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* ALLIANCE DEFENDING FREEDOM & AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF RESPONDENTS

JOHN J. BURSCH
TRAVIS C. BARHAM
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, D.C. 20001

CYNTHIA FLEMING CRAWFORD
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd., Suite 1000
Arlington, Virginia 22203

ALLYSON N. HO
ELIZABETH A. KIERNAN
Counsel of Record
JAIME R. BARRIOS
ANDREW R. MITCHELL
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
(214) 698-3100
EKiernan@gibsondunn.com

CHRISTINE A. BUDASOFF
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20046

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[*]

Alliance Defending Freedom is a nonprofit, public-interest legal organization providing strategic planning, training, funding, and litigation services to protect Americans' constitutional rights—including the rights to freedom of speech, free exercise of religion, freedom of association, and equal protection. Since its founding in 1994, Alliance Defending Freedom has played a role in dozens of cases before this Court, and many hundreds more before lower courts.

Americans for Prosperity Foundation is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including the preservation of our civil liberties and constitutionally limited government. As part of this mission, it often participates as a party or *amicus curiae* in cases involving government actors.

Alliance Defending Freedom and Americans for Prosperity Foundation submit this brief to highlight the importance of attorneys' fees when a party safeguards constitutional or civil rights by winning a preliminary injunction against an unlawful federal or state policy. *Amici* have often litigated to protect civil-rights plaintiffs' ability to recover some measure of their expenditures after successfully challenging a government actor's unlawful policies and practices. *E.g.*, *Uzuegbunam* v. *Preczewski*, 592 U.S. 279 (2021)

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[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

(holding that nominal damages were available to address violation of the constitutional rights of Alliance Defending Freedom's client); Br. for *Amici Curiae* Americans for Prosperity Foundation et al. in Support of Pet'rs, *ibid.*

STATEMENT

The government asks for a "get-out-of-jail-free" card. In petitioner's view, the government can promulgate a policy or practice that violates its citizens' constitutional rights, and then, after an injured party spends considerable time and thousands of dollars to persuade a court to enjoin the behavior, simply revise the policy and avoid responsibility. That can't be right. Section 1988 and longstanding practice prove it isn't.

1. Civil-rights litigation benefits everyone—not just the courageous individuals and counsel shouldering that litigation's burdens. This Court has long recognized that civil-rights plaintiffs are akin to "private attorney[s] general, vindicating a policy that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam) (quotation marks omitted). Yet few citizens could take up that mantle and "advance the public interest" if "forced to bear their own attorneys' fees." *Ibid.* That's why courts often awarded attorneys' fees to prevailing plaintiffs in civil-rights cases. See generally *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

So when this Court reversed course to hold that section 1983 plaintiffs couldn't recover attorneys' fees under the then-statutory framework, *Alyeska Pipeline*, 421 U.S. at 241, Congress's reaction was swift

and decisive. Within a month, Congress began work on what would become the Civil Rights Attorneys' Fees Award Act, S. Rep. No. 94-1011, at 1 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, which amended section 1988 to allow fee-shifting when plaintiffs prevail in myriad civil-rights cases, including those under 42 U.S.C. § 1983. By allowing "a prevailing plaintiff '[to] ordinarily recover an attorney's fee [absent] special circumstances,' " Congress "ensure[d] 'effective access to the judicial process' for persons with civil rights grievances." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1558, at 1 (1976) & S. Rep. No. 94-1011, at 4).

2. This Court has acknowledged that "awarding counsel fees to prevailing plaintiffs" in civil-rights "litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected." *City of Riverside* v. *Rivera*, 477 U.S. 561, 577 (1986) (plurality) (quoting H.R. Rep. No. 94-1558, at 9). Without a possible fee recovery, citizens who otherwise lack the means "to assert their civil rights" would never challenge unconstitutional policies, allowing those who "violate the Nation's fundamental laws" to do so "with impunity." *Id.* at 578 (quoting S. Rep. No. 94-1011, at 2). The recovery of attorneys' fees "is necessary '[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce.' " *Savidge* v. *Fincannon*, 836 F.2d 898, 905 (5th Cir. 1988) (quoting S. Rep. No. 94-1011, at 6).

In keeping with section 1988's empowerment of citizens to vindicate civil rights, this Court has afforded the term "prevailing party" a "generous formulation." *Farrar* v. *Hobby*, 506 U.S. 103, 109 (1992)

(quoting *Hensley*, 461 U.S. at 433). A plaintiff need not prevail after "full litigation," *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980), or even on the "central issue"—"interim fee awards [are] available 'where a party has prevailed on an important matter *in the course of litigation*,'" *Texas State Teachers Ass'n* v. *Garland Independent School District*, 489 U.S. 782, 790 (1989) (quoting S. Rep. No. 94-1011, at 5) (emphasis added). Put differently, "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Id.* at 792–793.

In *Maher*, for example, the Court recognized that a civil-rights plaintiff may be considered "prevailing" after a settlement. 448 U.S. at 129. The Court explained that "'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or [even] without formally obtaining relief.'" *Ibid.* (quoting S. Rep. No. 94-1011, at 5).

This Court has reiterated these principles. In *Hewitt* v. *Helms*, the Court observed that a plaintiff may prevail where "[a] lawsuit * * * produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment." 482 U.S. 755, 760 (1987).[1] And in *Buckhannon*, which held that a plaintiff doesn't prevail when

[1] Accord H.R. Rep. No. 94-1558, at 7 ("Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.").

a defendant ends a challenged policy once suit is filed but before any judicial decision is rendered, this Court explained that a plaintiff may be "prevailing" when the government enters into a consent decree with no admission of liability, because the agreement has the court's stamp of approval—its "imprimatur." *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 605–606 (2001) ("a judicial pronouncement that the defendant has violated the Constitution [not] unaccompanied by '*judicial* relief' " may suffice).

3. Both the statutory history of section 1988 and this Court's precedent confirm the importance of recompensing citizens and their counsel who stand firm in the face of civil-rights violations and effect change. Yet petitioner now asks this Court to ignore that history and precedent by forbidding attorneys' fees to plaintiffs who have obtained "*judicial* relief" via a preliminary injunction. *Buckhannon*, 532 U.S. at 606.

Petitioner asserts that even when civil-rights plaintiffs succeed in preliminarily enjoining the government's exercise of an unconstitutional statute, if the government moots the case by repealing the statute, the plaintiffs aren't entitled to recoup attorneys' fees. See Pet'r's Br. at 2. This means a government entity can avoid section 1988 if, after reading the room (and the injunction), it voluntarily does permanently what the trial court ordered it to do preliminarily.

Adopting petitioner's rule would discourage civil-rights litigation and lead to anomalous outcomes, as plaintiffs who successfully litigate a preliminary injunction are left holding the bag for attorneys' fees. See Pet. App. 21a (noting that these proceedings were

"long, contentious, and no doubt costly") (quoting *Stinnie* v. *Holcomb*, 396 F. Supp. 3d 653, 660 (W.D. Va. 2019)). It takes little foresight to anticipate how government actors will respond to adverse preliminary-injunction rulings in the future. This case is Exhibit A. As the en banc Fourth Circuit observed, after four years of litigation, in an "eleventh-hour capitulation" post-injunction, the government "game[d] the system" by obtaining a stay to change its "clear[ly]" unconstitutional law and "insulate it[self] from a fee award." Pet. App. 20a–22a. Nothing in section 1988's text, structure, or history justifies this result.

ARGUMENT

I. ATTORNEYS' FEES ARE INDISPENSABLE IN CIVIL-RIGHTS LITIGATION.

The availability of attorneys' fees in civil-rights cases is vitally important to protect the civil rights of all. Civil-rights cases are different from typical private litigation because "[u]nlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Rivera*, 477 U.S. at 574 (plurality). "Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards," including deterring future misconduct by government officials. *Ibid.*

Especially in cases like this one—involving indigent plaintiffs and limited damages—attorneys' fees are essential to enforcing civil rights, both for the individual plaintiff and the general public. Without the possibility of attorneys' fees, individuals would often

not have the resources necessary to mount litigation to protect their civil rights, effectively denying them their day in court. This Court recognized as much in *Rivera*, explaining that civil-rights plaintiffs "ordinarily cannot afford to purchase legal services at the rates set by the private market." 477 U.S. at 576–577 (plurality).

Moreover, "competent counsel" are unlikely to take on the burden of civil-rights litigation absent the possibility of attorneys' fees, because these cases require "substantial expenditures of time and effort," and, even when successful, result in "only small monetary recoveries." *Rivera*, 477 U.S. at 576–578 (plurality). Without a means to recover attorneys' fees, a "citizen [who] does not have the resources[has] his day in court * * * denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." *Id.* at 575.

But attorneys' fees aren't just a carrot to incentivize citizens and counsel. They're also a stick to incentivize the government to quickly resolve civil-rights claims or avoid civil-rights litigation entirely. The mere "potential" for attorneys' fees "provides additional—and by no means inconsequential"—incentives to the government to address unconstitutional conduct. *Carey* v. *Piphus*, 435 U.S. 247, 257 n.11 (1978).

This case underscores the importance of this incentive structure. Indigent plaintiffs were able to obtain counsel willing to challenge a law that deprived citizens of their driver's licenses if they couldn't afford to pay court-ordered debts. Resps.' Opp. to Pet. at 4–

5. When the government refused to acknowledge its unconstitutional conduct, and the cost of litigation soared, plaintiffs and their counsel stayed the course, even pursuing an appeal after the initial wrongful dismissal of the suit. Pet. App. 6a–7a & n.1. That tenacity was vindicated when the Fourth Circuit revived the suit and the district court held that plaintiffs made a "clear showing" of a constitutional violation. J.A.367, 372, 380–381.

Only then, reading the preliminary injunction and facing potential liability for attorneys' fees, did the government repeal the statute. Although that act moots the case, section 1988 provides that if the change is attributable to plaintiffs obtaining an order enjoining the unlawful activity, plaintiffs are still entitled to attorneys' fees. But petitioner found a way to "game the system"—by ceasing the challenged conduct after plaintiffs obtained the preliminary injunction. Pet. App. 20a–22a ("And because Virginia is in the Fourth Circuit and not anywhere else in the country, the Commonwealth could rest assured"—under then-controlling precedent—"that this eleventh-hour capitulation would insulate it from a fee award.").

Reversing the Fourth Circuit here would reward government gamesmanship. Under petitioner's proposed rule, one of the major incentives for government entities to avoid litigation altogether would no longer apply, while for plaintiffs the risk of unrecoverable expenditures would increase. Once government conduct is challenged in court, the government has no incentive to revise unconstitutional laws or policies until after they take a costly (for plaintiffs) peek at the district court's view on the merits. Meanwhile, the government benefits by potentially outlasting plaintiffs

who fear they will end up "holding the bag" even if their suit successfully alters the government's conduct. Pet. App. 21a.

This case is hardly an outlier. ADF, for example, has experienced such gamesmanship firsthand. ADF assisted in a case in which a Christian fraternity challenged a University of Florida policy that prohibited the group from only permitting leaders who were Christians. *Beta Upsilon Chi* v. *Machen*, 586 F.3d 908, 913–914 (11th Cir. 2009). When the district court denied its motion for a preliminary injunction, the fraternity sought an injunction pending appeal, which the Eleventh Circuit granted. *Id.* at 914. The Eleventh Circuit then held oral argument, where it became clear the fraternity would prevail on its preliminary-injunction motion on remand. See *id.* at 915. Five weeks later, the University changed its policy and moved to dismiss the case as moot, explaining the policy change gave the fraternity "the relief sought in its complaint." *Ibid.* The Eleventh Circuit agreed and dismissed the case as moot. *Ibid.*

Thankfully, the fraternity was in the Eleventh Circuit. When it sought attorneys' fees and the district court ruled it hadn't prevailed, the Eleventh Circuit reversed. See *Beta Upsilon Chi* v. *Machen*, 446 F. App'x 192, 193 (11th Cir. 2011) (per curiam); *Beta Upsilon Chi* v. *Machen*, 522 F. App'x 471, 472 (11th Cir. 2013) (per curiam). After four years of litigation, the fraternity finally received its attorneys' fees. See *Beta Upsilon Chi* v. *Machen*, 601 F. App'x 917 (11th Cir. 2015) (per curiam). So reversing the Fourth Circuit here would only make the already complicated endeavor of pursuing civil-rights litigation more daunting.

The University has also filed an *amicus* brief in this case that confirms the necessity of attorneys' fees in civil-rights litigation. The University admits it was only *after* the Eleventh Circuit issued a preliminary injunction, entertained briefing, and held oral argument that the University finally changed course and altered its (unconstitutional) policy. Br. for *Amicus Curiae* University of Florida Board of Trustees in Support of Pet'r at 4–5. The University may not like that it had to pay attorneys' fees after defending an unconstitutional policy in court, but had the Eleventh Circuit not acted as it did, the University would almost certainly still have that policy in place. The University's *amicus* brief shows why the availability of attorneys' fees in this context is so important.

II. EXAGGERATED POLICY CONCERNS CANNOT OVERRIDE THE TEXT OF SECTION 1988.

Lacking textual, historical, or practical support for their bright-line rule, petitioner and its *amici* retreat behind exaggerated policy concerns. Putting aside that their "parade of horribles" can't "surmount the plain language of the statute," *Truck Insurance Exchange* v. *Kaiser Gypsum Co.*, 144 S. Ct. 1414, 1427 (2024) (quoting *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 629 (2009)), their speculative fears are overblown. Indeed, their "hypothetical parade of horribles has yet to take its first step in the real world." *Washington State Dep't of Licensing* v. *Cougar Den, Inc.*, 586 U.S. 347, 376 (2019) (Gorsuch, J., concurring in the judgment).

1. Petitioner and its *amici* first argue that allowing attorneys' fees to parties who successfully obtain a preliminary injunction would perversely incentivize

plaintiffs to prolong litigation to increase potential attorneys' fees, while also disincentivizing government defendants from voluntarily changing their policies. Pet'r's Br. at 49–50; Br. for *Amici Curiae* Local Government Legal Center et al. in Support of Pet'r at 13–14. As demonstrated above, the opposite is true.

There's no evidence that plaintiffs seeking to vindicate their civil rights either have or would inflate litigation expenses in the hope of eventually recovering attorneys' fees at the end of a case. For good reason. As petitioner notes in his merits brief (at 53), the result of litigation "is at best uncertain." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967). And the idea that a plaintiff seeking to vindicate his civil rights would inflate litigation costs—with no guarantee of attorneys' fees—defies reality.

In any event, these concerns conflate the threshold question whether a party is "prevailing," with the secondary question whether the attorneys' fees sought are "reasonable." Congress entitled plaintiffs only to "reasonable" attorneys' fees. 42 U.S.C. § 1988(b); accord *Rivera*, 477 U.S. at 567 (plurality). So any concern that a plaintiff has unnecessarily run up attorneys' fees can be dealt with when the district court determines the reasonableness of those fees.

Moreover, petitioner misconstrues (at 49–50) the incentives here. Like any litigant subject to a preliminary injunction, the government can read the writing on the wall on its likelihood of prevailing and mitigate attorneys' fees by ceasing its unlawful activity. See *Carey*, 435 U.S. at 257 n.11 (the prospect of attorneys' fees can provide a not "inconsequential" inducement

to cease unlawful actions). Far from being incentivized to litigate further, state officials would instead be incentivized to resolve meritorious cases earlier and reduce their liability for attorneys' fees. Conversely, adopting petitioner's rule incentivizes government officials to prolong litigation until the brink of a final judgment.

In fact, the understanding that preliminary injunctions can confer prevailing-party status has been the majority view across the circuits for decades. Yet petitioner identifies no evidence of a government defendant being discouraged from repealing a law out of fear of paying attorneys' fees. See, *e.g.*, *Haley* v. *Pataki*, 106 F.3d 478, 483 (2d Cir. 1997); *People Against Police Violence* v. *City of Pittsburgh*, 520 F.3d 226, 233–234 (3d Cir. 2008); *Dearmore* v. *City of Garland*, 519 F.3d 517, 526 (5th Cir. 2008); *McQueary* v. *Conway*, 614 F.3d 591, 601 (6th Cir. 2010); *Dupuy* v. *Samuels*, 423 F.3d 714, 719–720 (7th Cir. 2005); *Rogers Group, Inc.* v. *City of Fayetteville*, 683 F.3d 903, 910–911 (8th Cir. 2012); *Higher Taste, Inc.* v. *City of Tacoma*, 717 F.3d 712, 717–718 (9th Cir. 2013); *Kansas Judicial Watch* v. *Stout*, 653 F.3d 1230, 1237–1238, 1240–1241 (10th Cir. 2011); *Common Cause/Georgia* v. *Billups*, 554 F.3d 1340, 1355–1356 (11th Cir. 2009); *National Black Police Ass'n* v. *District of Columbia Bd. of Elections & Ethics*, 168 F.3d 525, 528–529 (D.C. Cir. 1999).

If anything, petitioner's apprehension about how government defendants might respond to an award of attorneys' fees turns section 1988 on its head. As this Court has explained, Congress enacted section 1988 because "awarding counsel fees to prevailing plaintiffs * * * is particularly important and necessary if

Federal civil and constitutional rights are to be adequately protected." *Rivera*, 477 U.S. at 577 (plurality) (quoting H.R. Rep. No. 94-1558, at 9). Congress's focus, then, was on protecting private citizens' ability to challenge unlawful government action.

Attorneys' fees are the mechanism by which Congress furthers this purpose and ensures that "*private citizens* have a meaningful opportunity to vindicate their rights protected by the Civil Rights Acts." *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559 (1986) (emphasis added). Allowing plaintiffs to recover attorneys' fees for obtaining relief by means of a preliminary injunction furthers the goals "Congress sought to promote in the fee statute." *Texas State Teachers Ass'n*, 489 U.S. at 792–793.

2. Petitioner and *amici*'s next argument—that allowing a preliminary injunction to confer prevailing-party status would lead to a "second major litigation"—is similarly overblown. Pet'r's Br. at 46–49; Br. for *Amici Curiae* Georgia et al. in Support of Pet'r at 20.

That section 1988 requires district courts to conduct a fact-specific inquiry to determine whether a party is entitled to recover attorneys' fees is nothing new. Courts are routinely tasked with analyzing the facts to decide whether a party is prevailing for purposes of awarding attorneys' fees. For example, the Equal Access to Justice Act allows nongovernment litigants to recover attorneys' fees and expenses if they're prevailing parties in a suit against federal agencies—but only where the government's litigation position isn't "substantially justified." 28 U.S.C.

§ 2412(d)(1)(A); see also 5 U.S.C. § 504(a)(1) (awarding attorneys' fees to a "prevailing party," unless the government's position was "substantially justified" or "special circumstances make an award unjust"). So on top of determining which party is the prevailing party, courts must decide whether the government's arguments were "substantially justified"—another standard requiring a context-specific inquiry that courts must nevertheless conduct. *E.g.*, *Su* v. *Bowers*, 89 F.4th 1169, 1176–1179 (9th Cir. 2024) (extensively reviewing facts to determine whether the government was "substantially justified").

The Equal Access to Justice Act isn't the only statute that requires two layers of inquiry. The United States Code is replete with similar statutes requiring inquiries that extend far beyond simply determining whether a party prevailed. *E.g.*, 35 U.S.C. § 285 (awarding attorneys' fees to the "prevailing party" only in "exceptional cases"); 15 U.S.C. § 1117(a) (same). Yet none of these statutes conflicts with this Court's instruction that the determination of attorneys' fees shouldn't result in a "second major litigation."

Neither does section 1988. In fact, the circuits' now-uniform approach to determining prevailing-party status confirms that petitioner's concerns are overstated. To be sure, that approach requires a case-specific analysis to determine whether a preliminary injunction, in fact, confers prevailing-party status. But that analysis hardly prompts a "second major litigation." *Buckhannon*, 532 U.S. at 609.

Indeed, as this Court has explained, courts need determine only whether a preliminary injunction has

caused a "material alteration of the legal relationship of the parties." *Texas State Teachers Ass'n*, 489 U.S. at 792–793. In many cases, performing this analysis will require no more than reviewing the complaint and the preliminary-injunction ruling. *E.g.*, *Tennessee State Conference of NAACP* v. *Hargett*, 53 F.4th 406, 410 (6th Cir. 2022) (awarding attorneys' fees where the preliminary-injunction ruling provided the relief plaintiffs sought in their complaint and the injunction "was never reversed, dissolved, or even vacated"). That sensible analysis is a far cry from the "highly factbound inquiry" this Court has previously warned against. *Buckhannon*, 532 U.S. at 609.

* * * * *

"Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process." *Rivera*, 477 U.S. at 576 (plurality). Yet petitioner and its *amici* ask this Court to upset the consensus among the circuits and rule that a preliminary injunction can *never* confer prevailing-party status—all so petitioner can avoid reimbursing plaintiffs the money it cost to hold him accountable for his illegal policies. The Court should reject that request. Nothing in section 1988's text, history, or practice supports it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN J. BURSCH
TRAVIS C. BARHAM
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, D.C. 20001

CYNTHIA FLEMING CRAWFORD
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd., Suite 1000
Arlington, VA 22203

ALLYSON N. HO
ELIZABETH A. KIERNAN
Counsel of Record
JAIME R. BARRIOS
ANDREW R. MITCHELL
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, TX 75201
(214) 698-3100
EKiernan@gibsondunn.com

CHRISTINE A. BUDASOFF
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20046

Counsel for Amici Curiae

August 12, 2024