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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
CHARLES W. SCARBOROUGH
THOMAS PULHAM
DANA KAERSVANG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

The plaintiffs in this case initially obtained a preliminary injunction, but their claims for relief were ultimately dismissed as moot after the state legislature repealed the statutory provision that their suit challenged. The plaintiffs then sought an award of attorney's fees under 42 U.S.C. 1988(b). The questions presented are as follows:

1. Whether a plaintiff's success in obtaining a preliminary injunction can be sufficient to render him a "prevailing party" eligible for an award of attorney's fees under Section 1988(b) if the plaintiff does not ultimately obtain a judicial ruling that decides the merits in his favor.

2. Whether a plaintiff must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a non-judicial event that moots the case, to prevail under Section 1988(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and rules:

Statutes and rules—Continued: Page

In the Supreme Court of the United States

No. 23-621

GERALD F. LACKEY, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES, PETITIONER

v.

DAMIAN STINNIE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the meaning of the term "prevailing party" in 42 U.S.C. 1988(b). That phrase is a legal term of art that appears in numerous fee-shifting statutes, including statutes under which the United States may be ordered to pay attorney's fees. See, *e.g.*, 28 U.S.C. 2412(b) and (d)(1)(A), 42 U.S.C. 2000e-5(k), 2000e-16(d). In addition, Section 1988 authorizes attorney's-fee awards in private civil rights suits that complement the government's own enforcement efforts. The United States therefore has a substantial interest in the Court's resolution of this case.

STATEMENT

1. a. This attorney's-fee dispute arises from a district court action filed under 42 U.S.C. 1983 by five in-

dividual plaintiffs, respondents here, against the Commissioner of the Commonwealth of Virginia's Department of Motor Vehicles (DMV), petitioner here. See J.A. 71-123 (amended complaint). Respondents' class-action complaint asserted five claims for relief, alleging that the suspensions of respondents' driver's licenses under Virginia Code § 46.2-395 (repealed 2020) violated their procedural-due-process, substantive-due-process, and equal-protection rights under the Fourteenth Amendment. J.A. 113-121. Respondents sought (1) a "judgment declaring" that Section 46.2-395 is "unconstitutional" "on its face and as applied to [respondents] and Class Members"; and (2) injunctive relief enjoining petitioner from enforcing Section 46.2-395 and ordering petitioner to remove any suspensions imposed under that statute without charging DMV reinstatement fees. J.A. 121-122.

At the time respondents filed suit, Section 46.2-395 addressed situations in which a criminal defendant in Virginia state court was assessed a fine or costs upon conviction but "fail[ed] or refuse[d] to provide for immediate payment in full" or "fail[ed] to make deferred payments or installment payments as ordered by the court." Va. Code Ann. § 46.2-395(B) (2017). In those circumstances, the statute provided that "the court shall forthwith suspend the person's privilege to drive a motor vehicle." *Ibid.* Section 46.2-395 required "the clerk of the court that convicted the person" to provide "written notice"—either "at the time of trial" or by mail "within five business days" after the "date of conviction"—informing the defendant "of the suspension of his license * * * , effective 30 days from the date of conviction, if the fine" or "costs" were "not paid prior

to the effective date of the suspension as stated on the notice." *Id.* § 46.2-395(C).

On December 21, 2018, the district court granted respondents' motion for preliminary relief. J.A. 350-381. The court concluded that respondents were "likely to succeed on the merits of their procedural due process claim because [petitioner] suspends licenses without an opportunity to be heard." J.A. 351; see J.A. 372-376, 379; cf. J.A. 376 n.9 (declining to consider the other claims). The district court's preliminary injunction ordered petitioner to remove any current suspensions of the five respondents' licenses; enjoined petitioner from charging respondents a reinstatement fee; and further enjoined petitioner from applying Section 46.2-395 to respondents unless a hearing regarding a license suspension was first provided with adequate notice. J.A. 381.

b. Intervening events prevented the district court from considering the record later developed through discovery or resolving the parties' summary-judgment motions. On April 3, 2019, the Virginia legislature enacted budget legislation providing that, from July 1, 2019 through June 30, 2020 (J.A. 389), "no court shall suspend any person's privilege to drive a motor vehicle solely for failure to pay any fines[or] court costs," and instructing the DMV to reinstate without fee any driver's license "suspended prior to July 1, 2019, solely pursuant to [Section] 46.2-395." 2019 Va. Acts ch. 854, § 3-6.03 (2019 Act). The district court determined that the 2019 Act did not moot the case, finding a "reasonable expectation" that plaintiffs would "be subjected to the same action again" because Section 46.2-395 had not been repealed. C.A. App. 950 (citation omitted). Over respondents' objection, however, the court stayed proceedings until March 2020. *Id.* at 955.

In April 2020, the Virginia legislature repealed Section 46.2-395. 2020 Va. Acts ch. 965, § 2 (2020 Act). The repealing legislation, like the 2019 Act, required the DMV to reinstate (without charging a fee) licenses that had been suspended before July 1, 2019, based solely on Section 46.2-395. *Id.* § 3. The parties then filed a stipulation that, in light of the 2020 Act, "this case is moot" and "should be dismissed." J.A. 412.

In May 2020, the district court adopted the stipulation and ordered that "[t]his action is dismissed as moot." J.A. 420 (capitalization and emphasis omitted).

c. Respondents petitioned for an award of attorney's fees under Section 1988(b), which provides that in Section 1983 actions "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). Respondents' petition and accompanying brief (C.A. App. 1020-1057) argued that respondents were "prevailing parties" eligible for an attorney's-fee award. *Id.* at 1041-1055.

The district court denied the petition. Pet. App. 93a-106a. Based on the Fourth Circuit's decision in *Smyth ex rel. Smyth* v. *Rivero*, 282 F.3d 268, cert. denied, 537 U.S. 825 (2002), the court held that "a plaintiff who wins a preliminary injunction is not a prevailing party under § 1988." Pet. App. 96a; see *id.* at 102a, 106a.

2. A panel of the court of appeals affirmed. Pet. App. 73a-92a. Like the district court, the panel determined that under *Smyth*, a preliminary injunction does not confer "prevailing party" status. *Id.* at 81a-82a, 86a.

3. a. A divided en banc court of appeals overruled *Smyth* and vacated the district court's ruling, holding that the preliminary injunction here rendered respondents "prevailing parties." Pet. App. 1a-70a. The major-

ity expressed concern that *Smyth*'s rule would deter attorneys from taking civil-rights cases because it "allow[s] government defendants to game the system" by mooting cases after an award of preliminary relief. *Id.* at 20a-22a. The majority held that a plaintiff who obtains a preliminary injunction is a prevailing party when (1) the "preliminary injunction provides the plaintiff concrete, irreversible relief on the merits of her claim" by "materially altering the parties' legal relationship"; and (2) the case "becomes moot before final judgment because no further court-ordered assistance proves necessary," such that "the injunction cannot be 'reversed, dissolved, or otherwise undone' by a later decision." *Id.* at 22a, 35a-36a (citation omitted); see *id.* at 22a-37a.

The majority explained that the preliminary injunction here provided "'*actual* relief' by ordering a '*material* alteration' of the parties' legal relationship" and provided "'some of the benefit'" respondents sought in their suit by ordering "reinstatement of their suspended licenses." Pet. App. 24a (citation omitted). The court stated that the injunction thus had provided respondents "concrete, irreversible" benefits because "no matter what happened at the conclusion of the litigation," respondents were allowed to drive "for the time [the preliminary injunction] remained in effect." *Id.* at 24a-25a. The court added that, although "distinguishing between status quo and non-status quo injunctions * * * often proves difficult," "so-called status quo injunctions, which simply maintain the 'last uncontested status between the parties,'" will not "confer prevailing party status" if they are "'holding-pattern injunction[s]'" that do "not provide the plaintiff any of the relief he ultimately seeks." *Id.* at 26a & n.8 (citations omitted).

The majority also determined that the preliminary injunction here had provided "relief sufficiently *on the merits* to justify prevailing party status" because, like "all preliminary injunctions," it could be granted only upon "a 'clear showing' that the plaintiffs' claim was likely meritorious." Pet. App. 27a-28a (citation omitted). The majority rejected as irrelevant petitioner's contention that the likelihood-of-success standard for a preliminary injunction "is only an 'initial prediction'" that a plaintiff will prevail on the merits when the case is finally adjudicated, rather than an actual merits adjudication. *Id.* at 29a. The majority explained that respondents "do not allege that they *would have* prevailed on the merits" if the case had proceeded to "final judgment"; "they claim that they *did* prevail on the merits" when they received the preliminary injunction, which constituted a "'court-ordered change in the legal relationship'" between the parties. *Id.* at 29a-30a (citation omitted).

Finally, the majority determined that the preliminary injunction here had effected an "enduring" "court-ordered change in the [parties'] legal relationship." Pet. App. 31a (citation omitted). The majority reasoned that—unlike a preliminary injunction that is later "revisited" and overturned by a court's "final decision"—the consequence of "moot[ness]" here was that "no subsequent final judgment [could] supersed[e] the preliminary ruling," which the majority viewed as providing "precisely the merits-based relief [respondents] need-[ed] for precisely as long as [they] need[ed] it," *i.e.*, "for as long as the statute remain[ed] on the books." *Id.* at 32a-33a; see *id.* at 35a. The majority stated that such relief is "as 'enduring' as if [respondents] had received a permanent injunction to the same effect." *Id.* at 33a.

b. Judge Quattlebaum, joined by three judges, dissented. Pet. App. 42a-70a. Those judges concluded that, under Section 1988(b), a "prevailing party" is one who secures "final, not temporary, success" by obtaining a favorable judgment at the end of a case. *Id.* at 42a, 47a. They explained that legal dictionaries define "prevailing party" to mean the party who "successfully prosecutes [or defends against] the action" and for whom "'judgment is rendered'" "'at the end of the suit.'" *Id.* at 46a-47a & n.1 (citations omitted). The dissenting judges found further support for that interpretation in the principle that departures from the common-law rule that each party pays its own litigation expenses must be "construed narrowly." *Id.* at 62a, 66a-67a. They read this Court's decisions as establishing that a party can "prevail" in litigation only by securing a judicial decision "like a judgment or a consent decree" that "irreversibly alter[s] the [parties'] legal rights" by "resolv[ing] at least one issue on the merits." *Id.* at 57a; see *id.* at 47a-56a. The dissenting judges also observed that preliminary injunctions confer only "provisional" relief; are based on less formal procedures than a court's final adjudication of the case; and are premised on a finding of "likelihood of success on the merits," which "only predicts the outcome" and "does not definitively decide the merits of anything." *Id.* at 58a-61a.

SUMMARY OF ARGUMENT

A. This Court has repeatedly recognized that the phrase "prevailing party" is a legal term of art with a well-established meaning. As legal dictionaries establish, that term has long been used to refer to the "party in whose favor a judgment is rendered." *E.g.*, *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (citation omit-

ted). Statutory fee-shifting provisions, moreover, are an exception to the longstanding American Rule, under which each party to litigation presumptively bears its own litigation costs. The Court therefore has required "'explicit statutory authority'" before construing the term "prevailing party" to extend beyond its traditional scope. *Id.* at 608 (citation omitted).

B. This Court's precedents reflect the settled understanding that a plaintiff qualifies as a "prevailing party" only if the Court enters judgment in his favor and awards tangible relief. Plaintiffs most frequently acquire prevailing-party status by obtaining final judicial rulings that defendants have violated federal law. This Court has also identified consent and default judgments as types of judicial orders that can confer prevailing-party status. Those judgments finally resolve the plaintiff's claims and result in tangible relief, even though the defendant's own litigation conduct (in agreeing to entry of relief against it, or in failing to defend against the suit) obviates the need for an independent judicial determination whether the plaintiff's claims have merit.

Favorable *interlocutory* rulings, including merits-based rulings such as orders that reverse directed verdicts or direct that a case go to trial, are generally insufficient to confer "prevailing party" status. Even a judicial determination that the plaintiff's legal rights were violated will not confer prevailing-party status if the plaintiff is not awarded tangible relief. This Court has indicated in dicta that Section 1988 permits the award of fees *pendente lite* in some circumstances even while other aspects of a case remain ongoing. Such awards are appropriate, however, only when the court has finally resolved the merits of particular claims.

This Court's precedents also make clear that a plaintiff must obtain a favorable judgment and tangible relief *from the court* in order to qualify as a prevailing party. The Court in *Buckhannon* rejected the "catalyst theory," under which a plaintiff can become a prevailing party if his lawsuit induces the defendant to voluntarily discontinue its allegedly unlawful conduct.

Although most of this Court's prevailing-party cases have involved fee requests by plaintiffs, prevailing defendants likewise can qualify for fee awards in appropriate circumstances, even for a non-merits reason. At a minimum, however, the defendant must obtain a favorable final judgment to acquire prevailing-party status; favorable interlocutory rulings, such as the denial of a plaintiff's request for a preliminary injunction, will not suffice.

A plaintiff need not obtain total or even predominant success in order to qualify as a "prevailing party." But while partial success may be sufficient, that partial success must be reflected in a judicial order that finally resolves at least one claim in the plaintiff's favor and awards him tangible relief. The sort of partial success that respondents claim here—a *temporary* court-ordered cessation of the defendant's allegedly unlawful conduct—does not confer prevailing-party status.

C. Section 1988(b) authorizes the district court to award "the prevailing party * * * a reasonable attorney's fee *as part of the costs*" of the action. 42 U.S.C. 1988(b) (emphasis added). From the Judiciary Act of 1789 to the present, federal law has consistently provided for awards of litigation costs—including attorney's fees—*as part of*, or *incident to*, the judgment in a case. Costs therefore have traditionally been awarded *after* the trial court finally decides the merits of the

plaintiff's claims. Section 1988(b)'s directive that an attorney's-fee award be made "as part of the costs" accordingly reinforces the conclusion that a "prevailing party" is a litigant in whose favor judgment is entered after the merits have been finally resolved.

D. Respondents did not obtain prevailing-party status based on the district court's entry of a preliminary injunction or the ensuing events that terminated the suit—that is, the Virginia legislature's repeal of Section 46.2-395 and the district court's consequent dismissal of the case as moot. A preliminary injunction does not resolve the merits of the plaintiff's claims or produce a final judgment, but simply defines the parties' respective rights during the pendency of the suit. And while a showing of *likely* success on the merits is a prerequisite to entry of a preliminary injunction, that showing is quite different from the *actual* success on the merits that a favorable judgment provides. By the same token, entry of a preliminary injunction does not reflect any judicial determination that the defendant has actually violated federal law—a usual prerequisite to an attorney's-fee award.

The district court's final disposition of this suit likewise did not make respondents prevailing parties. The court did not enter judgment in respondents' favor or find that petitioner had violated federal law, and it did not award respondents any tangible relief. Rather, the court dismissed respondents' case as moot. And while the district court did not *reject* respondents' constitutional arguments, the fact that respondents did not lose on the merits does not make them prevailing parties.

Finally, the Virginia legislature's repeal of Section 46.2-395 did not make respondents prevailing parties. Although the repeal gave respondents the same practi-

cal benefit they had hoped to achieve through litigation, it did not reflect any judicial determination of the merits of respondents' constitutional claims, and it did not constitute *court-ordered* relief.

In holding that the preliminary injunction made respondents "prevailing parties," the en banc majority described this case as one in which "a preliminary injunction has provided the plaintiff with precisely the merits-based relief she need[ed] for precisely as long as she need[ed] it." Pet. App. 33a. But the preliminary injunction gave respondents relief "for precisely as long as [they] need[ed] it" only because of legislative action. As the dissenting judges below recognized, that approach is simply "a new spin on the catalyst theory." *Id.* at 62a (Quattlebaum, J., dissenting). And while the majority expressed concern that government agencies may moot cases strategically to avoid attorney's-fee liability, see *id.* at 20a-21a, such policy arguments are better addressed to Congress.

ARGUMENT

RESPONDENTS ARE NOT "PREVAILING PARTIES" ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER SECTION 1988(b)

Under settled legal principles, a "prevailing party" in the litigation-cost context is one who is awarded relief at the end of the action when a court renders judgment in his favor. A preliminary injunction, by contrast, is merely an interim order that addresses "the relative positions of the parties" pending the adjudication of a plaintiff's claims for relief. *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). At the end of this suit, the district court did not award respondents any relief and did not finally determine the merits of their claims, but rather dismissed those claims as moot. Respond-

ents therefore are not "prevailing parties" under Section 1988(b).

A. "Prevailing Party" Is A Legal Term Of Art That Has Long Been Understood To Refer To A Party Who Obtains A Favorable Court Judgment And Is Awarded Tangible Relief

1. The operative statutory phrase in this case is "prevailing party," a term this Court has "long held * * * is a 'term of art'" when used "in fee statutes." *Astrue* v. *Ratliff*, 560 U.S. 586, 591 (2010) (citing *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (*Buckhannon*)). More specifically, that "legal term of art" refers to the "'party in whose favor a judgment is rendered.'" *Buckhannon*, 532 U.S. at 603 (quoting *Black's Law Dictionary* 1145 (7th ed. 1999) (*Black's 7th Edition*)).

Legal dictionaries reflected the same understanding in 1976, when Congress enacted Section 1988(b). See *Black's Law Dictionary* 1069 (5th ed. 1979) (*Black's 5th Edition*) (defining "prevailing party" as the party for whom "judgment [is] entered"—*i.e.*, the party who "successfully prosecutes the action or successfully defends against it," and who therefore is "ultimately prevailing when the matter is finally set at rest"); *Black's Law Dictionary* 1352 (rev. 4th ed. 1968) (same). Under that definition, a litigant's prevailing-party status "does not depend upon the degree of success at different stages of the suit"; it turns simply on "whether, at the end of the suit, * * * the party who has made a claim against the other[] has successfully maintained it." *Black's 5th Edition* 1069; accord *Ballentine's Law Dictionary* 985 (3d ed. 1969). Legal dictionaries from the 19th and early 20th centuries likewise defined "'prevailing party'" to mean the party who "successfully prose-

cutes [or defends] the action" and for whom "judgment [is] entered," *Black's Law Dictionary* 1412 (3d ed. 1933), *i.e.*, the party who "at the end of the suit" has "successfully maintained" (or defended against) the plaintiff's "claim," *ibid.*; accord 2 *Bouvier's Law Dictionary* 738 (new Rawle ed. 1897); *Anderson's Law Dictionary* 809 (1889); cf. *Buckhannon*, 532 U.S. at 610 (Scalia, J., concurring) ("'Prevailing party' is not some newfangled legal term invented for use in late-20th-century fee-shifting statutes.").

2. The "'basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule,'" which "has roots in our common law reaching back to at least the 18th century." *Baker Botts L.L.P.* v. *ASARCO LLC*, 576 U.S. 121, 126 (2015) (citation omitted). "[A]t common law" in England, "the taxation of costs was not allowed." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 564 (2012) (citing *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247-248 (1975) (*Alyeska Pipeline*)); see 3 William Blackstone, *Commentaries* 399 (1768) (*Blackstone's Commentaries*). And in this country, the American Rule likewise directs that parties to litigation must "bear their own expenses"—including "not only * * * attorney's fees but also other costs of litigation," *Kansas* v. *Colorado*, 556 U.S. 98, 102-103 (2009)—unless a "statute or enforceable contract" provides otherwise. *Alyeska Pipeline*, 421 U.S. at 247, 257.

A court's task when construing a federal statute that authorizes an award of attorney's fees therefore is to determine the extent to which it departs from the common law. But a statute "which invade[s] the common law" is interpreted "with a presumption favoring the retention of long-established and familiar legal princi-

ples." *Baker Botts L.L.P.*, 576 U.S. at 126 (citation and brackets omitted). The Court therefore has required "'explicit statutory authority'" before construing the term "prevailing party" to extend beyond its traditional scope. *Buckhannon*, 532 U.S. at 608 (citation omitted).

B. This Court's Precedents Reflect The Settled Understanding That A Plaintiff Qualifies As A "Prevailing Party" Only If The Court Enters Judgment In His Favor And Awards Tangible Relief

Consistent with the legal dictionaries cited above, this Court's decisions reflect the settled understanding that a "prevailing party" is the "'party in whose favor a judgment is rendered.'" *Buckhannon*, 532 U.S. at 603 (quoting *Black's 7th Edition* 1145). The Court has identified three ways in which a plaintiff can qualify as a "prevailing party" under that longstanding definition. This Court itself has "only awarded attorney's fees" under prevailing-party statutes to plaintiffs who have (1) "received a judgment on the merits" or (2) "obtained a court-ordered consent decree." *Id.* at 605. The Court has also indicated in dicta that a plaintiff may qualify as a "prevailing party" by (3) obtaining a default judgment when the defendant fails to defend against the plaintiff's claims.

1. The Court's prevailing-party decisions have largely focused on the most common type of prevailing plaintiff: a plaintiff who obtains a favorable final judgment on the merits of a claim for relief, based on a determination that the defendant has violated the law, and who is awarded actual, enduring relief in the form of damages, a permanent injunction, or other equitable relief such as a formal declaratory judgment.

The Court has repeatedly stated that "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." *Farrar* v. *Hobby*, 506 U.S. 103, 110 (1992) (quoting *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987)) (brackets omitted); accord, *e.g.*, *Buckhannon*, 532 U.S. at 605. The Court has similarly stated that establishing "liability for violation of federal law" is "crucial" to rendering the defendant responsible for attorney's fees. *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 762 (1989); see *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 137 (2005) (presumption in favor of fees in civil rights cases applies only when the defendant has "violated federal law"). And the Court has repeatedly observed that "liability on the merits and responsibility for fees go hand in hand." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985); see, *e.g.*, *Farrar*, 506 U.S. at 109; *Zipes*, 491 U.S. at 763; *Supreme Court of Va.* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719, 738-739 (1980). Courts impose such merits liability only in a final judgment.

The Court has also determined that "the entry of a consent decree" can render a plaintiff a prevailing party even without "full litigation of the issues" or "a judicial determination that the plaintiff's rights have been violated." *Maher* v. *Gagne*, 448 U.S. 122, 124, 129 (1980). A "consent decree is a final judgment," *Rufo* v. *Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 391 (1992), that "is entered [by the court] as a judgment" and bears "some of the earmarks of judgments entered after litigation," but that also has a contractual component because "[its] terms are arrived at through mutual agreement of the parties," *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 518-519 (1986). A "consent decree does not always include an admission of liability by the defendant." *Buckhannon*, 532 U.S. at 604. But

"[o]nce entered, a consent decree may be enforced," just as a court may enforce the relief it awards in any other final judgment. *Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431, 440 (2004).[1]

This Court has additionally indicated in dicta that "default judgments" can give rise to statutory attorney's-fee awards to the "prevailing party." *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 579 U.S. 197, 202, 208 n.3 (2016); see Fed. R. Civ. P. 55(a) and (b). Like a defendant's agreement to a consent judgment, a defendant's failure to defend against a suit obviates the need for the court to make an independent determination of the merits. But the court can still enter a final judgment and award tangible relief (and "costs") in the plaintiff's favor. See Fed. R. Civ. P. 55(b).[2]

2. By contrast, favorable *interlocutory* rulings are generally insufficient to confer "prevailing party" status. Thus, in *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980) (per curiam), the Court determined that, although favorable "procedural or evidentiary rulings may affect the

---

[1] The Court in *Farrar* referred more generally to a "settlement" as a possible basis for prevailing-party status. See 506 U.S. at 111. The Court has since clarified, however, that only those settlements that become court-ordered "consent decrees" can have that effect. See *Buckhannon*, 532 U.S. at 604 n.7.

[2] Consent and default judgments are exceptions to the general rule that, under statutes that authorize attorney's-fee awards to "prevailing parties," a defendant may be required to pay its opponent's fees only if it is found to have violated federal law. See p. 15, *supra*. In each of those contexts, however, it is the defendant's own litigation conduct, in agreeing to a consent decree or in failing to defend against the suit, that subjects it to potential fee liability. Where the defendant contests a suit and does not consent to entry of judicial relief against it, a finding of liability is an essential predicate to an attorney's-fee award.

disposition on the merits," those rulings are "themselves not matters on which a party could 'prevail' for purposes of shifting his counsel fees to the opposing party under § 1988." *Id.* at 759. Even interlocutory orders that address merits issues, such as orders that reverse directed verdicts or direct that a case go to trial, *id.* at 756-758, are insufficient to make the plaintiff a prevailing party. It thus is "the party legally responsible for relief on the merits"—the losing defendant—"who must pay the costs of the litigation" and who bears "fee liability" as an "'incident of the judgment'" entered against it. *Graham*, 473 U.S. at 164 & n.7 (citation omitted).

A judicial determination that the plaintiff's legal rights were violated will not confer prevailing-party status if the court does not award the plaintiff tangible relief. In *Hewitt*, *supra*, the court of appeals held that prison officials in imposing punishment had denied the plaintiff constitutional due process, but the district court on remand granted the officials summary judgment on immunity grounds. 482 U.S. at 757-758. In a subsequent attorney's-fee appeal, this Court held that the plaintiff was not a "prevailing party" because he "never took the steps necessary to have a declaratory judgment or [injunctive] order [directing that his record be expunged] properly entered." *Id.* at 760. The Court explained that "[t]he real value of [a favorable] judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*," *i.e.*, an "action (or cessation of action) by the defendant that the [court's] judgment produces." *Id.* at 761. The Court observed that the plaintiff in *Helms* had "obtained nothing from the defendants" as a result of

the suit, *id.* at 761-762, and it "conclude[d] that a favorable statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party,'" *id.* at 763.

Relying on legislative history, the Court in *Hanrahan* stated that Congress in enacting Section 1988 had "contemplated the award of fees *pendente lite* in some cases." 446 U.S. at 757 (dicta). The Court thus indicated that a district court's consideration of fee requests need not invariably be deferred until the entire action has concluded. The Court further observed, however, that "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." *Id.* at 758; see *id.* at 757 (explaining that in two prior cases where the Court had approved interim fee awards, "the party to whom fees were awarded had established the liability of the opposing party, although final remedial orders had not been entered"); see also *Buckhannon*, 532 U.S. at 603.[3] The Court thus indicated that interim fee

[3] In one decision cited in the legislative history, the Court concluded that although injunctive remedies in school-desegregation cases may require "frequent modifications," so that multiple "final orders may issue in the course of litigation," the possibility of such post-judgment modifications should not forestall a fee award to the prevailing plaintiff in whose favor judgment was entered. *Bradley* v. *School Bd. of the City of Richmond*, 416 U.S. 696, 723-724 (1974); see *id.* at 699-705. In the other decision, the Court itself definitively resolved the merits of the plaintiff-shareholders' "cause of action" by directing the court of appeals to affirm the district court's "partial summary judgment on the issue of liability." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970); see *id.* at 381-385. The Court then concluded that a common-law exception to the American Rule—which did not involve a statutory prevailing-party requirement—allowed an award of attorney's fees, *id.* at 390-392, against the "other shareholders" who had obtained important bene-

awards may occasionally be appropriate when particular claims are definitively resolved in the plaintiff's favor, even though other matters remain to be adjudicated. But the Court did not suggest that a fee award may be premised on a ruling that does not finally resolve the merits of any claim.

3. To qualify as a "prevailing party" in a lawsuit, a plaintiff must obtain a favorable judgment and tangible relief *from the court*. The plaintiffs in *Buckhannon* alleged that state-law restrictions on the operation of assisted-living facilities violated two federal statutes. See 532 U.S. at 600-601. After "the West Virginia Legislature enacted two bills eliminating the" challenged restrictions, the district court dismissed the case as moot, "finding that the [new] legislation had eliminated the allegedly offensive provisions and that there was no indication that the West Virginia Legislature would repeal the amendments." *Id.* at 601.

The plaintiffs then sought attorney's fees under a federal statute that authorized the court to award fees to the "prevailing party." *Buckhannon*, 532 U.S. at 601. They "argued that they were entitled to attorney's fees under the 'catalyst theory,' which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Ibid.* This Court rejected the "catalyst theory," holding that the theory was inconsistent with the Court's prevailing-party precedents because "[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. The Court explained that "[a] defend-

---

fits from the plaintiffs' litigation, *id.* at 392-396. See *id.* at 396 (emphasizing that the fee award did "not * * * saddle the unsuccessful party with the expenses").

ant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Ibid.*

4. Although most of this Court's prevailing-party cases have involved fee requests submitted by plaintiffs, a *defendant* likewise cannot become a prevailing party unless and until final judgment is entered in its favor. The Court has recognized that "[p]laintiffs and defendants come to court with different objectives": "A plaintiff seeks a material alteration in the legal relationship between the parties," whereas a "defendant seeks to prevent this alteration to the extent it is in the plaintiff's favor." *CRST Van Expedited, Inc.* v. *EEOC*, 578 U.S. 419, 431 (2016). For that reason, a "defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason." *Ibid.* But no one would suggest that a defendant becomes a prevailing party by successfully opposing a plaintiff's request for a preliminary injunction, thereby *temporarily* avoiding any change in the parties' legal relationship. Instead, a defendant, like a plaintiff, prevails and can potentially become eligible for an attorney's-fee award under statutes authorizing such awards "when the case is resolved in [its] favor." *Id.* at 432. This Court has reserved the question whether a "defendant must obtain a *preclusive* judgment"—thereby preventing the plaintiff from reasserting the same claims in the future—"in order to prevail." *Id.* at 434 (emphasis added). But at a minimum, the defendant must obtain a favorable final judgment to acquire "prevailing party" status.

5. A plaintiff need not achieve total or even predominant success in order to qualify as a "prevailing party." In *Texas State Teachers Ass'n* v. *Garland Independent*

School District, 489 U.S. 782 (1989) (*Garland*), the Court rejected a lower court's view that a plaintiff claiming prevailing-party status must "succeed on the 'central issue' in the litigation and achieve the 'primary relief sought.'" *Id.* at 784-786. The Court observed that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Id.* at 792-793. It concluded that the plaintiffs in that case—who had "obtained a judgment" on their First Amendment claim—had "prevailed on a significant issue in the litigation and ha[d] obtained some of the relief they sought and [we]re thus 'prevailing parties' within the meaning of § 1988." *Id.* at 793.

Similarly in *Farrar*, the Court held that "a plaintiff who wins nominal damages is a prevailing party under § 1988." 506 U.S. at 112. The Court reached that conclusion even though the plaintiffs in *Farrar* had received only nominal damages after seeking $17 million in compensatory damages. *Id.* at 106, 114. The Court explained that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-112. The Court concluded that a nominal-damages award confers prevailing-party status under that standard because "[a] judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Id.* at 113.

The Court's decisions in *Garland* and *Farrar*, however, provide no sound basis for expanding prevailing-party status beyond its traditional application to the party in whose favor judgment is rendered. In particu-

lar, nothing in those decisions suggests that the partial success claimed by respondents here—*i.e.*, the *temporary* restriction on enforcement of Section 46.2-395 that the preliminary injunction imposed—should be viewed as analogous to the partial success that the plaintiffs in *Garland* and *Farrar* obtained. The lower courts in both of those cases had entered final judgments that awarded tangible relief in the plaintiffs' favor, even though the relief was less extensive than what the plaintiffs had sought. See *Garland*, 489 U.S. at 786-787; *Farrar*, 506 U.S. at 107; Pet. App. 51a-52a (Quattlebaum, J., dissenting). And the *Farrar* Court observed that, for purposes of the prevailing-party inquiry, "[n]o 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." *Farrar*, 506 U.S. at 113; see p. 16 n.1, *supra*. The Court thus made clear that, while partial successes may be sufficient to confer prevailing-party status, any such partial success must be reflected in a judicial order that finally resolves the plaintiff's claim and awards tangible relief.

C. Congress Has Long Awarded Costs And Attorney's Fees Incident To A Judgment Entered In Favor Of The Prevailing Party

Section 1988(b) authorizes the district court to award "the prevailing party * * * a reasonable attorney's fee *as part of the costs*" of the action. 42 U.S.C. 1988(b) (emphasis added). Because litigation "costs," including attorney's fees, have traditionally been awarded as an incident to the court's judgment, that language reinforces the understanding that the "prevailing party" is a party who obtains a favorable judgment.

In 1789, when the First Congress established the lower federal courts in the first Judiciary Act, ch. 20, 1 Stat. 73, multiple sections of the Act recognized "[t]axable costs * * * as a part of a judgment or decree in a Federal court," reflecting that "Congress intended to allow costs to the prevailing party, as incident to the judgment." *The Baltimore*, 75 U.S. (8 Wall.) 377, 388, 390 (1869); see *id.* at 389-390 (discussing Sections 11-12, 17, 20-23, and 35 of the Act); see also *Taniguchi*, 566 U.S. at 564 (discussing 1793 Act authorizing awards of certain costs, including attorney's fees, by federal courts "'in favour of the parties obtaining judgments therein'" as the "prevailing parties") (citation omitted).

"In 1853, Congress undertook to standardize the costs allowable in federal litigation." *Alyeska Pipeline*, 421 U.S. at 251; see *Taniguchi*, 566 U.S. at 565. The 1853 Act provided that "costs * * * recoverable in favor of the prevailing party"—including the "fees of * * * attorneys"—"shall be taxed * * * and be included in and form a portion of a judgment or decree against the losing party." Act of Feb. 26, 1853, ch. 80, § 3, 10 Stat. 168. The language specifying that costs and attorney's fees awarded to the "prevailing party" shall be included as part of the "judgment or decree against the losing party" was reenacted in the Revised Statutes, Rev. Stat. § 983 (2d ed. 1878), and remained in force until the 1948 codification of Title 28 into positive law, see 28 U.S.C. 830 (1946); see also 28 U.S.C. 571-572 (1946) (authorizing fees to be "taxed and allowed to attorneys, solicitors, and proctors" in fixed amounts ranging from $2.50 to $100); Rev. Stat. §§ 823-824.[4]

---

[4] The 1853 Act's authorization to grant (small sums of) attorney's fees as part of the costs continues today as 28 U.S.C. 1923(a). See *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714,

"By the time the Federal Rules of Civil Procedure were adopted in 1938, federal statutes had authorized and defined awards of costs to prevailing parties for more than 85 years." *Marek* v. *Chesny*, 473 U.S. 1, 7-8 (1985). Rule 54 accordingly provided that "costs shall be allowed as of course to the prevailing party" unless the court or a statute provided otherwise. Fed. R. Civ. P. 54(d) (1939), available at 28 U.S.C. p. 878 (Supp. V 1939). Today, Rule 54(d) similarly provides that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1).

In 1948, when Congress codified the provisions of Title 28 into positive law, "[t]he sweeping reforms of the 1853 Act [were] carried forward * * * 'without any apparent intent to change the controlling rules.'" *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987) (quoting *Alyeska Pipeline*, 421 U.S. at 255); see 28 U.S.C. 1920-1924 reviser's notes (Supp. II 1948); see also *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) (explaining that "changes of language" in the 1948 codification make "no changes of law or policy" absent a "clearly expressed" intent to do so). Section 1920 of Title 28 states that the "costs" taxed by the court shall be "included in the judgment or decree," 28 U.S.C. 1920, which—as Rule 54(d) reflects—is a judgment or decree in favor of the "prevailing party." See *Crawford Fitting Co.*, 482 U.S. at 440-442.

Accordingly, when Congress enacted Section 1988(b) in 1976, it acted against a long history of awarding costs incident to a court's judgment to the party in whose fa-

---

718 n.11 (1967); see also *Alyeska Pipeline*, 421 U.S. at 255 & n.27, 257 & n.30.

vor judgment was rendered. Congress's authorization to award attorney's fees "as part of the costs," The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, therefore reinforces the most natural understanding of the term "prevailing party."

D. Neither The District Court's Entry Of A Preliminary Injunction, Nor The Court's Subsequent Dismissal Of Respondents' Suit In Light Of Intervening State Legislation, Conferred "Prevailing Party" Status Upon Respondents

Respondents' success in obtaining a preliminary injunction did not make them prevailing parties. The district court's issuance of the injunction did not reflect any definitive resolution of respondents' claims, but simply defined the parties' respective rights during the pendency of the lawsuit. The court's ultimate disposition of respondents' case was to dismiss it as moot, not to enter judgment for respondents or to award them tangible relief. And while the Virginia legislature's repeal of Section 46.2-395 gave respondents the same practical benefit they sought to obtain through the litigation, that repeal did not make respondents prevailing parties because it was not *court-ordered* relief.

1. "The purpose" of "a preliminary injunction" is "not to conclusively determine the rights of the parties." *Trump* v. *International Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (per curiam). Rather, it "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Camenisch*, 451 U.S. at 395; accord *Benisek* v. *Lamone*, 585 U.S. 155, 161 (2018) (per curiam). A "preliminary injunction is customarily [adjudicated] on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Camenisch*, 451 U.S. at

395. And it requires only a "likelihood of success on the merits"—a showing that is "significantly different" from the actual "success" on the merits that a favorable judgment provides. *Id.* at 393-394. By the same token, a preliminary injunction does not reflect any judicial determination that the defendant has actually violated federal law—a usual prerequisite to a fee award to the plaintiff. See pp. 15, 16 n.2, *supra*.[5]

The Federal Rules of Civil Procedure reflect the inherently interim and tentative nature of preliminary injunctions. "Since a preliminary injunction may be granted on a mere probability of success on the merits, generally the moving party must demonstrate confidence in his legal position by posting bond in an amount sufficient to protect his adversary from loss in the event that future proceedings prove that the injunction issued wrongfully." *Edgar* v. *MITE Corp.*, 457 U.S. 624, 649 (1982) (Stevens, J., concurring in part and concurring in the judgment). Rule 65(c) states that "[t]he court may issue a preliminary injunction * * * only if the movant

---

[5] An appellate court reviewing a preliminary injunction ordinarily does not determine the ultimate merits of the plaintiff's claim, but instead addresses whether the district court abused its discretion in finding that "the plaintiff[] would [likely] succeed on the merits." *Thornburgh* v. *American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 755 (1986). On rare occasions, however, this Court has conducted "plenary review" of the merits in that procedural posture when "a district court's ruling rest[ed] solely on a premise as to the applicable rule of law, and the facts [we]re established or of no controlling relevance." *Id.* at 756-757 (identifying two such decisions in 1897 and 1952). If this Court definitively resolved the legal merits of such a claim in a plaintiff's favor in a preliminary-injunction appeal, such a decision would be analogous (for purposes of the "prevailing party" inquiry) to this Court definitively resolving partial summary judgment on liability.

gives security in an amount the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c); cf. 28 U.S.C. 382 (1934) (repealed 1948); S. Rep. No. 698, 63d Cong., 2d Sess. 21, 77-78 (1914). The Rule thus expressly contemplates, and provides for, the possibility that a plaintiff who obtains a preliminary injunction may not ultimately succeed on the merits of his claims.

In circumstances where "an expedited decision on the merits [is] appropriate," Rule 65(a)(2) establishes a "means of securing one." *Camenisch*, 451 U.S. at 395. That Rule authorizes the district court to "advance the trial on the merits and consolidate it with the [preliminary-injunction] hearing," Fed. R. Civ. P. 65(a)(2), where clear "notice" "afford[s] the parties a full opportunity to present their respective cases." *Camenisch*, 451 U.S. at 395 (citation omitted). To be sure, such acceleration is "generally inappropriate" because the truncated procedures and the "less complete" evidence available before discovery can be barriers to a fair adjudication. *Ibid.* But that simply underscores that the grant of temporary relief under such circumstances is a far cry from an appropriate final resolution of the merits of a plaintiff's claims.

2. In *Sole* v. *Wyner*, 551 U.S. 74 (2007), the plaintiffs (collectively Wyner) challenged the application of certain Florida-law restrictions to their proposed activities in Florida state parks. *Id.* at 78-79. Their complaint sought preliminary and permanent injunctive relief. *Id.* at 79. The district court granted a preliminary injunction, which allowed the plaintiffs to engage in activities the next day that the challenged state law would otherwise have prohibited. *Id.* at 79-80. The court ultimately

granted summary judgment for the defendants, however, *id.* at 80, and therefore did not award permanent injunctive relief.

Wyner then sought attorney's fees under Section 1988(b), arguing that the plaintiffs had "prevailed at the preliminary injunction stage, and therefore qualif[ied] for a fee award for their counsels' efforts to obtain that interim relief." *Sole*, 551 U.S. at 77-78. This Court disagreed, holding "that a final decision on the merits denying permanent injunctive relief ordinarily determines who prevails in the action for purposes of § 1988(b)." *Id.* at 78. The Court held that Wyner was "not a prevailing party" because "her initial victory was ephemeral." *Id.* at 86. The Court did not resolve whether "success in gaining a preliminary injunction may sometimes warrant an award of counsel fees" "in the absence of a final decision on the merits of a claim for permanent injunctive relief." *Ibid.*

The circumstances of this case differ in two significant respects from the circumstances of *Sole*. First, respondents' lawsuit was ultimately dismissed as moot rather than decided against them on the merits. Second, the Virginia legislature's repeal of Section 46.2-395 gave respondents the practical benefit they had sought to achieve through their lawsuit, whereas the district court's grant of summary judgment for the defendants in *Sole* meant that the plaintiffs were again subject to the disputed Florida-law restrictions. The *Sole* Court's analysis nevertheless sheds light on the proper resolution of the question presented here. And neither of those factual differences between the two cases supports the conclusion that respondents are "prevailing parties."

3. a. The court of appeals in this case stated that "a preliminary injunction entails a 'judicially sanctioned change' in the parties' legal relationship." Pet. App. 28a (citation omitted). The court also asserted that respondents' "claim to fees rests entirely on their victory at the preliminary injunction stage, and not on the General Assembly's subsequent repeal of § 46.2-395." *Sole* makes clear, however, that respondents could not credibly have claimed to have become prevailing parties at the moment the district court entered the preliminary injunction. The Court in *Sole* observed that "the provisional relief granted" by the preliminary injunction in that suit "terminated only the parties' opening engagement" in a case where "the litigation to definitively resolve the controversy" would continue after the injunction issued. 551 U.S. at 84. The Court explained that a "fee request at the initial stage" when the preliminary injunction was granted therefore would have been "premature." *Ibid.* Respondents' claim to prevailing-party status in this case therefore necessarily depends on events that occurred after the injunction issued.

b. The district court's final disposition of this case likewise could not have made respondents "prevailing parties." The court did not enter judgment in respondents' favor or award them any relief, and it did not find that petitioner had violated federal law. The court instead dismissed the case as moot. To be sure, the district court in this case (unlike the district court in *Sole*) did not *reject* the plaintiffs' claims on the merits. But Section 1988(b) does not authorize fee awards to non-losing parties. It authorizes awards to *prevailing* parties, and respondents no more prevailed in the final disposition of their suit than did the plaintiffs in *Sole*.

c. Also unlike the plaintiffs in *Sole*, respondents ultimately achieved the practical objectives of their suit when the Virginia legislature repealed the statutory provision they had challenged. But the Virginia legislature's repeal of Section 46.2-395—the event that caused this case to become moot—could not make respondents prevailing parties. Although that repeal gave respondents the same practical benefit that a favorable court judgment would have provided, it did not reflect any judicial determination of the merits of respondents' constitutional claims, and it did not constitute *court-ordered* relief. See *Buckhannon*, 532 U.S. at 605 (explaining that "[a] defendant's voluntary change in conduct lacks the necessary judicial *imprimatur*" to confer "prevailing party" status.). That is so even if the Court assumes *arguendo* that respondents' success in obtaining a preliminary injunction played an important causal role in inducing the legislature to act. See *id.* at 610 (rejecting the "catalyst theory" as a ground for holding that non-judicial action can confer prevailing-party status); pp. 19-20, *supra*.

4. The en banc court of appeals made no attempt to reconcile its holding with the long-established term-of-art understanding of "prevailing party," *i.e.*, the party in whose favor the court enters judgment after finally resolving the plaintiff's claim. Cf. Pet. App. 46a-47a (Quattlebaum, J., dissenting). The majority instead emphasized that a preliminary injunction is premised on a finding of *likely* success on the merits, and it concluded that such a finding is "sufficiently *on the merits* to justify prevailing party status." *Id.* at 27a-28a. This Court has made clear, however, that it would be "improper[]" to "equate[] 'likelihood of success' with 'success'" on a claim because an order granting a preliminary injunc-

tion is not "tantamount to [a] decision[] on the underlying merits." *Camenisch*, 451 U.S. at 394. Attorney's fees are awarded to a prevailing plaintiff because the losing defendant is "the party legally responsible for relief on the merits" and bears "fee liability" as an "'incident of the judgment'" against it. *Graham*, 473 U.S. at 164 & n.7 (citation omitted). In this case, petitioner was never found to have violated the law, and judgment was never entered against him.

In holding that the preliminary injunction here gave respondents "prevailing party" status, the en banc majority described this case as one in which "a preliminary injunction has provided the plaintiff with precisely the merits-based relief she need[ed] for precisely as long as she need[ed] it," *i.e.*, until the Virginia legislature repealed Section 46.2-395. Pet. App. 33a. But such temporary relief during a discrete period while litigation is pending bears no relevant relationship to the enduring, enforceable relief that a final decision on the merits or a consent decree provides. The only *enduring* relief secured by respondents came from the Virginia legislature, which repealed Section 46.2-395 and directed the no-fee restoration of suspended licenses. See pp. 3-4, *supra*.

The fact that legislation enacted during the pendency of the suit obviated the need for a favorable court judgment does not mean that the district court's preliminary injunction conferred prevailing-party status. And the preliminary injunction gave respondents relief "for precisely as long as [they] need[ed] it," Pet. App. 33a, only because of that legislative action. Thus, while the en banc court of appeals purported to base its prevailing-party determination solely on the preliminary injunction rather than on the legislature's repeal of the chal-

lenged statute, see *id.* at 28a, 30a, the repeal was central to the court's conclusion that respondents had prevailed. See *id.* at 63a-64a (Quattlebaum, J., dissenting). That approach is simply "a new spin on the catalyst theory." *Id.* at 62a (Quattlebaum, J., dissenting).

Finally, the majority's concern that government agencies may moot cases strategically to avoid fee liability (see Pet. App. 20a-21a) does not justify an exception to established prevailing-party principles. This Court in *Buckhannon* characterized similar "policy arguments" about "unilateral[] mooting" acts as both "speculative" and irrelevant to the proper interpretation of the term "prevailing party." 532 U.S. at 608, 610 (noting that "the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct"). Such policy concerns are better directed to Congress, which "is free, of course, to revise" Section 1988(b) if it concludes that a different balance among competing values is appropriate. *Id.* at 622 (Scalia, J., concurring).

After the *Buckhannon* Court rejected the catalyst theory, Congress enacted a targeted amendment to the Freedom of Information Act, 5 U.S.C. 552, that now authorizes attorney's-fee awards where the complainant has "obtained relief" through "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. 552(a)(4)(E)(ii)(II). In certain other limited contexts as well, Congress has enacted attorney's-fee provisions that do not limit awards to "prevailing parties." See, *e.g.*, 28 U.S.C. 1447(c) (authorizing court to award "just" costs, including attorney's fees, that are "incurred as a result of the removal" of a case when the case is remanded to state court); 42 U.S.C. 300aa-15(e)(1) (authorizing recovery of

attorney's fees for a vaccine-compensation petition, even if the court awards no compensation, if "the petition was brought in good faith and there was a reasonable basis for the claim"). If Congress concludes that the established term-of-art understanding of "prevailing party" is ill-suited to Section 1988(b), it can amend the statute accordingly.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
CHARLES W. SCARBOROUGH
THOMAS PULHAM
DANA KAERSVANG
Attorneys

JUNE 2024

APPENDIX

TABLE OF CONTENTS

APPENDIX

1. The Act of Feb. 26, 1853, ch. 80, 10 Stat. 161, provided in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, to United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners, and printers, in the several States, the following and no other compensation shall be taxed and allowed. But this act shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

Fees of Attorneys, Solicitors, and Proctors. In a trial before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: *Provided*, That in cases in admiralty and maritime jurisdiction, where the libellant shall recover less than fifty dollars the docket fee of his proctor shall be but ten dollars.

In cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued.

For scire facias and other proceedings on recognizances, five dollars.

For each deposition taken and admitted as evidence in the cause, two dollars and fifty cents.

A compensation of five dollars shall be allowed for the services rendered in cases removed from a district to a circuit court by writ of error or appeal.

* * * * *

SEC. 3. *And be it further enacted*, * * * *

* * * * *

The bill of fees of clerk, marshal, and attorneys, and the amount paid printers, and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trial in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause.

* * * * *

2. 28 U.S.C. 382 (1934) (repealed 1948) provided:

[Injunctions]; security on issuance of. Except as otherwise provided in section 26 of Title 15, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

3. 28 U.S.C. 830 (1946) provided:

[Costs]; bill of; taxation.

The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause.

4. 28 U.S.C. 1920 provides:

Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

* * * * *

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 9a(a) and 830 (R.S. § 983; Mar. 3, 1911, ch. 231, § 5a, as added Jan. 20, 1944, ch. 3, § 1, 58 Stat. 5).

For distribution of other provisions of section 9a of title 28, U.S.C., 1940 ed., see table at end of reviser's notes.

Word "may" was substituted for "shall" before "tax as costs," in view of Rule 54(d) of the Federal Rules of Civil Procedure, providing for allowance of costs to the prevailing party as of course "unless the court otherwise directs".

Changes were made in phraseology.

5. 28 U.S.C. 1923 provides in pertinent part:

Docket fees and costs of briefs

(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

$20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;

$20 in admiralty appeals involving not over $1,000;

$50 in admiralty appeals involving not over $5,000;

$100 in admiralty appeals involving more than $5,000;

$5 on discontinuance of a civil action;

$5 on motion for judgment and other proceedings on recognizances;

$2.50 for each deposition admitted in evidence.

* * * * *

6. 42 U.S.C. 1988 provides in pertinent part:

Proceedings in vindication of civil rights

* * * * *

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

* * * * *

7. Rule 54 of the Federal Rules of Civil Procedure provides in pertinent part:

Judgment; Costs

* * * * *

(d) COSTS; ATTORNEY'S FEES.

(1) *Costs Other Than Attorney's Fees*. Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

* * * * *

8. Rule 65 of the Federal Rules of Civil Procedure provides in pertinent part:

Injunctions and Restraining Orders

(a) PRELIMINARY INJUNCTION.

(1) *Notice*. The court may issue a preliminary injunction only on notice to the adverse party.

(2) *Consolidating the Hearing with the Trial on the Merits*. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But

the court must preserve any party's right to a jury trial.

(b) TEMPORARY RESTRAINING ORDER.

* * * * *

(c) SECURITY. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

* * * * *

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivisions (a) and (b). These are taken from U.S.C., Title 28, [former] § 381 (Injunctions; preliminary injunctions and temporary restraining orders).

Note to Subdivision (c). Except for the last sentence, this is substantially U.S.C., Title 28, [former] § 382 (Injunctions; security on issuance of). * * * *

* * * * *