of the merits" is inherently unreliable. *Smyth*, 282 F.3d at 276-77 & n.8.

In addition, a likelihood of success on the merits is a significantly lower bar than ultimate actual success. Plaintiffs must show only some "probability" of success, *Sole*, 551 U.S. at 84; they "need not show a certainty of winning," Wright & Miller § 2948.3. This merits prediction "by no means represents a determination that the claim . . . will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows." *Smyth*, 282 F.3d at 276. Thus, a preliminary injunction "does not definitively decide the merits of anything"—it merely "predicts the outcome of a future decision." Pet.App.61a (Quattlebaum, J., dissenting). It is therefore "closely analogous . . . to the examples of judicial relief deemed insufficient in *Buckhannon*," such as other "interlocutory ruling[s]" that confer "preliminary successes" on a party. *Smyth*, 282 F.3d at 275-76.

In several circuits, the "likelihood" bar can be lowered further based on the remaining three equitable factors: whether the plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Starbucks Corp.* v. *McKinney*, __ U.S. __, 2024 WL 2964141, at *3

(June 13, 2024) (quoting *Winter*, 555 U.S. at 20). These circuits hold that a comparatively weak "likelihood of success" suffices under *Winter* if the equitable factors "tip[] decidedly in favor of the moving party." *Green Haven Prison Preparative Meeting of the Religious Soc'y of Friends* v. *New York State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67, 78 (2d Cir. 2021).[5] "[A]lthough a showing that plaintiff will be more severely prejudiced by a denial of the injunction than defendant would be by its grant does not remove the need to show some probability of winning on the merits, it does *lower the standard* that must be met." Wright & Miller § 2948.3 (emphasis added). Treating a preliminary injunction as a ruling on the merits therefore rests on two fundamental errors: "first collaps[ing] the standard four-factors test for granting preliminary injunctive relief into one factor—likelihood of success—and then equat[ing] likelihood of success with success." *Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939, 957 (D.C. Cir. 2005) (Henderson, J., dissenting).

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[5] See also *In re Revel AC, Inc.*, 802 F.3d 558, 568-70 (3d Cir. 2015) ("[T]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in its favor; the less likely it is to win, the more need it weigh in its favor" (cleaned up)); *Mock* v. *Garland*, 75 F.4th 563, 587 (5th Cir. 2023) (A "sliding scale is utilized"); *Alliance for the Wild Rockies* v. *Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (preliminary injunction appropriate when "serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor"); *Curtis* v. *Thompson*, 840 F.2d 1291, 1296 (7th Cir. 1988) (plaintiff may have a sufficient "likelihood" of success "even though a plaintiff has less than a 50 percent chance of prevailing on the merits").

Doctrines and rules governing preliminary injunctions reflect the unreliability of the merits prediction. A preliminary injunction "does not preclude the parties in any way from litigating the merits of the case." Wright & Miller § 2962. Rather, "legal and factual rulings made as part of a preliminary-injunction analysis are not binding upon panels when they later consider the matter on the merits." *Tully* v. *Okeson*, 78 F.4th 377, 381 (7th Cir. 2023) (citing *Camenisch*, 451 U.S. at 395); see *Glaxo Grp., Ltd.* v. *Apotex, Inc.*, 376 F.3d 1339, 1346 (Fed. Cir. 2004) (similar). The federal rules require parties seeking a preliminary injunction to post "security" sufficient to "pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). This rule is specifically designed to protect defendants "against a court order granted without the full deliberation a trial offers." *Camenisch*, 451 U.S. at 397. Because a preliminary injunction is not "a final judicial decision based on the actual merits of the controversy," to "equate[] 'likelihood of success' with 'success'" would be "improper." *Id.* at 390.

The principle that "[s]tatutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar [legal] principles" further confirms that preliminary injunctions do not confer prevailing-party status. *Baker Botts L.L.P.*, 576 U.S. at 126 (quoting *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 534 (1994)). Because awarding attorney's fees is in derogation of the common law, fee-shifting statutes must be sufficiently "specific and

explicit" to override the American Rule. *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 (1975). Section 1988 does not meet that standard with respect to awarding fees based on preliminary injunctions. See Pet.App.62a (Quattlebaum, J., dissenting). Thus, "preliminary injunctions—by their very nature—are insufficient to confer prevailing party status." Pet.App.60a (Quattlebaum, J., dissenting).

2. Multiple cases illustrate the unreliability of preliminary injunction merits predictions. *Sole*, for instance, reversed an award of fees to a plaintiff who obtained a preliminary injunction but ultimately lost the case. 551 U.S. at 86. The preliminary injunction hearing there was "[h]eld one day after the complaint was filed and one day before the event" in question. *Id.* at 84. Defendants thus had "little opportunity to oppose" the motion, with "no time for discovery, nor for adequate review of documents or preparation and presentation of witnesses." *Ibid.* Based on the record and argument before it, the district court predicted a "likelihood of success" for the plaintiff. *Id.* at 82. But that prediction was wrong. With the benefit of a full evidentiary record and arguments, the district court granted summary judgment for defendants. *Id.* at 80. Although the plaintiff "won a battle," she ultimately "lost the war." *Id.* at 86 (alterations omitted).

The preliminary injunction ruling in this case also shows the unreliability of merits predictions. The district court held that Respondents were "likely to succeed" on their procedural due process claim, on the ground that the Commissioner did not provide "an opportunity to be heard on the fact of license suspension"

or "inability to pay court fines and costs." J.A.374, 376. This merits prediction was incorrect.

The district court pointed to *Fowler*, 2017 WL 6379676, which had found a likelihood of success on a highly similar procedural due process claim. J.A.376-77 n.9. But six months later, the Sixth Circuit reversed that decision. It explained that, because "[p]laintiffs' indigency is not relevant to the state's underlying decision to suspend their licenses, then giving them a hearing—or any other procedural opportunity—where they can raise their indigency would be pointless." *Fowler* v. *Benson*, 924 F.3d 247, 259 (6th Cir. 2019). The requested hearing would be nothing more than "'procedure for procedure's sake,'" which the Due Process Clause does not require. *Ibid.* (quoting *Rector* v. *City & Cnty. of Denver*, 348 F.3d 935, 943 (10th Cir. 2003)).

The Ninth Circuit also subsequently rejected a highly similar due process claim. It held that there was no "basis for concluding that the Constitution required Defendants to consider [plaintiff's] inability to pay her traffic debt in deciding to suspend her license and to continue that suspension." *Mendoza* v. *Strickler*, 51 F.4th 346, 361 (9th Cir. 2022). Rather, "[t]he procedural aspects of the Due Process Clause do not require that the State afford a process for evaluating a factor that, under the applicable substantive law, is not relevant to the ultimate decision at issue." *Ibid.*

For the same reasons, the Commissioner would ultimately have prevailed on the merits here. Virginia courts assessed the fines and costs at issue, and they

provided an opportunity to be heard both as to that assessment and as to any request for a payment plan based on a defendant's financial hardship. See pp. 4, 6, *supra*. The statute, however, required the Commissioner automatically to record the court's suspension of the defendant's driver's license. See p.5, *supra*; Va. Code § 46.2-395(B). "[I]ndigency [was] not relevant to the [Commissioner's] underlying decision" to record the license suspensions. *Fowler*, 924 F.3d at 259. Indeed, the Commissioner had no discretion at all. See Va. Code § 46.2-395(B) (requiring "the court" to suspend licenses); *id.* § 46.2-395(C) (requiring court clerk to send the Commissioner a record "of the license suspension").[6]

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[6] The district court found that "[w]hen suspension occurs pursuant to § 46.2-395, neither a judge nor a clerk enters an order suspending the license," based on testimony from the Charlottesville circuit court clerk at the preliminary injunction hearing. J.A.355. But evidence in the summary judgment record showed that other Virginia courts had different practices and ordered license suspensions, including of the Respondents' licenses. See, *e.g.*, Dkt. 196-18 at 27-28, 35-37; Dkt. 204-1, 204-3; Dkt. 207-3, 207-4, *Stinnie* v. *Holcomb*, No. 3:16-cv-44 (W.D. Va. Jun. 3, 2019); Va. Code § 46.2-395 (when a person defaults on court debt, "*the court* shall forthwith suspend the person's privilege to drive a motor vehicle" (emphasis added)). Thus, this finding illustrates the unreliability of a merits prediction due to the truncated record available in a preliminary injunction proceeding. See pp. 23-24, *supra*. In any event, even where a court does not enter a formal separate order, as the district court stated, "[t]he Commissioner has no discretion as to whose license is suspended," but rather simply "records the suspension" based on the circuit court's determination that the person defaulted. J.A.362; see p. 5, *supra*.

Thus, the Due Process Clause did not require the Commissioner to "afford a process for evaluating a factor that, under the applicable substantive law, is not relevant[.]" *Mendoza*, 51 F.4th at 361; see *Fowler*, 924 F.3d at 259. An additional hearing before the Commissioner might have made Respondents "feel that [they have] received more personal attention, but it would not serve to protect any substantive rights." *Dixon* v. *Love*, 431 U.S. 105, 114 (1977). The district court erred in predicting that the Commissioner likely violated the Due Process Clause by failing to provide a hearing regarding Respondents' ability to pay their court debts—the sole basis on which the district court held Respondents had a likelihood of success.

Numerous other authorities similarly reflect the unreliability of preliminary injunction merits predictions. It "is not unusual for courts to deny a permanent injunction to an applicant who was already successful in procuring the exact same injunction on a preliminary basis," due to the court's intervening ability "to thoroughly analyze the alleged facts and applicable law." *Getir US, Inc.* v. *Doe*, No. 1:21-cv-1237, 2023 WL 3898933, at *3 (E.D. Va. June 8, 2023). One study, for instance, found that several circuits "granted about twice as many stays" of removal based on a "likelihood of success" analysis as ultimate relief on "petitions for review." Fatma Marouf et al., *Justice on the Fly: The Danger of Errant Deportations*, 75 Ohio St. L.J. 337, 385 (2014). Another study found that in intellectual property cases, "16 percent of the defendants that were preliminarily enjoined" did not have an "adverse final judgment." Ronald J. Ventola

II & Samuel W. Silver, *The Value of First Impressions*, 7 Landslide 8, 11 (2014). And, of course, this Court and other appellate courts may disagree with the lower court on the merits prediction. See, *e.g.*, *Trump* v. *Hawaii*, 585 U.S. 667, 710 (2018) (reversing the court of appeals' likelihood of success on the merits determination); *Higuchi Int'l Corp.* v. *Autoliv ASP, Inc.*, 103 F.4th 400, 2024 WL 2744687, at *6 (6th Cir. 2024) (vacating preliminary injunction based on likelihood of success).

A preliminary prediction of the likelihood of success is simply not the same as an actual ruling on the merits.

3. Alternatively, if there were ever an appropriate circumstance where a preliminary injunction could confer prevailing-party status, it would be only in "that rare situation where a merits-based determination is made at the injunction stage." *Singer*, 650 F.3d at 229. For example, the Third Circuit has allowed fees based on a preliminary injunction where a district court definitively held that the challenged ordinance "was facially unconstitutional," enjoined its enforcement, and ordered the defendant to propose a replacement. *Id.* at 229-30 (discussing *People Against Police Violence* v. *City of Pittsburgh*, 520 F.3d 226 (3d Cir. 2008)). In such a case, the party claiming fees has convinced the court that the law *was* unconstitutional, not just that it was likely to succeed on the merits, and the court both enjoined enforcement of the challenged law *and* affirmatively created judicially mandated procedures going forward. *Id.* at 230.

Even if fees were permitted in such "rare" situations, this case is not one. Respondents never received a ruling definitively "concluding that the [challenged law] was facially unconstitutional." *Singer*, 650 F.3d at 229 (cleaned up). Rather, the district court held that Respondents were "likely to succeed," based on what it predicted Respondents were "likely to show" at "trial." J.A.368, 372, 376. The district court did not issue sweeping relief reflecting a conclusive ruling that the law was facially unconstitutional; rather, it simply preliminarily enjoined the Commissioner from enforcing Section § 46.2-395 against the five individual Respondents while the litigation proceeded. J.A.381. And the district court clearly did not regard its preliminary injunction ruling as a final decision on the merits of the constitutional claim. To the contrary, it held a stay to be appropriate under principles of "judicial economy" and "restraint," to avoid the need to "weigh in on sensitive constitutional questions about license suspension schemes about which other courts have disagreed." *Stinnie*, 396 F. Supp. 3d at 660.

In short, this case involves no more than a typical preliminary injunction ruling that merely predicts a likelihood of success. Such a preliminary merits prediction does not render Respondents the prevailing parties. The judgment below should therefore be reversed.

II. Respondents did not obtain a judicially sanctioned "enduring change" in the parties' legal relationship

A. Any enduring change was not judicially sanctioned

Respondents are not prevailing parties for the independent reason that they did not obtain enduring judicially sanctioned relief. The only enduring change here had no judicial imprimatur, and the only change with a judicial imprimatur was not enduring. The Fourth Circuit's holding to the contrary is "little more than a new spin on the catalyst theory" that *Buckhannon* rejected. Pet.App.62a (Quattlebaum, J., dissenting).

1. The "touchstone" requirement for a "prevailing party" is a "material alteration of the legal relationship of the parties." *Garland*, 489 U.S. at 792-93. This alteration must be "enduring," *Sole*, 551 U.S. at 86, because whether a party "prevails" depends on the outcome "at the end of the suit," not "the degree of success at different stages of the suit," Black's Law Dictionary 1352 (4th rev. ed. 1968).

Further, the enduring alteration in the legal relationship between the parties must be "judicially sanctioned." *Buckhannon*, 532 U.S. at 605. *Buckhannon* specifically prohibited fee awards "where there is no judicially sanctioned change in the legal relationship of the parties." *Ibid.* It rejected the "catalyst theory," under which nearly all circuits had held that a plaintiff was the prevailing party where it "achieved the de-

sired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 600-01.

Preliminary injunctions do not provide an enduring, judicially sanctioned change in the legal relationship between the parties. Rather, the change preliminary injunctions provide "is, by its very nature, intended to be temporary." *Higher Taste, Inc.* v. *City of Tacoma*, 717 F.3d 712, 716 (9th Cir. 2013). A preliminary injunction is a procedural device—a placeholder until a court *actually* decides the merits. *Withrow* v. *Larkin*, 421 U.S. 35, 43 (1975) ("[A] preliminary injunction is granted a plaintiff to protect his interests during the ensuing litigation."); *Starbucks*, __ U.S. at __, 2024 WL 2964141, at *4 (The purpose of a preliminary injunction "'is merely to preserve the relative positions of the parties until a trial on the merits can be held.'" (quoting *Camenisch*, 451 U.S. at 395)). Because preliminary injunctions do not conclusively decide the merits, they are not binding in subsequent phases of a proceeding. See p. 23, *supra*. Thus, obtaining a preliminary injunction is merely a "fleeting success." *Sole*, 551 U.S. at 83.

Conversely, while repeal of a challenged statute may cause enduring change for plaintiffs as a practical matter, it is not judicially sanctioned relief. Thus, the only "lasting change" "did not come from the court." Pet.App.62a, 64a (Quattlebaum, J., dissenting). Rather, Respondents here "got what they wanted because the General Assembly of Virginia decided to change the law." Pet.App.62a (Quattlebaum, J., dis-

senting). This Court has "never" held that such a "non-judicial 'alteration of actual circumstances'" can supply a basis for awarding attorney's fees. *Buckhannon*, 532 U.S. at 606 (citation omitted). The "prevailing party" must prevail *in the litigation*.

Accordingly, this Court has held that when "the judgment . . . is vacated on the basis of an event that mooted the controversy" on appeal, that order "would deprive [a plaintiff] of its claim for attorney's fees under 42 U.S.C. § 1988 . . . because such fees are available only to a [prevailing] party." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 480, 483 (1990); see *Rhodes* v. *Stewart*, 488 U.S. 1, 4 (1988) (rejecting attorney's fees under § 1988 because "[t]he case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever"). The "subsequent mooting of the . . . lawsuit—not by adjudication but by voluntary regulatory change"—cannot confer prevailing-party status. *Select Milk*, 400 F.3d at 955-56 (Henderson, J., dissenting). And where "[w]hat mooted the case was the State-Defendants' own actions," then "[g]ranting the fees . . . promotes the very thing *Buckhannon* cast aside—the catalyst theory." *Tennessee State Conf. of NAACP* v. *Hargett*, 53 F.4th 406, 412-13 (6th Cir. 2022) (Nalbandian, J., dissenting); see *Advantage Media, L.L.C.* v. *City of Hopkins, Minn.*, 511 F.3d 833, 838 (8th Cir. 2008) ("Although [plaintiff]'s lawsuit resulted in alteration of several potentially unconstitutional provisions of the [City's] sign ordinance, the Supreme Court has rejected the 'catalyst' theory of fee recovery as a means of attaining prevailing party status." (citation omitted)). Respondents

"cannot be prevailing parties. *Buckhannon* is crystal clear on this point." Pet.App.62a (Quattlebaum, J., dissenting).

2. The Fourth Circuit majority contended that it was not adopting a catalyst theory because the prevailing-party determination was based "entirely" on the preliminary injunction, "and not on the General Assembly's subsequent repeal of § 46.2-395." Pet.App.28a. Not so. The majority relied on the repeal to satisfy the second part of its test: that the claim "becomes moot before final judgment such that the injunction cannot be reversed, dissolved, or otherwise undone." Pet.App.36a.

Indeed, the majority had no choice but to rely on the repeal, because the preliminary injunction itself did not provide an "enduring change in the [parties'] legal relationship." *Sole*, 551 U.S. at 86 (citation omitted). Rather, the preliminary injunction lost all force when the district court dismissed the case as moot, and thus had no "enduring" effect at all. 7 James William Moore et al., *Moore's Federal Practice* ¶ 65.07 at 65-144 to 65-145 (2d ed. 1994) ("A preliminary injunction is *ipso facto* dissolved by a dismissal of the complaint or the entry of a final decree in the cause."); see Wright & Miller § 2947 (A "preliminary injunction normally lasts until the completion of the trial on the merits, unless it is dissolved earlier[.]"). And absent the repeal, Respondents' claims could well have foundered at summary judgment, at trial, or on appeal, and Respondents would have obtained nothing more than the "fleeting" relief that *Sole* held insufficient. 551 U.S. at 83; see p. 27, 34, *supra*. Thus, "the

relief that the plaintiffs received under the preliminary injunction is every bit as 'ephemeral' as the relief afforded in *Sole*." Pet.App.63a (Quattlebaum, J., dissenting).

Because "[t]he majority needs something more" than the preliminary injunction, it held that a "legislative, not judicial, action" could provide the enduring change. Pet.App.63a-64a (Quattlebaum, J., dissenting); see *Northern Cheyenne Tribe* v. *Jackson*, 433 F.3d 1083, 1086-87 (8th Cir. 2006) ("In the end, the [plaintiffs] achieved their desired result because of a regulatory action taken by [the agency] . . . and because of voluntary decisions by the other defendants . . . . Accordingly, under *Buckhannon*, the [plaintiffs] may not be awarded attorneys' fees as prevailing parties."). Thus, "either way the majority turns, its conclusion conflicts with Supreme Court precedent"—Respondents obtained no enduring change to the parties' relationship that was judicially sanctioned. Pet.App.63a (Quattlebaum, J. dissenting). They are therefore not prevailing parties.

B. The circuits' various contrary tests are deeply flawed

The Courts of Appeals have adopted a variety of tests governing when they consider preliminary injunctions to be "enduring change." Each of these tests has fundamental conceptual problems. In addition, under several, the preliminary injunction here would not qualify as an enduring change.

1. The Fourth Circuit and other circuits ask whether the preliminary injunction provided "irrevocable" relief "that is not defeasible by further proceedings." *Dupuy* v. *Samuels*, 423 F.3d 714, 719 (7th Cir. 2005); Pet.App.22a, 36a (a preliminary injunction confers prevailing-party status if it provides "concrete and irreversible judicial relief"); *Select Milk*, 400 F.3d at 948 (same); see *Hargett*, 53 F.4th at 410 ("[T]he court's relief was 'irrevocable' [because] as a result of the preliminary injunction in this case, plaintiffs were able to conduct voter-registration drives for seven months[.]"). These circuits contrast such "irrevocable" relief with "so-called status quo injunctions, which simply maintain the 'last uncontested status between the parties.'" Pet.App.26a; see, *e.g.*, *Roberts* v. *Neace*, 65 F.4th 280, 284 (6th Cir. 2023) (contrasting preliminary injunctions that are "final in all but name" with those that "merely preserved the status quo until time allowed for a closer look").

This test is fundamentally flawed. It is unclear whether it provides any meaningful distinction; if so, the line is exceedingly difficult to discern. In one sense, preliminary relief will almost always be "not defeasible" and "irrevocable," because subsequent events cannot change the past: the plaintiff will have had the benefit of the preliminary relief during the period that the preliminary injunction was in force. The plaintiff in *Sole*, for instance, was able to hold a particular demonstration due to the preliminary injunction. *Sole*, 551 U.S. at 83. Nonetheless, the plaintiff did not achieve any "enduring change in the [parties'] legal relationship." *Id.* at 86 (citation omitted). To the

contrary, the plaintiff ultimately lost, and the defendant remained free to enforce the challenged law in the future. *Ibid.* The Fourth and other circuits would apparently deem this relief "irrevocable" if the case had become moot before judgment, but any enduring change would clearly have lacked "judicial *imprimatur*." *Buckhannon*, 532 U.S. at 605.

In addition to its inconsistency with *Buckhannon*, this distinction between "status quo" and "irrevocable" preliminary injunctions is extremely difficult to discern. The Fourth Circuit majority itself, in adopting the test, remarked that "distinguishing between status quo and non-status quo injunctions—and identifying the 'last uncontested status between the parties'—often proves difficult." Pet.App.26a-27a n.8. Indeed, this distinction has been "much, and rightly, criticized," often leaving courts "deeply uncertain what the status quo was before [the] suit." *Chicago United Indus., Ltd.* v. *City of Chicago*, 445 F.3d 940, 944 (7th Cir. 2006) (Posner, J.) (collecting authorities); Wright & Miller § 2948 ("It often is difficult to determine what date is appropriate for fixing the status quo."); Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 Wash. Lee L. Rev. 109, 166 (2001) (discussing circuit split regarding the standard for "status quo" injunctions and concluding that "[c]ontinued retention of the hollow inquiry into the nature of an injunction or its effect on the status quo will give rise to additional costs without producing any offsetting benefits").

It is also unclear why the Fourth Circuit concluded that the preliminary injunction here is not a "status

quo" injunction. The standard definition of the "status quo" is "'the last peaceable uncontested status' existing between the parties before the dispute developed." Wright & Miller § 2948. Respondents were contesting the suspension of their driver's licenses; thus, the "'last peaceable uncontested status'" before the dispute developed was prior to the suspension of their driver's licenses. *Ibid.*; J.A.85. And the preliminary injunction did no more than prevent the suspension of Respondents' driver's licenses while the suit was pending. See p. 7, *supra*; J.A.381. The same conceptual gap appears in other cases applying this standard. See, *e.g.*, *Select Milk*, 400 F.3d at 954-55 (Henderson, J., dissenting) (noting that while the majority characterized the preliminary injunction as providing "permanent" relief, it simply "preserve[d] the status quo" by "restoring the regulatory landscape that existed before the [challenged] Order").

The Fourth Circuit majority elsewhere suggests that a "status quo" preliminary injunction is one that "does not provide some of the benefit the plaintiff ultimately seeks in bringing suit." Pet.App.26a, 33a-34a. It contrasts a "concrete and irreversible" preliminary injunction that provides "precisely the merits-based relief" the plaintiff needs "for precisely as long as she needs it." *Ibid.*; see *Higher Taste*, 717 F.3d at 717 ("[T]he preliminary injunction ended up affording all the relief that proved necessary."). Again, it is difficult to discern what line, if any, this test draws. Nearly every preliminary injunction will provide at least "*some* of the benefit" that the plaintiff sought

during the period when the preliminary injunction is in effect. Pet.App.33a (emphasis added).

If the test compares the *extent* of the relief that the plaintiff ultimately sought with the extent of the relief the preliminary injunction granted, that factor is irrelevant to fee eligibility. Indeed, the majority elsewhere observed that "considerations that bear on the 'extent of a plaintiff's success'" have "no relevance to the legal question before us of whether a party has prevailed in the first place." Pet.App.39a-40a & n.13 (citing *Hensley* v. *Eckerhart*, 461 U.S. 424, 439-40 (1983)). And it is again unclear why the Fourth Circuit concluded that the preliminary injunction here satisfied this test when "it gave the plaintiffs so little of what they wanted": they obtained "only reinstatement of their own licenses," while they ultimately sought "also class certification, a declaratory judgment that § 46.2-395 was unconstitutional, and hence permanent license reinstatement for hundreds of thousands of Virginians." Pet.App.39a; see J.A.108-13, 121-22.

In short, the circuits' attempts to distinguish between preliminary injunctions based on the nature of relief they grant is contrary to this Court's precedent and conceptually incoherent.

2. The Fifth Circuit has a different test, holding that a preliminary injunction confers prevailing-party status when it "causes the defendant to moot the action." *Dearmore*, 519 F.3d at 524. But this test is simply a "new spin on the catalyst theory," Pet.App.62a (Quattlebaum, J., dissenting): it awards fees "because the lawsuit brought about a voluntary

change in the defendant's conduct," *Buckhannon*, 532 U.S. at 600. The Fifth Circuit contends that its causation requirement "satisfies *Buckhannon*" because it mandates that "the defendant moots the plaintiff's action in response to a court order, not just in response to the filing of a lawsuit." *Dearmore*, 519 F.3d at 524. But the test has the same central problem: the only "enduring" change is a "nonjudicial 'alteration of actual circumstances,'" the defendant's voluntary change in conduct. *Buckhannon*, 532 U.S. at 606 (citation omitted).

And like the catalyst theory, the Fifth Circuit test improperly "requir[es] analysis of the defendant's subjective motivations in changing its conduct." *Buckhannon*, 532 U.S. at 609. This is the kind of "highly fact-bound inquiry" that *Buckhannon* specifically rejected. *Ibid.* This inquiry is particularly problematic if applied to parse the subjective motivations of a state legislature, even if the evidence is limited to supposedly "objective metrics." *Amawi* v. *Paxton*, 48 F.4th 412, 419 (5th Cir. 2022). As an initial matter, because the legislature is a separate and independent branch of government, its repeal of a statute should not be treated as "the defendant . . . moot[ing] the action" at all. *Dearmore*, 519 F.3d at 524; see pp. 50-51, *infra*.

In addition, as this Court has long recognized, because the passage of laws requires the agreement of numerous legislators, "[t]he diverse character of such motives . . . precludes all such inquiries [into legislative motive] as impracticable and futile." *Soon Hing* v. *Crowley*, 113 U.S. 703, 710-11 (1885); see *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951) ("The holding of

this Court in *Fletcher* v. *Peck*, 6 Cranch 87, 130 . . . that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned."); *Foreman* v. *Dallas Cnty.*, 193 F.3d 314, 321-22 (5th Cir. 1999) (attribution of a "causal connection" between a lawsuit and a legislative act is a "formidable task" because the legislative process is "fraught with compromises, competing concerns, and unspoken motives"). At best, attempting to determine what "caused" a legislature to act would be a difficult inquiry, involving careful parsing of the legislative history. That is hardly a recipe for avoiding a "second major litigation" over fee eligibility. *Buckhannon*, 532 U.S. at 609.

Respondents also would not be the "prevailing parties" under the Fifth Circuit test. The defendant, Commissioner Lackey, did not moot the action; the General Assembly did. And even if the General Assembly could somehow be treated as equivalent to "the defendant," the preliminary injunction did *not* cause it to repeal Section 46.2-395. See pp. 8-9, *supra*. Long-running repeal efforts, which pre-dated the litigation, came to fruition when a different political party took control of a legislative subcommittee. *Ibid.* Indeed, in holding a stay appropriate, the district court recognized the "shifting political winds" and mounting "political hostility towards § 46.2-395." *Stinnie*, 396 F. Supp. 3d at 658-59. Respondents' counsel likewise attributed the repeal to "the new makeup of the General Assembly" following an election. Jimmy O'Keefe, *Bill Preventing License Suspension Over Court Debt Unanimously Passes Va. Senate*, Capital News Serv.

(Feb. 12, 2020), https://tinyurl.com/mrxcye4y. Further, the General Assembly could have mooted the litigation by simply providing an indigency exception and associated procedures, see p. 6, *supra*; instead, it repealed the statute entirely. That decision was a policy judgment, not a strategic response to the preliminary injunction order.[7]

3. The Seventh and Eighth Circuits have adopted yet a different test, holding that preliminary relief is "sufficiently akin to final relief on the merits" where "the party's claim [for a] permanent injunction is rendered moot by the impact of the preliminary injunction." *Northern Cheyenne Tribe*, 433 F.3d at 1086. This test is satisfied where a preliminary injunction provided the plaintiffs with "everything [they] asked for in the lawsuit," and what mooted the case was this "court-ordered success and the passage of time." Pet.App.19a. For instance, a case may become moot where the plaintiff sued seeking to hold a particular event, and the event occurs under the preliminary in-

[7] The Fourth Circuit pointed to a letter from the Commissioner to the General Assembly, which it stated "provided significant input on how to structure the repeal" so as to "result in the pending litigation being dismissed." Pet.App.21a-22a. But there is no evidence that this letter—or anything other than the change to the General Assembly's political makeup—caused the repeal. The letter was written years after the sponsor first introduced a repeal measure, see p. 8, *supra*, and the General Assembly did not adopt the Commissioner's suggestion relating to the litigation, see J.A.408-09.

junction. See, *e.g.*, *Dupuy*, 423 F.3d at 719-20 (discussing *Young* v. *City of Chicago*, 202 F.3d 1000 (7th Cir. 2000)).

This test avoids some of the flaws discussed above: it is far more administrable than the Fourth Circuit test. See pp. 38-41, *supra*. It also bears less resemblance to the catalyst theory, because it does not turn on the suit having caused the defendant voluntarily to change its conduct. See p. 41-42, *supra*. Nonetheless, it still erroneously treats a nonjudicial "alteration of actual circumstances" as transforming provisional preliminary relief into an "enduring change." *Buckhannon*, 532 U.S. at 606. It also erroneously allows fees without a conclusive determination of the merits. See Section I.A, *supra*. And where a party seeks a preliminary injunction for an imminently planned event, the preliminary injunction procedures will frequently be "hasty and abbreviated," presenting a serious risk that the preliminary ruling will be incorrect and that attorney's fees will punish a defendant for lawful conduct. *Sole*, 551 U.S. at 84; see pp. 23-24, *supra*.

In the alternative, if this Court were to adopt a standard distinguishing preliminary injunctions mooted only by the passage of time, Respondents here would not be prevailing parties. What mooted this case was not only the passage of time, but the General Assembly's independent decision to repeal the challenged statute. Any "enduring change" provided by nonjudicial acts, such as this legislative repeal, lacks the "judicial *imprimatur*" *Buckhannon* requires. 532 U.S. at 605.

As in *Buckhannon*, this Court should correct the circuits' erroneous gloss on "prevailing party." See 532 U.S. at 602. Respondents obtained no enduring judicially sanctioned relief, and the judgment should be reversed.

III. The Fourth Circuit's remaining contentions are inconsistent with the purposes of Section 1988

Finally, the Fourth Circuit majority's arguments that its test is needed to secure Section 1988's purposes also fail. This Court does not "disregard the clear legislative language and the holdings of [its] prior cases on the basis of such policy arguments." *Buckhannon*, 532 U.S. at 610. The Fourth Circuit also overlooks the critical guidepost of ready administrability, which strongly favors *Smyth*'s bright-line rule over its complex and fact-intensive test.

1. *Smyth*'s bright-line rule that preliminary injunctions do not confer prevailing-party status conforms to the critical requirement that fee-shifting standards must be readily administrable. See p. 22, *supra*. This Court has repeatedly instructed that "[a] request for attorney's fees should not result in a second major litigation." *Buckhannon*, 532 U.S. at 609 (quoting *Hensley*, 461 U.S. at 437). *Smyth*'s bright-line rule is clear and easy to administer, and will not "spawn a second litigation." *Garland*, 489 U.S. at 791.

By contrast, circuits have adopted dizzyingly complicated inquiries, frequently leading to "'a second major litigation.'" *Buckhannon*, 532 U.S. at 609 (quoting *Hensley*, 461 U.S. at 437). By their own admission,

courts have "struggled to decide whether the requirements for prevailing-party status are met." *Higher Taste*, 717 F.3d at 715. Many have adopted a "contextual and case-specific inquiry" that is inherently difficult to administer. *McQueary* v. *Conway*, 614 F.3d 591, 601 (6th Cir. 2010); see also *DiMartile* v. *Hochul*, 80 F.4th 443, 458 (2d Cir. 2023) ("Determining whether a district court's grant of interim relief confers prevailing party status under Section 1988 is often a fact-intensive inquiry."); *Dearmore*, 519 F.3d at 521 (circuits have "fact-specific standards").

For instance, many circuits deny fees if preliminary injunction proceedings were "hasty and abbreviated," *Sinapi* v. *Rhode Island Bd. of Bar Exam'rs*, 910 F.3d 544, 551 (1st Cir. 2018), or where there was no "serious examination" of the merits, *Kansas Jud. Watch* v. *Stout*, 653 F.3d 1230, 1238 (10th Cir. 2011); see *DiMartile*, 80 F.4th at 453 (similar). But courts struggle to draw the line between "hasty and abbreviated" and "thorough" or "serious" examination. The standard is unpredictable and fact-intensive, turning on a "constellation of factors," including the duration of the briefing schedule and hearing, *DiMartile*, 80 F.4th at 458, the extent of the evidentiary record, *Sinapi*, 910 F.3d at 548, and the thoroughness of the district court's reasoning, *Kansas Jud. Watch*, 653 F.3d at 1239. This is "clearly not a formula for 'ready administrability.'" *Buckhannon*, 532 U.S. at 610 (citation omitted).

Likewise, courts struggle to define "[h]ow much of a 'likelihood of success' is enough." *Select Milk*, 400 F.3d at 957 (Henderson, J., dissenting); see *ibid.*

("Will a 75 per cent likelihood do? How about 50 per cent with a strong public interest showing to boot?"); *Singer*, 650 F.3d at 235 n.3 (Roth, J., dissenting) (noting that "courts use a bewildering variety of formulations of the need for showing some likelihood of success" (quotation marks omitted)). Deciding when this ill-defined threshold has been crossed necessarily "requires close analysis" of the "reasoning underlying the grant of preliminary relief." *Mastrio* v. *Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) (citation omitted). This "contextual and case-specific inquiry" leaves litigants and appellate courts parsing language in preliminary-injunction opinions like the text of a statute. *McQueary*, 614 F.3d at 601; see, *e.g.*, *Dupuy*, 423 F.3d at 722 ("Although certain language in the district court's fee order can be read to suggest that the court had adopted a particular view of the merits of the case, when the writings of the district court are read in their totality, we cannot say that they make it sufficiently clear").

Further, the circuits' attempts to decide when preliminary injunctions are sufficiently "enduring" have led to equally thorny and fact-intensive questions. For instance, some circuits struggle with fraught and "highly factbound" causation questions. *Buckhannon*, 532 U.S. at 609; see p. 42, *supra*. Others face similarly unpredictable and complex attempts to distinguish between "stay-put or status quo injunctions" and preliminary injunctions that provide "irrevocable" relief. *Rogers Grp., Inc.* v. *City of Fayetteville, Ark.*, 683 F.3d 903, 910 (8th Cir. 2012) (quoting *McQueary*, 614 F.3d at 600); see p. 39, *supra*.

A bright-line rule that preliminary injunctions do not confer prevailing-party status would eliminate all these complexities. It would replace the current confusion with a principle of "'ready administrability,'" thereby avoiding a "'second major litigation'" over fee requests. *Buckhannon*, 532 U.S. at 609-10.

2. Holding that preliminary injunctions confer prevailing-party status also creates perverse incentives. It imposes a "disincentive" for a government "to voluntarily change its conduct, conduct that may not be illegal." *Buckhannon*, 532 U.S. at 608. Governmental defendants or legislatures may want to change a challenged practice or law for reasons independent of the litigation—for instance, because it has unintended downsides or costs, or the expected public benefits have not materialized. See, *e.g.*, *Northern Cheyenne Tribe*, 433 F.3d at 1084 (federal agency independently determined that challenged shooting range "would not generate necessary public benefits"); *Fowler*, 924 F.3d at 262-63 (noting that "[p]erhaps Plaintiffs are right that the policy [of suspending driver's licenses due to unpaid court debt] is unwise, even counterproductive," but that "misguided laws may nonetheless be constitutional" (citation omitted)). But potential fee awards can have heavy impacts on the public fisc, "'sometimes even more significant than[] . . . potential liability on the merits.'" *Buckhannon*, 532 U.S. at 608 (quoting *Evans* v. *Jeff D.*, 475 U.S. 717, 734 (1986)). Thus, "the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct." *Ibid.*

It also creates perverse incentives for defendants to continue litigating when a case could otherwise easily be resolved. *Evans*, 475 U.S. at 736-37. Such a result would "forc[e] more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants." *Ibid.*

3. Finally, the Fourth Circuit majority's concern that its rule is necessary to prevent governmental "gamesmanship" is misplaced.

The majority asserts that a bright-line rule would allow "government defendants to game the system" by strategically mooting a case before final judgment after a district court grants a preliminary injunction. Pet.App.21a. But government defendants cannot "game the system" by repealing laws. Only legislatures can repeal laws, and legislatures are not the defendants in civil rights cases. See, *e.g.*, *Valero Terrestrial Corp.* v. *Paige*, 211 F.3d 112, 121 (4th Cir. 2000) ("[T]he mootness was . . . caused by the state *legislature*'s amendment of statutory provisions that it had earlier enacted, and not by the actions of any of the defendants before this court, all of whom are state *executive* officials[.]"). These two separate branches of government are independent of each other and may be controlled by different parties. They make their own assessments of both the litigation and the wisdom of the underlying public policy. The actions of a legislature represent "responsible lawmaking, not manipulation of the judicial process." *American Libr. Ass'n* v. *Barr*, 956 F.2d 1178, 1187 (D.C. Cir. 1992).

Indeed, repeal of a statute moots a case precisely *because* the executive official defendant has no control over the legislative process; thus, the defendant cannot be said to have voluntarily ceased any conduct. *Board of Trustees of Glazing Health & Welfare Tr.* v. *Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019). When the legislature repeals a challenged law, "the executive branch is in a position akin to a party who finds its case mooted . . . by 'happenstance,' rather than events within its control." *National Black Police Ass'n* v. *District of Columbia*, 108 F.3d 346, 353 (D.C. Cir. 1997).

In addition, attempting to coordinate with the legislature to time a repeal strategically will typically be impracticable, given the pace of litigation and competing demands of the legislative schedule. For instance, some state legislatures meet only biennially, and others are in session for four months or fewer throughout the year. See Laura C. Tharney et al., *Legislation and Law Revision Commissions: One Option for the Management and Maintenance of Ever-Increasing Bodies of Statutory Law*, 41 Seton Hall Legis. J. 329, 331-32 (2017). An executive official gambling that the legislature will strategically repeal a law to moot a case between the issuance of a preliminary injunction and a ruling on the merits is at best making an extremely risky bet.

Here, for instance, the General Assembly repealed the challenged statute eighteen months after the district court issued the preliminary injunction. See pp. 8-9, *supra*. The repeal mooted the case before a ruling on the merits only because the district court

granted a stay pending the potential repeal. *Stinnie*, 396 F. Supp. 3d at 656. Decisions to stay litigation rest within the sound discretion of district courts, and courts can deny stay motions that they conclude are unfair attempts at gamesmanship. See, *e.g.*, *Clinton* v. *Jones*, 520 U.S. 681, 706 (1997) (district court has "broad discretion to stay proceedings"); *Landis* v. *North Am. Co.*, 299 U.S. 248, 254-55 (1936) (power to stay proceedings "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance"). Where appropriate, a district court also has discretion to "consolidat[e]" preliminary injunction proceedings "with the trial on the merits." Fed. R. Civ. P. 65. The court could then enter a permanent rather than preliminary injunction. See, *e.g.*, *Campaign for Fam. Farms* v. *Glickman,* 200 F.3d 1180, 1189 (8th Cir. 2000); *M Welles & Assocs., Inc.* v. *Edwell, Inc.*, 69 F.4th 723, 729 (10th Cir. 2023).

The Fourth Circuit's concern with gamesmanship is overblown even where the defendant can unilaterally cease the challenged conduct. This concern "only materializes in claims for equitable relief." *Buckhannon*, 532 U.S. at 608. Defendants cannot moot a claim for damages by ceasing the challenged conduct, *ibid.*, including a claim for "nominal damages," see *Uzuegbunam* v. *Preczewski*, 592 U.S. 279, 283 (2021). Many government defendants are subject to damages claims. See, *e.g.*, 42 U.S.C. § 1983. And even for equitable claims, "it is not clear how often courts will find a case mooted," as "[i]t is well settled that a defendant's voluntary cessation" will not moot a case unless it is "absolutely clear" that the challenged behavior

will not "recur." *Buckhannon*, 532 U.S. at 609. Given the risk that a case will not be mooted, a defendant has a "strong incentive to enter a settlement agreement, where it can negotiate attorney's fees and costs." *Ibid.*

Finally, *Smyth*'s bright-line rule is unlikely to discourage attorneys from "represent[ing] civil rights plaintiffs in even clearly meritorious actions." Pet.App.21a. *Buckhannon* rejected a highly similar argument that the catalyst theory was necessary to avoid "deter[ing] plaintiffs with meritorious but expensive cases from bringing suit," finding the concern "entirely speculative." 532 U.S. at 608. When an attorney brings suit, her ultimate eligibility for fee-shifting is necessarily uncertain; the plaintiff may never obtain a ruling on the merits, or the ruling may not be in its favor. See, *e.g.*, *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (observing that the "American rule" exists because "litigation is at best uncertain"). The possibility that a case may become moot following a preliminary injunction is just one uncertainty among many and is unlikely to have a significant effect upon attorneys' decisions to sue. In addition, even if a bright-line rule would "sometimes den[y] fees to the plaintiff with a solid case," allowing fees based on preliminary injunctions would "sometimes reward[] the plaintiff with a phony claim (there is no way of knowing)." *Buckhannon*, 532 U.S. at 618 (Scalia, J., concurring). Ultimately, "the evil of the former far outweighs the evil of the latter." *Ibid.* Denying "the extraordinary boon of attorney's fees" is far better than allowing "the law to be the very instrument of

wrong—exacting the payment of attorney's fees to the extortionist." *Ibid.*

If Congress desires a different tradeoff, it "is free, of course, to revise" Section 1988. *Buckhannon*, 532 U.S. at 622 (Scalia, J., concurring). Indeed, after *Buckhannon*, Congress amended the Freedom of Information Act to broaden fee eligibility. 5 U.S.C. § 552(a)(4)(E)(ii)(I-II) (FOIA complainants are eligible for fees due to "a voluntary or unilateral change in position by the agency."). Congress, however, has not similarly amended Section 1988.

This Court should follow the plain text of Section 1988 and its precedents, and hold that preliminary injunctions do not confer prevailing-party status.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

JASON S. MIYARES
Attorney General of Virginia

MAYA M. ECKSTEIN
TREVOR S. COX
DAVID M. PARKER
HUNTON ANDREWS
KURTH LLP
Riverfront Plaza, East Tower
951 E. Byrd Street
Richmond, Virginia 23219

ERIKA L. MALEY
Solicitor General
Counsel of Record
KEVIN M. GALLAGHER
Principal Deputy Solicitor General
GRAHAM K. BRYANT
Deputy Solicitor General
M. JORDAN MINOT
Assistant Solicitor General
OFFICE OF THE VIRGINIA
ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071
EMaley@oag.state.va.us

Counsel for Petitioner