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 AMICI CURIAE LOCAL GOVERNMENT LEGAL CENTER, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND THE CITY OF ARLINGTON IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Local Government Legal Center ("LGLC") is a coalition of national local government organizations formed in 2023 to educate local governments regarding the Supreme Court and its impact on local governments and local officials and to advocate for local government positions at the Supreme Court in appropriate cases. The National Association of Counties, the National League of Cities, and the International Municipal Lawyers Association are the founding members of the LGLC, and the Government Finance Officers Association is an associate member of the LGLC.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC"), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages, where more than 218 million Americans live.

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1. As required by Supreme Court Rule 37.6, amici affirm that no counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The Government Finance Officers Association ("GFOA") is the professional association of state, provincial, and local finance officers in the United States and Canada. GFOA has served the public finance profession since 1906 and continues to provide leadership to government-finance professionals through research, education, and the identification and promotion of best practices. Its more than 21,000 members are dedicated to the sound management of government financial resources.

The City of Arlington is a home-rule municipality in the State of Texas with a population of approximately 400,000 residents and close to 3,000 employees. Arlington, part of one of the fastest growing metropolitan areas in the United States, is also home to the Dallas Cowboys, the Texas Rangers, and host to the 2026 FIFA World Cup. The City has a vested interest in the protection of civil rights within its jurisdiction, and an obligation to use taxpayer money responsibly in service of residents, employees, and visitors.

Amici represent cities, counties, and towns reflecting a wide range of communities throughout the United States. Amici represent the level of government most closely connected to communities, providing the spectrum of essential programs, services, and public infrastructure to meet local needs. With limited economic resources, and a concomitant responsibility to use public resources for the benefit of the public, Amici have a substantial interest in the question before this Court. The Fourth Circuit's decision, like similar decisions in other circuits, impose substantial penalties on local governments when they act diligently to respond to concerns raised in litigation about laws and government action. The lower court's decision discourages local governments from changing their policies and practices prior to a full determination on the merits of claims against them, a situation that leads to unnecessary litigation and a waste of public resources, both in the judiciary and in local government.

SUMMARY OF ARGUMENT

This Court has already rejected the catalyst theory, which improperly sought to award attorney's fees to parties who had received no judicial determination on the merits of their claims. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). While Respondents and lower courts purport to have found an exception to this Court's decision in *Buckhannon*, what they have actually done is adopt what amounts to a revised version of the rejected catalyst theory. Under their revised catalyst theory, a plaintiff can circumvent this Court's decision in *Buckhannon* by obtaining a preliminary injunction. The purpose of a preliminary injunction, however, 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) (emphasis added).

Amici urge this Court to reaffirm its rejection of the catalyst theory, including in this slightly altered form. The historical, textual, and policy reasons that justified this Court's *Buckhannon* decision over twenty years ago have not diminished in force. To the contrary, this Court made clear that the authority to award costs, including attorney's fees, rests in Congress. Congress has not adopted the catalyst theory. Neither should this Court.

ARGUMENT

I. Success on an interlocutory motion, such as a request for preliminary injunction, does not render a party the "prevailing party" in the suit.

> Statutes relating to taxable costs are to a degree penal in character. As a result, they must be strictly construed and items to be taxed must be within the express language of the statute.

United States v. Pommerening, 500 F.2d 92, 102 (10th Cir. 1974); *see also Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) ("In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit.").

A. "Prevailing party" should be interpreted in light of the history and tradition of cost-shifting in litigation.

For over two hundred years, this Court has consistently held that the judiciary would not create a general rule, independent of statute, allowing awards of attorney's fees in federal courts. *Alyeska Pipeline Svc. Co. v. Wilderness Soc'y*, 421 U.S. 240, 249–50 (1975). Until 1853, the federal courts awarded costs, including, when applicable, attorney's fees, based on state law rules. *Id.* at 250–51. Congress then "undertook to standardize the costs allowable in federal litigation," apparently because "there was a great diversity in practice among the courts and . . . losing litigants were being unfairly saddled with exorbitant fees for the victor's attorneys." *Id.* at 251. Specifically, Congress enacted tight limits on the types and amount of fees that might be charged to a losing party. *Id.* at 252. And while Congress subsequently expanded the availability of attorney's fees as costs under certain statutory causes of action, it retained the long-standing requirement that such costs, with or without attorney's fees, are only available to the "prevailing party." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602–603 (2001).

Respondents urge this Court to interpret "prevailing party" to include a party who received temporary, interlocutory relief from the court in the form of a temporary or preliminary injunction, but never received a final determination on the merits. In essence, Respondents request what amounts to a return to the "catalyst theory" rejected in *Buckhannon*. However, no then-available or subsequent research into the history and tradition of cost-

shifting in litigation casts doubt on this Court's rejection of the catalyst theory, and Respondents' revived catalyst theory should be similarly rejected.

"'Prevailing party' is not some newfangled legal term invented for use in late-20th-century fee-shifting statutes." *Id.* at 610 (Scalia, J., concurring). When "prevailing party" is used by courts or legislatures in the context of a lawsuit, it is a term of art. *Id.* at 615.

> It has traditionally—and to my knowledge, prior to enactment of the first of the statutes at issue here, *invariably*—meant the party that wins the suit or obtains a finding (or an admission) of liability.

Id.

On the other hand, a preliminary injunction, by definition, is an interim measure that does not involve a final finding (or admission) of liability. *Sole v. Wyner*, 551 U.S. 74, 84 (2007). For example, in *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 723–24 (1974), this Court observed that, despite ten years of litigation and numerous temporary injunctive orders (desegregation plans), petitioner had not yet prevailed until the permanent injunction was entered and consequently "any fee award was not appropriately to be made until" the date of that final injunction. Similarly, the *Buckhannon* Court rejected the catalyst theory and its application to Buckhannon, even though West Virginia had agreed to the entry of what amounted to a temporary restraining order before the state amended the law and mooted the case. 532 U.S. at 624 (Ginsburg,

J., dissenting) ("[A]t a hearing on plaintiffs' request for a temporary restraining order, defendants agreed to the entry of an interim order allowing Buckhannon to remain open without changing the individual plaintiffs' housing and care.); *id.* at 601 (majority opinion) ("Respondents agreed to stay enforcement of the cease-and-desist orders pending resolution of the case.").

This Court has explained that "'[t]he touchstone of the prevailing party inquiry,' . . . is 'the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.'" *Sole*, 551 U.S. at 82. The purpose of a preliminary injunction, however, 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); *Heckler v. Redbud Hosp. Dist.*, 472 U.S. 1308, 1314 (1985) (Rehnquist, J., order granting stay) ("Plainly, I think, the District Court has inappropriately used its 'preliminary injunction' as a vehicle for final relief on the merits.").

Amici urge this Court to reaffirm *Buckhannon* and reject this new version of the catalyst theory because it, like its original, is inconsistent with the traditional deference owed to the legislature in authorizing courts to penalize losing litigants.

B. The award of costs for the successful prosecution of interlocutory proceedings is already permitted by law under certain circumstances.

Amici also urge this Court to reject Respondents' new catalyst theory, as it ignores the various situations

in which courts are authorized to award costs to a party without a determination on the merits of the underlying claim. For example, Congress has explicitly authorized the award of costs, expenses, and attorney's fees against any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927; *see also* Fed. R. Civ. P. 11(c) (authorizing district court to impose sanctions, including attorney's fees). Significantly, a court may award attorney's fees under Section 1927 without a determination that the party is a "prevailing party." *Roadway Exp. v. Piper*, 447 U.S. 752, 762–63 (1980).

Similarly, Federal Rule of Appellate Procedure 39 awards costs to parties based on the outcome of an appeal, without regard to whether the result of the appeal is interlocutory or final. *See* Fed. R. App. P. 39. In addition, on remand, the district court lacks discretion to modify the appellate court's allocation of costs. *City of San Antonio v. Hotels.com*, 593 U.S. 330, 340 (2021).

Congress has permitted the imposition of attorney's fees on parties as to certain interlocutory orders, and those provisions notably lack the "prevailing party" requirement. Congress could generally authorize an award of attorney's fees to a party that prevails in a motion, such as a motion for preliminary injunction, but it has chosen not to do so. It is not the court's role to legislate a contrary result.

C. The lower court impermissibly relies on supposed legislative intent.

The court of appeals urges acceptance of Respondents' revised catalyst theory in light of certain language in

Congressional committee reports. Committee reports, however, are unreliable as a genuine indicator of congressional intent, and as a safe predictor of judicial construction. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 617 (1991) (Scalia, J., concurring). Legislative history may be evidence of legislative intent, but is not itself the equivalent of legislative intent. *Id*.

The Fourth Circuit relies upon legislative history as a basis to find that the policy behind 42 U.S.C. § 1988 would be undermined by "allowing government defendants to game the system." *Stinnie v. Holcomb*, 77 F.4th 200, 210 (4th Cir. 2023). While the court correctly recognized that the cost provisions in Section 1988 are an exception to the "American Rule," *id*. at 206 (citing *Buckhannon*, 532 U.S. at 602), it seems to have forgotten that, when modifying or supplanting common law, Congress must express clear legislative intent by the language used. *United States v. Tex.*, 507 U.S. 529, 537–38 (1993). Congress modifies only the part of the common law directly addressed in the statute, and silence is presumed to leave it in place, unmodified. *Id*.

This Court has already interpreted this legislative history, and concluded that it excludes situations in which a legislative body changes a law, even when it is arguable that change was made because of, or in response to, an order in a lawsuit. *Buckhannon*, 532 U.S. at 601, 604–605. The Fourth Circuit, now, looking at the same legislation and the same history, rejects this Court's precedent and finds the opposite intent in the same text. *Stinnie*, 77 F.4th at 210. The lower court's reliance upon this interpretation of legislative history is improper as a basis for the decision of a subordinate court.

II. Interpreting "prevailing party" to encompass mere success on a request for preliminary injunction would harm local governments, public officials, and those asserting their constitutional and statutory rights.

Respondents' theory, that they are entitled to prevailing-party status because their lawsuit might have encouraged the legislature to repeal the challenged policy, is nothing more than a rehashing of the catalyst theory rejected in *Buckhannon*. In addition to the historical and textual reasons to reject Respondents' theory, there are also strong public policy reasons for withholding prevailing-party status from Section 1983 plaintiffs who receive nothing more than a preliminary injunction. Respondents' theory, if adopted, would discourage public bodies from repealing constitutionally suspect policies, incentivize protracted and expensive litigation practices, and threaten the public fisc. Any theory that lacks a textual basis, discourages settlement, incentivizes prolonged and costly litigation, and requires taxpayers to foot the bill cannot be correct.

When this Court rejected what had come to be called the "catalyst theory," it held that legislative action, even after a favorable ruling in litigation, is not a judicially sanctioned change in the legal relationship of the parties so as to render a party "prevailing" for purposes of an award of attorney's fees. *Buckhannon*, 532 U.S. at 605. This Court also addressed precisely the purported horribles that the lower courts in this case paraded, and determined that they were not sufficient to compel the court to approve of the catalyst theory. *Id.* at 608–09.

The case at bar presents only a slightly different issue: the lower court found that a preliminary injunction confers "prevailing party" status, when a legislative body, without a final judicial decree, repeals or modifies legislation. *Stinnie*, 77 F.4th at 215. And while the Fourth Circuit notes that the "plaintiffs here do not rely on the catalyst theory," *id.* at 213, the substance of the argument, even without the convenient label, is unchanged. The Fourth Circuit ruled that, after a preliminary injunction, if a legislative body repeals a statute and moots a case, the plaintiff is a "prevailing party" under Section 1988(b). Unless the Fourth Circuit means to adopt a standard in which every granted preliminary injunction comes with attorney's fees, it will instead resurrect the catalyst theory in all but name.

A. The revived catalyst theory threatens to discourage local governments from engaging in prompt remedial action.

Perhaps the most serious problem with Respondents' position is that, if adopted, it would strongly discourage public bodies from repealing or altering challenged polices out of fear of automatically exposing themselves to an award of attorney's fees. *Cf. Buckhannon*, 532 U.S. at 608 ("[T]he possibility of being assessed attorney's fees may well deter a defendant from altering its conduct."). Under Respondents' theory, once a Section 1983 plaintiff has secured a preliminary injunction, the only way for the defendant to avoid attorney's fees is to win the case at trial on the merits. *See Sole*, 551 U.S. at 83–84. Anything short of that, and the taxpayers are on the hook for the plaintiffs' costs and fees. *See Stinnie*, 77 F.4th at 215; *McQueary v. Conway*, 614 F.3d 591, 599 (6th Cir. 2010).

Accordingly, under Respondents' theory, whenever a judge temporarily enjoins a challenged policy,[2] the public body will be faced with a dilemma: it must either (a) bite the bullet and immediately repeal or alter the policy to moot the case and stop attorney's fees from accruing, or (b) never settle and fight tooth-and-nail to final judgment—and likely through appeal—in the hopes of avoiding an automatic award of attorney's fees. Both options are unacceptable; a small group of plaintiffs should not be able to use a potentially exorbitant award of attorney's fees to bully an elected body into repealing public policy, and elected bodies should not feel afraid to alter or repeal policies out of fear of opening the public's coffers to these plaintiffs. This Court can and should eliminate this dilemma by unambiguously holding in this case that (a) obtaining a preliminary injunction is not enough to confer prevailing-party status, and (b) a governmental unit's voluntary repeal of a challenged policy never confers

2. It cannot be emphasized enough that a preliminary injunction is merely a prediction of success based on incomplete evidence and underdeveloped legal arguments. *See* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2448.3 (2d ed. 2009) (a preliminary injunction "give[s] temporary relief based on a preliminary estimate of the strengths of plaintiff 's suit, prior to the resolution at trial of the factual disputes and difficulties presented by the case"). "In the early stages of a case, the facts or legal arguments may not be fully developed or the decision may be rushed, leading to a significant risk that the preliminary assessment of the merits will be incorrect." Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 Fla. L. Rev. 779, 779 (2015). As a result, in cases like this, taxpayers are forced to pay six- and seven-figure sums to plaintiffs merely because they convinced a single judge that a policy might be unconstitutional, without ever having to prove that the challenged policy was in fact unconstitutional.

prevailing-party status, even if the plaintiffs' lawsuit may have been the impetus for the repeal.

B. The revived catalyst theory encourages unnecessary and wasteful litigation.

Under Respondents' theory, the moment a Section 1983 plaintiff secures a preliminary injunction, several perverse incentives emerge. On the plaintiff 's side, there emerges an incentive to prolong the case, engage in voluminous discovery, and inflate attorney's fees as much as possible. Because the plaintiff has already received a preliminary injunction, under the Fourth Circuit's rule, his legal team is presumptively entitled to collect their fees, so why not try to make the fees as high as possible? Plaintiffs' attorneys understand that an exorbitant award of attorney's fees—hanging over the defense like a Damoclean sword—provides considerable leverage that can be used to influence settlement.

On the defense side, once the plaintiff has secured a preliminary injunction, the public body has a strong incentive to never repeal or alter the challenged policy—even if it might otherwise be inclined to do so—to avoid opening itself up to an automatic award of attorney's fees.[3]

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3. Of note, in Section 1983 cases where the plaintiff is seeking only money damages, the defendant can use a Rule 68 offer of judgment to prevent runaway attorney's fees. *See Marek v. Chesny*, 473 U.S. 1, 9–12 (1985). This tool, however, is rarely feasible in Section 1983 cases where the plaintiff is seeking injunctive relief, leaving public bodies susceptible to runaway attorney's fees in this context. *Cf.* 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 3005 (2d ed. 1997).

The upshot is that, once a preliminary injunction has been issued, public bodies will have little incentive to settle and plenty of incentive to litigate the case to final judgment, placing unneeded stress and work on district court judges. See *Evans v. Jeff D.*, 475 U.S. 717, 736–37 (1986) ("It is . . . not implausible to anticipate that parties to a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open, thereby forcing more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants.") (footnote omitted).

The civil rules' primary purpose is "to secure the just, speedy, and inexpensive determination of every cause of action and proceeding." Fed. R. Civ. P. 1. But the Fourth Circuit's interpretation of Section 1988 produces just the opposite—litigation that is expensive, protracted, and anything but just. Worse, it spawns secondary litigation that is wholly unrelated to the underlying case—litigation over "what hours were reasonably expended on what claims, whether that expenditure was reasonable in light of the success obtained, and what is an appropriate hourly rate for the services rendered," not to mention arguments about "whether a 'multiplier' or other adjustment is appropriate." *Evans*, 475 U.S. at 736. Sections 1983 and 1988 were passed to vindicate civil rights, not to place the federal courts in charge of funneling hundreds of thousands of taxpayer dollars to plaintiffs' attorneys simply because they stumbled upon a government policy that can be challenged.

C. The revived catalyst theory threatens the public fisc.

Permitting an award of attorney's fees in this context would allow plaintiffs who have received no enduring, court-ordered relief to receive exorbitant taxpayer-funded windfalls—with no real connection to their actual damages or the case's constitutional significance—simply because their attorneys managed to record a lot of billable hours. This cannot be right.

Exorbitant fee awards against public entities are not rare. Here is a small sampling:

- The State of Tennessee was forced to pay over $842,000 in attorney's fees to two groups of plaintiffs who obtained only a preliminary injunction because the State voluntarily repealed the challenged policy. *Tennessee State Conference of NAACP v. Hargett*, No. 3:19-cv-00365, 2021 WL 4441262 at *11 (M.D. Tenn. Sept. 28, 2021).

- The State of New York was forced to pay nearly $350,000 in attorney's fees to a group of plaintiffs who merely obtained a temporary injunction pending appeal because the challenged law expired on its own terms. *Chrysafis v. Marks*, No. 21-cv-2516, 2023 WL 6158537 at *3, *12 (E.D.N.Y. Sept. 21, 2023).

- The State of Kentucky was forced to pay over $270,000 in attorney's fees to three plaintiffs who obtained a preliminary injunction that allowed them to go to church during the COVID-19 pandemic because the State altered the challenged policies to the plaintiffs'

benefit. *Roberts v. Neace*, 65 F.4th 280, 283, 286 (6th Cir. 2023).

- The State of Georgia was forced to pay over $166,000 in attorney's fees to a group of plaintiffs who received only a TRO because the State passed new laws that fixed the plaintiffs' concerns. *Common Cause Ga. v. Secretary of State, State of Ga.*, 17 F.4th 102, 105–06 (11th Cir. 2021).

- The City of Pittsburgh was forced to pay a group of plaintiffs nearly $104,000 in attorney's fees because they obtained a preliminary injunction against an ordinance that regulated parades and crowds because the City revised the ordinance to remedy the plaintiffs' concerns. *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 229–30 (3d Cir. 2008).

- The City of Fayetteville was forced to pay over $110,000 to a single plaintiff who obtained a preliminary injunction against an ordinance that prevented him from operating a limestone quarry because the City voluntarily repealed the ordinance before final judgment. *Rogers, Inc. v. City of Fayetteville*, 683 F.3d 903, 907 (8th Cir. 2012).

- The County of Riverside was forced to pay almost $154,000 in attorney's fees to a single plaintiff who obtained a preliminary injunction that prevented the County from introducing a police report at his administrative termination proceeding. *Watson v. County of Riverside*, 300 F.3d 1092, 1095, 1097 (9th Cir. 2002).

Respondents' theory, moreover, pays far too little heed to the underlying case's constitutional significance and the seriousness of the underlying civil rights violation. The case at bar nicely illustrates this point. Here, five offenders challenged the constitutionality of a Virginia law that allowed the courts to suspend the driver's license of an offender or convicted criminal for failing to pay court-ordered debts related to their offenses, such as fines, forfeitures, restitution, and other penalties. Am. Compl., *Stinnie v. Holcomb*, No. 3:16-cv-00044 (W.D. Va. Sept. 11, 2018) (ECF No. 84) (challenging Va. Code § 46.2-395). They asserted five constitutional claims against this statute and sought the most expansive relief possible: class certification, a declaratory judgment striking down the statute, and a permanent injunction barring the State from enforcing this statute against anyone ever. *Id.* at 44.

The district court gave the plaintiffs only a tiny fraction of what they asked for; the court refused to certify a class and ruled against the plaintiffs on all but one claim. *See Stinnie v. Holcomb*, 355 F. Supp. 3d 514, 520 (W.D. Va. 2018); Order, *Stinnie v. Holcomb*, No. 3:16-cv-00044 (W.D. Va. Dec. 21, 2018) (ECF No. 127). But the court found that one of their claims (a pre-deprivation-hearing, procedural due process claim) had a likelihood of success on the merits, leading the court to issue a preliminary injunction that temporarily prevented the State from enforcing this statute against only the five plaintiffs named in the suit. *Stinnie*, 355 F. Supp. 3d at 520.

Before and after this ruling, the plaintiffs, their attorneys, and others lobbied the Virginia General Assembly to repeal the challenged statute. And it worked. In 2020, after years of lobbying, the Virginia General

Assembly repealed the statute at issue. Those plaintiffs now claim that, because a legislative body repealed a statute, they somehow "prevail[ed]" in their federal lawsuit. And they now claim that, under Section 1988, despite never reaching final judgment in their lawsuit, they are entitled to hundreds of thousands of taxpayer dollars. *See* Mot. for Att'y Fees, No. 21-1756 (4th Cir. Aug. 21, 2023) (ECF No. 89-1) (plaintiffs' attorneys requesting over $767,000 just for their appellate fees).

The only court victory Respondents can possibly claim is that they convinced a single district court judge that they might have had their driver's licenses improperly suspended for a period of time, and so their attorneys are entitled to a windfall in taxpayer dollars. This cannot be correct. At a minimum, this much should be clear: A citizen who successfully lobbies his elected representatives and persuades them to repeal or alter a law has not, by doing so, "prevail[ed]" in court. This Court recognized as much in *Buckhannon*. And it should similarly hold in this case that a Section 1983 plaintiff does not "prevail" if his only court-ordered relief is a preliminary injunction.

* * * *

Respondents' theory discourages public bodies from repealing or altering potentially unconstitutional polices, discourages out-of-court settlement or resolution, encourages costly and protracted litigation, and requires ordinary taxpayers to pay the costs. But it does not have to be this way. This Court can and should avoid these unnecessary consequences by holding that (a) obtaining a preliminary injunction is not enough to confer prevailing-party status, and (b) a governmental unit's voluntary

repeal of a challenged policy never confers prevailing-party status, even if the plaintiffs' lawsuit may have been the impetus for the repeal.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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