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 THE STATES OF GEORGIA, ALABAMA, ARKANSAS, FLORIDA, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTERESTS OF THE *AMICI CURIAE*

This case is about how to interpret the term "prevailing parties," the statutory threshold for deciding when parties in certain civil rights lawsuits are eligible for attorney's fees. 42 U.S.C. § 1988. The States have obvious sovereign interests in the proper construction of this threshold because state officials are often defendants in these cases, and the States will inevitably pay any fee awards against them. States have had to pay out millions in attorney's fees on the basis of nothing more than district courts granting preliminary injunctions—even though a preliminary injunction is just a litigation order designed to maintain a court's ability to ultimately decide the case. This is atextual, costly, provides terrible incentives, and the Court should reverse the Fourth Circuit's erroneous decision to the contrary.

SUMMARY OF THE ARGUMENT

Section 1988 gives courts discretion to award attorney fees to the "prevailing party" in certain civil rights cases. 42 U.S.C. § 1988(b). Although the statute does not define "prevailing party," this Court has made clear that attorney fees are warranted "only when a party has prevailed on the merits of at least some of his claims," and that a "defendant's voluntary change in conduct . . . lacks the necessary judicial imprimatur on the change" to make that plaintiff a prevailing party, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 603, 605 (2001) (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980)). Nonetheless, several circuits award attorney fees when the plaintiffs obtain a preliminary injunction but the case is mooted before a

final ruling. The Court should hold that such awards are beyond the scope of § 1988 and adopt a bright-line rule that a party prevails for purposes of § 1988(b) only upon securing a final judgment on the merits.

That approach would be consistent with both the statutory text and the Court's own precedent on § 1988. "Prevailing party" is a legal term of art, and at the time of the fee-provision's passage, it was widely understood to mean the party who wins the lawsuit after a "judicial finding of liability." *Buckhannon*, 532 U.S. at 614 (Scalia, J., concurring). And this Court's precedents make clear that a party is not a "prevailing party" entitled to attorney's fees unless the party secures relief that is both (1) court-ordered and (2) enduring. *Id.* at 604; *Sole v. Wyner*, 551 U.S. 74, 86 (2007). Preliminary injunctions do not satisfy these requirements. They are simply tools for courts to preserve the status quo during the course of the suit. While the preliminary-injunction analysis involves some examination of the merits, that determination is "necessarily abbreviated," and is weighed along with other factors including the likelihood of irreparable harm to the plaintiff. *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002), *overruled by Stinnie v. Holcomb*, 77 F.4th 200 (4th Cir. 2023) (en banc). A preliminary injunction, in other words, "does not definitively decide the merits of anything," *Stinnie*, 77 F.4th at 227 (Quattlebaum, J., dissenting), so a plaintiff who obtains one is not a "prevailing party" unless she also goes on to win a final judgment on the merits.

The importance of adopting a clear definition of "prevailing party" is underscored by the current patchwork of tests that have developed among the

circuit courts. Those tests turn on a variety of subjective inquiries, such as whether the preliminary-injunction inquiry was sufficiently merits based, *see*, *e.g.*, *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006), or whether the injunction "cause[d] the defendant to moot the action," *Dearmore v. City of Garland*, 519 F.3d 517, 524 (5th Cir. 2008). A host of recent examples show that these concerns are far from abstract. States regularly face large fee awards based solely on the issuance of a preliminary injunction early in the case. The circuit courts' unstable and often contradictory tests impose needless costs on the States and their residents in the form of protracted secondary litigation over fees. This uncertainty then complicates the States' litigation and policy decisions, and it creates a perverse incentive to continue litigating cases to final judgment to avoid spending the public's money on attorney's fees.

The Court should hold that that the grant of a preliminary injunction, standing alone, is not a basis for awarding fees under § 1988, because only a final judgment is sufficient.

ARGUMENT

I. The Court should make clear that a party is "prevailing" under § 1988(b) only if it has won a final judgment on the merits.

Section 1988 is an exception to the "American Rule" under which parties typically bear their own attorney fees. *Buckhannon*, 532 U.S. at 602. It authorizes courts to award a reasonable attorney's fee to a "prevailing party" in civil rights actions. 42 U.S.C. § 1988(b).

"Prevailing party" is a legal "term of art [that] has traditionally . . . meant the party that wins the suit or obtains a finding (or an admission) of liability." *Buckhannon*, 532 U.S. at 615 (Scalia, J., concurring); *see also id.* at 610 ("'Prevailing party' is not some newfangled legal term invented for use in late-20th-century fee-shifting statutes."). Statutory terms are defined according to their meaning at the time of enactment, *Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021), and when Congress enacted the fee statute in 1976, Black's Law Dictionary defined the term as "one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of his original contention," *Prevailing Party*, Black's Law Dictionary (rev. 4th ed. 1968); *see also id.* (further defining "prevailing party" as "[t]he one in whose favor the decision or verdict is rendered and judgment entered," and "[t]he party ultimately prevailing when the matter is ultimately set at rest").

Congress has confirmed that reading through its frequent usage of the phrase "in a context that *presumes* the existing of a judicial ruling." *Buckhannon*, 532 U.S. at 614 (Scalia, J. concurring); *see*, *e.g.*, 5 U.S.C. § 1221(g)(2) ("[i]f an employee . . . is the prevailing party . . . and the decision is based on a finding of a prohibited personnel practice"); § 1221(g)(3) (providing for an award of attorney's fees to the "prevailing party," "regardless of the basis of the decision"); 5 U.S.C. § 7701(b)(2)(A) (allowing the prevailing party to obtain an interlocutory award of the "relief provided in the decision"); 8 U.S.C. § 1324b(h) (permitting the administrative law judge to award an attorney's fee to the prevailing party "if the losing party's argument is without reasonable foundation

in law and fact"); 18 U.S.C. § 1864(e) (allowing the district court to award the prevailing party its attorney's fee "in addition to monetary damages").

The Court's "prevailing party" precedents reflect that understanding. Read together, they impose two basic requirements for fee eligibility. *First*, the party must have won a "court-ordered 'change in the legal relationship between'" the parties. *Buckhannon*, 532 U.S. at 604 (quoting *Tex. State Tchr. Ass'n v. Garland Indep. Sch. Dist.* (*Garland*), 489 U.S. 782, 792 (1989)) (alterations adopted). Thus, *Buckhannon* rejected the circuit courts' "catalyst theory" of fee eligibility, under which they had allowed a fee award "if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 601. *Second*, the requisite court-ordered change in legal relationship must be "enduring," in the sense that the ordered relief lives on after the case is closed. *Sole*, 551 U.S. at 86. In *Sole*, for example, winning a preliminary injunction against enforcement of a state rule prohibiting nudity in state parks did not make the plaintiff a prevailing party because by the end of the case, she had lost on the merits and the challenged rule remained in place. *Id.* In short, a "prevailing party" is one who, at the end of the day, wins the lawsuit; they get their desired court-ordered and enduring change in the legal relationship between the parties. The upshot, as the dissent below noted, is "that to prevail, a party must achieve final, not temporary success." *Stinnie*, 77 F.4th at 221.

Preliminary injunctions do not satisfy these requirements. For one, they are by definition *preliminary*: "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." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Benson Hotel Corp. v. Woods*, 168 F.2d 694, 696 (8th Cir. 1948) ("The application for such an injunction does not involve a final determination on the merits; in fact, the purpose of an injunction *pendente lite* is not to determine any controverted right, but to prevent . . . the doing of any act pending the final determination of the action whereby rights may be threatened or endangered. . . ."). And while the preliminary-injunction analysis does involve some inquiry into the merits, that inquiry "is necessarily abbreviated." *Smyth*, 282 F.3d at 276. The plaintiff must typically demonstrate something between "a 'substantial question'" and a "substantial likelihood of success." *Id.*

But even this required showing is not fixed; it can vary according to the strength of the other preliminary-injunction factors. *Id.* at 277. *See, e.g.*, *Green Haven Prison Preparative Meeting of the Religious Soc'y of Friends v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67, 78 (2d Cir. 2021) (explaining that a comparatively weak likelihood of success on the merits will suffice if the equitable factors "tip[ ] decidedly in favor of the moving party"); *Mock v. Garland*, 75 F.4th 563, 587 (5th Cir. 2023) (noting that courts use a "sliding scale" rather than assigning a "fixed quantitative value" to each of the factors). "The interplay of these equitable and legal considerations and the less stringent assessment of the merits of claims that are part of the preliminary injunction context belie the assertion that [a grant of a preliminary injunction is] an 'enforceable judgment on the merits' or something akin to one for prevailing party purposes." *Smyth*, 282 F.3d at 277 (quoting *Buckhannon*, 532 U.S. at 604).

The preliminary-injunction merits analysis is thus more like a "prediction of a probable, but necessarily uncertain, outcome." *Id.* at 276. Things can and do change as lawsuits progress—new facts come to light, defenses are developed, etc. That means a preliminary injunction "does not definitively decide the merits of anything." *Stinnie*, 77 F.4th at 227. It is instead an "ephemeral" victory, *Sole*, 551 U.S. at 86, and does not render a plaintiff a prevailing party for purposes of § 1988(b).

The ruling below upends these principles. The district court's preliminary injunction was not an *enduring* victory for the plaintiffs because it provided only temporary relief pending the district court's resolution of their request for a permanent injunction. *Stinnie*, 77 F.4th at 203–04. Indeed, the preliminary injunction was in effect for less than four months before the Virginia General Assembly, on its own initiative, paused enforcement of the State's license suspension scheme. *Id.* at 204; Doc. 143 at 9, *Stinnie v. Holcomb*, No. 3:16-cv-00044 (W.D. Va. Apr. 23, 2019). In other words, the plaintiffs may have "got[ten] what they wanted" eventually, but "they did not get what they wanted because a federal court decided the merits of their challenge." *Stinnie*, 77 F.4th at 227 (Quattlebaum, J., dissenting); *see also id.* at 228 (noting that the district court's preliminary injunction was necessarily "ephemeral" (quoting *Sole*, 551 U.S. at 86)). And the real-world outcome that actually did end the lawsuit was not *court-ordered*; it resulted instead from Virginia's independent and voluntary decision to amend its laws. *Id.* at 228.

Sole and *Buckhannon* respectively held that neither of these circumstances is enough to make someone a

"prevailing party." *See Sole*, 551 U.S. at 84, 86 (precluding fee awards where the plaintiff's initial victory is "ephemeral" and has "no preclusive effect in the continuing litigation"); *Buckhannon*, 532 U.S. at 606 ("Never have we awarded attorney's fees for a nonjudicial 'alteration of actual circumstances.'" (citation omitted)). Cobbling together the combination—a preliminary injunction that does not provide enduring relief, and a desired outcome that did not come from a court order—as a recipe for attorney's fees conflicts with those clear holdings.

At bottom, preliminary injunctions are no different from any of the various other rulings that occur throughout a typical lawsuit. Discovery orders can so significantly alter the evidentiary landscape, and with it one side's likelihood of success on the merits, as to induce settlement or a voluntary change in the challenged behavior. (For that matter, they can also result in an award of monetary sanctions.) The same holds true for motions *in limine* at trial. The inclusion or exclusion of key testimony can be devastating to the losing party's case. But no matter these rulings' impact on one side's chances to win, they are not *final* in the sense of bringing about an "enduring change in the legal relationship" between the parties. *See Sole*, 551 U.S. at 86 (quotation omitted) (noting that plaintiff who secured initial preliminary injunction had "won a battle but lost the war"). So too with preliminary injunctions.

Consistent with the plain language of § 1988, the Court's precedents always require a plaintiff to win (1) court-ordered (2) enduring relief before they are a "prevailing party." *Buckhannon*, 532 U.S. at 605–06

(explaining that the "plain language of the statutes" forbids awarding "attorney's fees for a nonjudicial 'alteration of actual circumstances'" (citation omitted)); *Garland*, 489 U.S. at 792 (holding that the "ordinary" meaning of § 1988 means that the plaintiff prevails only if he can "point to a resolution of the dispute which changes the legal relationship between itself and the defendant"); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("Respect 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."). Under these principles, § 1988(b) permits awards of attorney fees only for final judgments on the merits, not for preliminary injunctions.[1]

II. Anything short of a clear-cut rule poses a variety of negative consequences for States.

It is important for the Court to provide a clear answer to this question because the circuit courts have not: their tests for determining fee eligibility are subjective and unpredictable. Courts applying these tests frequently saddle States with large attorney fee awards in cases, like this one, where the plaintiff was granted a preliminary injunction. Apart from these fees themselves, the lack of a clear test also imposes a variety of other burdens and misincentives on the States and their residents.

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1. The Court has held that consent decrees are a species of final, enforceable judgments for purposes of § 1988(b). *Buckhannon*, 532 U.S. at 604. Private settlements, by contrast, are not. *Id.* at 604 n.7. In any event, the Court need not address those devices to rule that preliminary injunctions are not *any* kind of final judgment.

A. The existing tests lead to uncertainty and unpredictability.

The explosion of civil-rights litigation over recent decades means that federal courts must frequently consider the question of fee eligibility for preliminary injunction winners. It stands to reason that the rule for deciding it, like standards for fee eligibility in general, should be clear and easy to administer. *See Buckhannon*, 532 U.S. at 610. But most circuit courts have not provided such a rule. In addition to coming up with a number of different and often conflicting formulations of a rule to govern fee eligibility, circuit courts have mostly chosen amorphous, fact-specific rules over bright lines. *Dearmore*, 519 F.3d at 521 ("[C]ircuit courts considering this issue have announced fact-specific standards that are anything but uniform.").

Only a few circuit courts have established a bright-line rule to govern the fee eligibility question presented here. In the Third Circuit—and, until this case, the Fourth Circuit—a plaintiff who wins a preliminary injunction is not a "prevailing party" on that basis alone because the plaintiff has not won anything on the merits. *See Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc); *Smyth*, 282 F.3d at 277.[2] The First Circuit has a less certain rule, holding that preliminary relief does not confer prevailing party status, at least where the opposing party "never receive[s] a fair

2. Even the Third Circuit left room for uncertainty, however. In *Singer*, that court described a different case as "that rare situation where a merits-based determination is made at the injunction stage" and this *did* support a fee award. 650 F.3d at 229.

opportunity to contest" the merits on a fully developed record. *Sinapi v. R.I. Bd. of Bar Exam'rs*, 910 F.3d 544, 551–52 (1st Cir. 2018).

Other circuits' rules are messier. Under one approach, while winning a preliminary injunction "usually will not suffice to obtain fees under § 1988," "contextual and case-specific inquiry" may reveal "occasional exceptions." *McQueary v. Conway*, 614 F.3d 591, 604 (6th Cir. 2010); *see also Tennessee State Conference of NAACP v. Hargett*, 53 F.4th 406, 410–11 (6th Cir. 2022) (describing "a spectrum of cases" along which the relief granted ranges from "fleeting" to "enduring," the difference being only "one of degree"). Other tests focus on how "thorough[ly]" the district court considered the merits of the claim at issue in granting the injunction. *See Northern Cheyenne Tribe*, 433 F.3d at 1086; *DiMartile v. Hochul*, 80 F.4th 443, 451–54 (2d Cir. 2023) (denying prevailing party status where a preliminary injunction, although supposedly merits-based, was premised on a "hasty and abbreviated" analysis). But this approach is inherently subjective—what, after all, is the line between "abbreviated" and "reasoned"?—and leads to inconsistent applications. For instance, the *Northern Cheyenne* court denied a fee award after the defendants' voluntary action mooted the case because, although the preliminary injunction order addressed the likelihood of success on the merits, it "did not discuss whether those claims would entitle the Tribes to final relief on the merits against the Secretary." 433 F.3d at 1086. But the same court later upheld a fee award based on a preliminary injunction that prevented new quarry regulations from going into effect because the order "engaged in a thorough analysis of the probability that [the plaintiff] would succeed on the merits of its

claim," even though the injunction just maintained the real-world status quo). *Rogers Group, Inc. v. City of Fayetteville*, 683 F.3d 903, 911 (8th Cir. 2012).

Other approaches introduce uncertainty by asking whether the preliminary injunction was based on an "unambiguous indication of probable success on the merits" as opposed to a mere balancing of the equities in favor of the plaintiff. *Dearmore*, 519 F.3d at 524; *Kansas Judicial Watch v. Stout*, 653 F.3d 1230, 1239 (10th Cir. 2011) (same); *see also*, *e.g.*, *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 948 (D.C. Cir. 2005) (affirming fee award to a preliminary injunction winner and emphasizing that the "Milk Producers secured a preliminary injunction in this case largely because their likelihood of success on the merits was never seriously in doubt"). But a preliminary injunction, by its "very nature," is a "flexible" remedy that precludes "wooden application of the probability test." *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35–36 (2d Cir. 2010) (quotation omitted). Deciding whether the district court examined the merits "serious[ly]" enough in that context is a fraught endeavor, *id.*, and a particularly "unstable threshold to fee eligibility," *Garland*, 489 U.S. at 791.[3]

3. This difficulty is compounded by the "bewildering variety of formulations" courts use to decide whether the likelihood of success on the merits is high enough to secure a preliminary injunction. 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.3 (3d ed. 2022) (listing fourteen different articulations). Many courts allow the requisite likelihood of success to increase or decrease on a sliding scale depending on the strength of the other preliminary-injunction factors. *See*, *e.g.*, *Hoosier Energy Rural Elec. Coop. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) ("[T]he more net harm an

In addition to the fuzzy "is it sufficiently merits-based?" inquiry, at least one circuit has added into its test the knotty question whether the preliminary injunction also "cause[d] the defendant to moot the action." *Dearmore*, 519 F.3d at 524; *see also Amawi v. Paxton*, 48 F.4th 412, 417–18 (5th Cir. 2022) (doubling down on *Dearmore*'s causation element). That question pushes courts not only to assess motives and mental states of government officials, but also to make a subjective judgment about just how strong the causative link between the injunction and the mooting action has to be. Did the defendants moot the action because they were enjoined, for some other reason, or for a combination of reasons? If the latter, which reason did they care about most? This is hardly the stuff of "ready administrability." *Buckhannon*, 532 U.S. at 609–10 (quotation omitted); *see also Garland*, 489 U.S. at 791 (rejecting the "central issue" test for the "prevailing party" question because, "[b]y focusing on the subjective importance of an issue to the litigants, it asks a question which is almost impossible to answer," since it "appears to depend largely on the mental state of the parties").

There is no reason to analyze whether a particular preliminary injunction is the kind of order that should be subject to attorney's fees. *None* of them makes a party "prevailing." The Court should put this confusion to rest by clarifying that a "prevailing party" has won a final judgment on the merits. Adopting any of the alternatives discussed above would perpetuate needless uncertainty.

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injunction can prevent, the weaker the plaintiff 's claim on the merits can be while still supporting some preliminary relief."); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317–18 (D.C. Cir. 1998); *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017); *Citigroup Glob. Mkts., Inc.*, 598 F.3d at 36–38 & n.5 (all similar).

B. States have had to pay millions in attorney's fees in cases where they never actually lost.

States are often ordered to pay large attorney fee awards in cases in which plaintiffs accomplished no more than obtaining a preliminary injunction. Here, for instance, plaintiffs in this case failed to win a merits ruling on any of their claims against the Commissioner before Virginia's independent and voluntary actions mooted their case. Yet, because the district court had earlier issued a preliminary injunction, the Fourth Circuit deemed them "prevailing parties" under § 1988 and put Virginia on the hook for hundreds of thousands of dollars in fees and expenses. *See* J.A. 458 (requesting $768,491.70 in appellate fees and expenses alone). The plaintiffs did not win their lawsuit, but now that it faces the possibility of a seven-figure fee award, Virginia can hardly be faulted for thinking *it* lost.

Unfortunately for the States, Virginia is not an outlier. Plaintiffs regularly seek, and courts have been willing to impose, substantial fee awards against state officials under § 1988 based on this same combination: a preliminary injunction, and a case that ends without the plaintiffs having won a judgment.

Take Georgia, for example. In *Common Cause/Georgia v. Billups*, the district court issued a preliminary injunction against enforcement of a voter ID law. 406 F. Supp. 2d 1326, 1377 (N.D. Ga. 2005). But after Georgia enacted a new law that modified the ID requirement, the court ultimately denied permanent injunctive relief because Georgia's "compelling interest in preventing fraud in voting" outweighed any burden that the updated

ID requirement might have on the right to vote. 504 F. Supp. 2d 1333, 1382–83 (N.D. Ga. 2007), *aff'd in relevant part*, 554 F.3d 1340, 1355 (11th Cir. 2009). So the plaintiffs didn't just fail to win a merits judgment; they lost the case. Yet the State was forced to pay $112,235.03 in fees because the plaintiffs had obtained a preliminary injunction with respect to the old law. 554 F.3d at 1356; No. 4:05-cv-0201, 2007 WL 9723985, at *22 (N.D. Ga. Dec. 27, 2007).

More recently, in *Common Cause Georgia v. Secretary, State of Georgia*, the plaintiffs argued that security issues in Georgia's voter registration system could result in the erroneous rejection of some provisional ballots. 17 F.4th 102, 105 (11th Cir. 2021). The district court granted a temporary restraining order—the most preliminary form of preliminary relief—directing Georgia's Secretary of State to take steps to ensure the accuracy of the November 2018 election results. *Id.* at 106. Before the district court could consider the plaintiffs' request for permanent relief, however, the State enacted two new voting laws that resolved the plaintiffs' concerns, and the parties agreed to dismiss the action with prejudice. *Id.* Based solely on the temporary restraining order, which the plaintiffs themselves acknowledged was "a very, very narrow order," the district court awarded $166,210.09 in fees and expenses. *Id.* at 105–06.

Other States, and their political subdivisions too, have been made to pay large fee awards under the same basic set of circumstances:

- In *Chrysafis v. Marks*, the district court actually *denied* the plaintiffs' request to preliminarily

enjoin a New York law limiting evictions during the COVID pandemic and dismissed their case. No. 21-cv-2516, 2023 WL 6158537, at *1 (E.D.N.Y. Sept. 21, 2023). The plaintiffs then secured a temporary injunction against the law pending appeal, but the law automatically expired by its own terms before the plaintiffs' appeal was resolved. *Id.* at *2. The Second Circuit dismissed the appeal as moot, but New York was subsequently ordered to pay almost $350,000 in fees and costs—based on nothing more than an injunction pending appeal. *Id.* at *3, 12.

- In *Tennessee State Conference of NAACP v. Hargett*, the plaintiffs challenged a suite of Tennessee laws regulating voter registration drives. 53 F.4th 406, 408–09 (6th Cir. 2022). The plaintiffs secured a preliminary injunction halting enforcement of the laws while their legality was under review, but Tennessee repealed the challenged laws less than seven months later—before the plaintiffs won any permanent relief on the merits—and the parties agreed to dismiss the case. *Id.* at 409. Tennessee was nevertheless ordered to pay roughly $800,000 in fees and expenses. *See* No. 3:19-cv-00365, 2021 WL 4441262, at *11 (M.D. Tenn. Sept. 28, 2021).

- In *Kansas Judicial Watch v. Stout*, candidates for judicial office obtained a preliminary injunction preventing the Kansas Commission on Judicial Qualifications from disciplining them for responding to a candidate questionnaire. 653 F.3d 1230, 1233–34 (10th Cir. 2011). The Kansas Supreme Court revised the challenged canons

before the district court decided the merits of the challenge. *Id.* at 1234. Still, Kansas had to pay $151,470.08 in fees. *See* No. 06-4056, 2012 WL 1033634, at *14 (D. Kan. Mar. 27, 2012).

- In *People Against Police Violence v. City of Pittsburgh*, the plaintiffs challenged Pittsburgh's ordinance regulating parades and crowds in public forums. 520 F.3d 226, 229–30 (3d Cir. 2008). The court preliminarily enjoined the ordinance, and then the city passed a revised ordinance that satisfied the plaintiffs' concerns. *Id.* The city was still on the hook for $103,718.89 in attorney's fees. *Id.*

- In *Rogers Group, Inc. v. City of Fayetteville*, the plaintiff challenged a city ordinance limiting its ability to operate a limestone quarry just outside the city limits. 683 F.3d 903, 904 (8th Cir. 2012). The plaintiff obtained a preliminary injunction, but the city independently and voluntarily repealed the ordinance before the court could rule on the plaintiff 's request for permanent relief. *Id.* Despite the absence of any decision on the merits of the plaintiff 's claims, the city was forced to pay $110,419.71 in fees and costs. *Id.* at 907.

- In *Watson v. County of Riverside*, the plaintiff sought and obtained a preliminary injunction preventing the county from introducing a police report in his administrative termination proceedings. 300 F.3d 1092, 1094 (9th Cir. 2002). The court later granted judgment for the defendants on all claims except one—on which

the court merely denied summary judgment—but because the administrative hearing was over, that claim was moot. *Id.* The county nevertheless paid $153,988.41 in fees, including fees for post-preliminary injunction work, even though the plaintiff did not prevail on the legal merits of any claim. *Id.* at 1095, 1097.

And those are just § 1988 cases. The same "prevailing party" language appears in many other federal statutes. *See* 15 U.S.C. § 1117(a) (Lanham Act); 20 U.S.C. § 1415(i)(3)(B)(i) (Individuals with Disabilities Education Act); 28 U.S.C. § 2412(d)(1)(A) (Equal Access to Justice Act); 42 U.S.C. § 2000e-5(k) (Civil Rights Act of 1964); 42 U.S.C. § 3613(c)(2) (Fair Housing Act); 42 U.S.C. § 12205 (Americans with Disabilities Act); 52 U.S.C. § 10310(e) (Voting Rights Act).

- In *Douglas v. District of Columbia*, a plaintiff sued under the Individuals with Disabilities Education Act and obtained a preliminary injunction directing the public school to permit him to return to and complete a program for at-risk students. 67 F. Supp. 3d 36, 39 (D.D.C. 2014). Because the plaintiff was allowed to return to school, the case was mooted before any merits decision. *Id.* at 40. But the district court ordered the school system to pay $17,009.62 in attorney's fees and costs under 20 U.S.C. § 1415(i)(3)(B)(i). *Id.* at 39, 44.

- In *Tri-City Community Action Program, Inc. v. City of Malden*, the plaintiffs wished to retrofit a house to bring it into compliance with the ADA.

680 F. Supp. 2d 306, 308 (D. Mass. 2010). They sought and obtained a preliminary injunction preventing the city from interfering. *Id.* at 310. The construction ended, mooting the suit, before any further litigation occurred. *Id.* at 310–11. The City paid $49,999 in fees and costs under 42 U.S.C. § 3613(c)(2). *Id.* at 317.

- And in *Davis v. Perry*, the plaintiffs challenged a redistricting plan adopted by the Texas legislature. 991 F. Supp. 2d 809, 815 (W.D. Tex. 2014). The court enjoined the plan because it had not been precleared under the Voting Rights Act, and the court issued its own interim plan for the 2012 election. *Id.* at 816. After preclearance was denied by a different district court, the Texas Legislature passed a new plan, which mirrored the court's interim plan, mooting the case. *Id.* at 818. The district court ordered Texas to pay $363,378.43 in fees and costs under § 1988 and § 10310(e) because the plaintiffs obtained "judicially sanctioned relief." *Davis v. Abbott*, 781 F.3d 207, 213–14 (5th Cir. 2015). This time, however, the court of appeals reversed the fee award. *Id.* at 215–18 (holding that the plaintiffs were not prevailing parties because the preliminary relief did not arise from a prediction of future success on the merits).

In short: this is not an abstract concern for the States. What happened to Virginia here happens all the time.

C. Messy and unpredictable tests for fee eligibility impose needless costs on the States and their residents.

Amorphous, fact-specific tests are not just trouble for district and circuit courts trying to apply them. Apart from the actual fee awards discussed above, they are costly in other ways for States and their officials.

First, these tests impose the same obvious cost as any "unstable threshold[s] to fee eligibility": a second major litigation when the case was supposed to be all but over. *Garland*, 489 U.S. at 791. Time and again this Court has rejected complicated rules for fee eligibility to avoid subjecting parties to the needless costs—both time and resources—of litigating over fees. The Court rejected the "central issue" test for just this reason. *Id.* ("Creating such an unstable threshold to fee eligibility is sure to provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension."). Same with the "catalyst theory" tossed away in *Buckhannon*, 532 U.S. at 609–10 (rejecting the theory because it required a "highly factbound" and "nuanced 'three thresholds' test").

Second, these tests frustrate the States' ability to make informed litigation and policy decisions. When deciding whether and how to defend against a lawsuit, a State must balance a number of competing interests, including defending duly enacted laws, implementing effective policies, safeguarding citizens' rights, and protecting the public fisc. *See*, *e.g.*, *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002) (explaining that government lawyers have ethical

duties to protect the public interest and the public fisc); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. Rev. 789, 789 (2000). The State's exposure to attorney's fees is an important variable in that calculus, and it ought to be a controllable one; the State should remain exposed to a costly fee award only so long as it continues the litigation, since fees are usually allowed only if the plaintiff actually wins the case. But an amorphous test replaces this modicum of control with uncertainty because it would allow fee awards even when a State decides to stop litigating—for instance, because changing a law would better serve the public interest—after a preliminary injunction is entered. And worse, unlike before the preliminary injunction, the State can no longer assess its exposure to a fee award simply by evaluating the merits of the claims against it. Instead, it must try to predict the outcome of a subjective, "context-specific," and inconsistently applied legal test to figure out whether amending a law or changing a policy will also subject the State to a six- or seven-figure fee award.

Finally, in addition to needlessly complicating the States' litigation and policy decisions, an amorphous test allowing for attorney's fees before final judgment would distort the States' incentives in making those decisions. *See Evans v. Jeff D.*, 475 U.S. 717, 734–35 (1986) (explaining that uncertainty regarding fee exposure often prevents settlement, especially in § 1983 litigation where fee awards often represent "the most significant liability in the case" (quotation omitted)). The specter of high fee awards is usually a disincentive to litigate: All else equal, rational parties will try to avoid paying attorney's fees of six or seven figures, and the surest way to avoid that is

to resolve the dispute before either party wins the case (and thus can be called a "prevailing party"). *See id.* at 733 (explaining that settlement is often in the best interests of both plaintiffs and defendants because it offers cost certainty and ensures relief "at an earlier date without the burdens, stress, and time of litigation" (quoting *Marek v. Chesny*, 473 U.S. 1, 10 (1985))). And States should be especially averse to spending the public's money on such fees instead of for the public good.

But that incentive is reversed by unpredictable rules that can result in fee awards to a preliminary injunction winner. *See id.* at 736–37 (predicting that "parties to a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open, thereby . . . unnecessaril[y] burdening the judicial system, and disserving civil rights litigants"). Under the shadow of such rules, the logical move for States that wish to avoid spending the public's money on large fee awards is to litigate cases to the hilt rather than explore other options that might better serve the public interest. *See Buckhannon*, 532 U.S. at 608 (explaining that a defendant may be deterred from "altering its conduct," especially if the conduct "may not be illegal," if doing so will result in a fee award). After all, under these rules, the States' alternatives to continuing litigation—for example, amending a challenged law or regulation, reversing a challenged action, or declining to enforce a challenged policy—could actually lock in a substantial fee award against them. *See*, *e.g.*, *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 717–18 (9th Cir. 2013) (affirming a fee award because the city's compromise solution with the plaintiffs "transformed what had been temporary relief capable of being undone . . . into a lasting alteration of the

parties' legal relationship"); *Dearmore*, 519 F.3d at 526 (holding that the plaintiff was a prevailing party, despite not obtaining a final judgment, because the city amended the ordinance rather than litigating to finality); *People Against Police Violence*, 520 F.3d at 234 (same).

Consider, for example, how *Common Cause/Georgia v. Billups* and *Common Cause Georgia v. Secretary, State of Georgia* have the potential to shape Georgia's response to future § 1983 suits. In the former, the court issued a preliminary injunction against enforcement of Georgia's voter ID law. *Billups*, 554 F.3d at 1346. Georgia then enacted a new voter ID law, and it ultimately defended the law successfully. *Id.* at 1348. Given the district court's holding, Georgia might well have prevailed on the merits had it defended the *original* law, too. But because Georgia chose a legislative solution instead, it was rewarded with a $112,235.03 bill for attorney's fees. *Billups*, 2007 WL 9723985, at *22. And in the latter case, although there was no court order requiring it to do so, Georgia took legislative steps to remedy the plaintiffs' concerns about the potential for error in the State's procedures for handling provisional ballots. *Sec'y, State of Georgia*, 17 F.4th at 106. That left the State on the hook for $166,210.09 in fees and expenses. *Id.* at 105–06. The lesson from these cases is doubly clear: Even if the public interest might otherwise be best served by a legislative fix, States should litigate to the bitter end if they want to protect the public fisc.

Limiting fee awards to true prevailing parties—i.e., those who have won a final judgment on the merits—would eliminate these skewed incentives.

CONCLUSION

For the reasons stated above, the Court should reverse the decision below.

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