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* FIRST LIBERTY INSTITUTE IN SUPPORT OF RESPONDENTS IN NO. 23-621

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INTEREST OF AMICUS CURIAE[1]

As a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans, First Liberty Institute maintains a strong interest in the outcome of this case. First Liberty provides *pro bono* legal representation to individuals and institutions of all faiths—Catholic, Jewish, Muslim, Native American, Protestant, the Falun Gong, and others.

In the regular course of its practice, First Liberty frequently litigates and settles civil rights cases involving the fee provisions at issue in this matter, including actions under 42 U.S.C. § 1983 and statutory challenges under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq*. ("RFRA"), and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq*. ("RLUIPA").

First Liberty regularly partners with outside counsel from private law firms who provide an excellent quality of legal services on a *pro bono* basis to represent religious liberty plaintiffs who could never afford to defend their First Amendment rights without such help. The fee provisions at issue in this matter have played an important role in helping offset sometimes significant hours expended by both First Liberty and co-counsel. While First Liberty and many

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* curiae or its counsel has made a monetary contribution to the preparation or submission of this brief.

public interest firms like it rely on the gracious donations of supporters, awards of attorney's fees in meritorious cases can provide seed money to help the firm represent the next plaintiffs who need legal assistance and access to the courts. As an amicus, First Liberty maintains an interest both in seeking clarification in the law related to attorneys' fees under 42 U.S.C. § 1988 and in ensuring that people of all faith traditions continue to receive meaningful access to federal courts in civil rights litigation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Section 1988 ensures that private citizens have a meaningful opportunity to vindicate their civil rights by providing prevailing parties an award of attorney's fees. This law is a vital tool for providing private citizens effective access to the judicial process with quality legal representation by allowing them to recover what it costs to vindicate their rights at court.

Unfortunately, the instant petition invites this Court to restrict that access, narrowing Section 1988's scope by adopting new *per se* rules limiting what procedural victories may confer prevailing-party status. These new proposed rules are at odds with this Court's precedent, the purpose of Section 1988, and the statutory text.

Whether a party has prevailed under Section 1988 should remain a case-specific question. Under some circumstances, relief in the form of a preliminary injunction materially alters the legal relationship of the parties to the benefit of the prevailing party in an enduring way that is not later undone by judicial order. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603–04 (2001); *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992); *Sole v. Wyner*, 551 U.S. 74, 86 (2007). While not an exhaustive list, this can be the case with mandatory preliminary injunctions or injunctions that provide the exact relief requested in such a way that renders the lawsuit moot. Such plaintiffs have received enduring judicial relief to be a prevailing party. This Court should reject any *per se* rule that a

preliminary injunction can *never* confer prevailing-party status.

Likewise, a non-prevailing defendant should not be allowed to engage in gamesmanship to avoid paying a Section 1988 fee award. Once a plaintiff achieves the requisite, enduring court-awarded relief to satisfy *Buckhannon*, he should be considered the prevailing party, regardless of the defendant's efforts out of court to moot his claims. That is, a defendant should not be able to fairly claim that he voluntarily amended his behavior, but only at a strategically advantageous time: *after* being subjected to an adverse court injunction. Enduring relief is rendered effectively meaningless if a defendant might simply sidestep its statutory obligations.

ARGUMENT

I. As it is currently enforced, Section 1988 is an important tool for obtaining civil rights relief for aggrieved plaintiffs.

For many victims of constitutional grievances, meaningful access to court is illusory without counsel who are willing to represent their cause *pro bono*. Some may brave the legal system *pro se* without the information, advice, and representation needed to enforce their rights. Some may pour their life savings into costly billing rates to access the courts. Others may simply forego taking any legal action because they find the system too daunting or expensive. While public interest firms like First Liberty offer *pro bono* legal services to enable such plaintiffs an avenue to vindicate their religious liberty rights, such firms

cannot begin to handle the number of meritorious legal requests that they receive each year.

After passing historic civil rights legislation in the 1960s, Congress realized it must craft incentives to encourage the bar to represent civil rights plaintiffs, as the "effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens,' and unless reasonable attorney's fees could be awarded for bringing these actions, Congress found that many legitimate claims would not be redressed." *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) (quoting H.R. Rep. No. 94-1558, at 1 (1976)). Because the public benefits when private plaintiffs are empowered to enforce civil rights laws, Section 1988's attorney's fee provision serves a vital function in incentivizing both paid counsel and pro bono counsel to represent aggrieved civil rights plaintiffs. *See Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 325 (D.C. Cir. 2006) (Kavanaugh, J.) ("The attorney's fees provision was designed … to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." (quotation omitted)). As this Court explained it, "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam).

In recognition that victims of civil rights violations could not access the legal system effectively using the private market, Congress enacted Section 1988, which provides that, in federal civil rights litigation—for

example, in cases under 42 U.S.C. § 1983, RFRA, and RLUIPA—the court of jurisdiction, "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). Congress "considered that the potential recovery of attorneys' fee in civil rights cases would encourage litigants to act as private attorneys general, vindicating the important policies behind our civil rights laws." *Ne. Women's Ctr. v. McMonagle*, 889 F.2d 466, 474 (3d Cir. 1989) (citing *City of Riverside v. Rivera*, 477 U.S. 561, 575–76 (1986)); *see also Perdue v. Kenny A.*, 559 U.S. 542, 559 (2010) ("Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights."); *Del. Valley Citizens' Council*, 478 U.S. at 559 ("Section 1988 was enacted to insure that private citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Acts.").

Whether or not Congress intended Section 1988 to serve as a deterrent against civil rights violations, the practical impact is at least a reverse incentive to government entities to steer clear of violating the civil rights of its citizens. When government entities are found to have violated the civil rights of an American, requiring them to fund the fees of that citizen's attorney provides "the consequent deterrence of civil rights violations presumably fostered by these actions [which] are of greater weight than the hypothetical reluctance of defendants to pursue potentially meritorious objections (to fee awards) for fear of having to pay additional attorney's fees in the event their arguments prove unsuccessful." *Bond v. Stanton*, 630 F.2d 1231, 1236 (7th Cir. 1980).

Congress anticipated that Section 1988 would facilitate the vindication of these critical constitutional and civil rights by incentivizing attorneys to take cases for clients who would otherwise be unable to afford legal representation. *See Kenny A.*, 559 U.S. at 550 ("Congress enacted 42 U.S.C. § 1988 in order to ensure that federal rights are adequately enforced."); *Piggie Park*, 390 U.S. at 402 (Congress "enacted the provision for counsel fees … to encourage individuals injured by [] discrimination to seek judicial relief"); H.R. Rep. No. 94-1558, at 1 (1976) ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to courts. … [Section 1988] is designed to give such persons effective access to the judicial process."); S. Rep. No. 94-1011, at 2 (1976) ("If private citizens are to be able to assert their civil rights, and if those who violate the Nation's laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."). That such paid-in-public attorney's fees cannot be shielded from the citizenry—and are often the subject of media intrigue, retained as public records, the subject of intense public debate, and even the political motivation for electoral change—serves to warn future public servants of their duty to carefully steward the limited power vested in their governance. Any restriction to such practical accountability would lessen the impact of Section 1988—which remains as important a tool today as it was at its earlier inception.

II. Under this Court's precedent, where a court orders all enduring relief requested by a plaintiff, no later, out-of-court actions by a defendant should negate plaintiff's prevailing-party status.

A. *Buckhannon* and *Sole* have already provided sufficient guidance to evaluate prevailing-party status.

This Court has already provided sufficient guidance interpreting Section 1988 to answer the questions presented in this case. As a legal term of art, "prevailing party" maintains readily discernible characteristics: (1) the prevailing party "has been awarded some relief by the court" that creates a "material alteration of the legal relationship of the parties," *Buckhannon*, 532 U.S. at 603–04; (2) the relief "modif[ied] the defendant's behavior in a way that directly benefits the plaintiff," *Farrar*, 506 U.S. at 111–12; and (3) the relief is "enduring" in nature, and is not "reversed, dissolved, or otherwise undone" by later judicial acts, *Sole*, 551 U.S. at 86.

For a plaintiff to "prevail," he need not achieve his "central goal"; rather, if "the plaintiff has succeeded on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit, the plaintiff has crossed the threshold to a fee award of some kind." *Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791–92 (1989) (cleaned up). Because "[t]his is a generous formulation" that only brings a plaintiff "across the statutory threshold" to eligibility for a fee award, *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), this Court has found various forms of partial relief to be sufficient to establish

prevailing-party status under Section 1988. *See, e.g.*, *Lefemine v. Wideman*, 568 U.S. 1, 4 (2012) (permanent injunction); *Farrar*, 506 U.S. at 112 (nominal damages); *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (declaratory judgment); *Maher v. Gagne*, 448 U.S. 122, 130 (1980) (settlement enforced via consent decree).

On the other end of the spectrum, this Court has made clear that where a plaintiff "obtained no relief" on the merits of his claim, he cannot be a "prevailing party" under Section 1988. *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). As Justice Scalia reasoned in *Hewitt*, where no damages were awarded, "no injunction or declaratory judgment" entered in his favor, and no "relief without the benefit of a formal judgment—for example, through a consent decree or settlement," "respect for ordinary language requires" finding that the plaintiff had not prevailed. *Id.*

Allowing for attorney's fees upon a sufficient degree of success but before final judgment or a damages award is consistent with Congressional intent. "In appropriate circumstances, counsel fees under [Section 1988] may be awarded pendente lite," that is, during the pendency of the litigation. S. Rep. No. 94-1011, at 5 (1976). "Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues," and importantly, "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief*." *Id.*; *see also Buckhannon*, 532 U.S. at 603 (explaining that "we reviewed the legislative history of § 1988 and found

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") (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam)).

Notwithstanding Section 1988's purpose and clear outer limits for the prevailing party test, Petitioner now seeks to limit Section 1988's reach to prevent otherwise availing civil rights plaintiffs from the legislation's benefits.

B. A plaintiff achieves prevailing-party status when he obtains preliminary injunctive relief that is not "reversed, dissolved, or otherwise undone."

Petitioner first asks this Court to categorically bar civil rights plaintiffs who win preliminary injunctive relief but do not secure a final judgment from recovering fees. He argues for a hardline rule that a preliminary injunction cannot provide a conclusive ruling on the merits or final judgment to confer prevailing-party status. Pet. Br. 23. For several reasons, the Court should reject this interpretation of Section 1988 and clarify that winning a preliminary injunction can confer prevailing-party status when the order provides sufficiently concrete change in the legal relationship of the parties and is not "reversed, dissolved, or otherwise undone." *See Sole*, 551 U.S. at 86. While not every preliminary injunction will satisfy this standard, some such orders will. In some circumstances, preliminary injunctive relief suffices to provide "actual relief" "by modifying the defendant's behavior in a way that directly benefits the plaintiff," *Farrar*, 506 U.S. at 111–12, in a manner that

"material[ly] alter[s] the legal relationship of the parties." *Buckhannon*, 532 U.S. at 603–04 (2001). Upon an award of some preliminary injunctions (albeit not all of them), the plaintiff irreversibly gains the benefit of the relief sought, and later judgment would not change that the plaintiff substantially prevailed on a central issue.

As an initial matter, it bears reminding that plaintiffs face a significant uphill climb to obtain preliminary injunctive relief at all. It is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief" and one not easily given. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

This is particularly true in civil rights litigation where issuing a preliminary injunction would alter, rather than preserve, the status quo ante. For instance, when a plaintiff seeks a *mandatory* preliminary injunction, especially against a governmental body, federal courts across the country often apply an additional hurdle or heightened scrutiny before applying this disfavored remedy. *See, e.g.*, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 319 (D.C. Cir. 2018); *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011); *Pierce v. N.C. St. Bd. of Elections*, 97 F.4th 194, 209 (4th Cir. 2024); *Doe v. Snyder*, 28 F.4th 103, 111–12 (9th Cir. 2022); *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1154–55 (10th Cir. 2001). A mandatory preliminary injunction can render concrete, irreversible, judicially sanctioned relief on the merits. Under such circumstances, the "court-ordered change in the legal relationship"

between the parties is "enduring" rather than "ephemeral." *Sole*, 551 U.S. at 86. This type of court-ordered relief should easily satisfy *Buckhannon*'s test, but Petitioners would exclude such relief from serving as the foundation for attorney's fees.

Likewise, a plaintiff should be able to establish prevailing-party status where a preliminary injunction provides him with exactly the merits-based relief he needed at the time he needed it, and as a result, the "court-ordered success and the passage of time" moot the case. *McQueary v. Conway*, 614 F.3d 591, 599 (6th Cir. 2010); *see also People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 233–34 (3d Cir. 2008) (awarding attorney's fees to prevailing party where the "ultimate mooting" resulted "from the results of the legal process"); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945–50 (D.C. Cir. 2005) (same); *Watson v. County of Riverside*, 300 F.3d 1092, 1095–96 (9th Cir. 2002), *cert. denied*, 538 U.S. 923 (2003) (same); *Dupuy v. Samuels*, 423 F.3d 714, 718–25 (7th Cir. 2005). Where the "party's claim for a permanent injunction is rendered moot by the impact of the preliminary injunction," the "preliminary injunction functions much like the grant of an irreversible partial summary judgment on the merits," and should suffice to establish prevailing-party status. *See N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006).

As these examples show, preliminary injunctions of various forms can, and should, satisfy *Buckhannon*. Prevailing-party status may be appropriate in civil rights cases that successfully obtain injunctive relief, pausing a newly enacted statute from going into effect.

To take a hypothetical, assume the status quo in a municipal jurisdiction has been to allow a certain type of free speech, but the municipality enacts a new policy facially restricting that civil right. A private plaintiff sues and obtains a preliminary injunction to maintain the status quo and exercises his free speech rights. Under this scenario, the plaintiff obtained the relief sought, the legal relationship between the parties changed by disallowing the government to enact its policy, and no later ruling would undo the plaintiff's speech made in reliance on the preliminary injunction. No meaningful distinction justifies why this plaintiff would not be a prevailing party simply because he challenged a new policy as it went into effect, rather than wait for it to become established, allow the law to violate his civil rights for a time, and then file the same challenge.

In these circumstances, the preliminary injunctive relief did far more than give an initial prediction of the merits, but rather, rendered concrete, judicially sanctioned relief. The award of a preliminary injunction is, of course, immediately appealable and subject to judicial enforcement. 28 U.S.C. § 1291(a)(1). Under such circumstances, there is no risk that the preliminary relief would be later reversed or dissolved by a superseding judicial decision, and thus, no likelihood that the plaintiff would lose its prevailing-party status under Section 1988. This should carry all of the "judicial imprimatur" necessary to satisfy *Buckhannon* and be the type of enduring nature required under *Sole*. After obtaining such concrete relief from a court, surely a plaintiff has already prevailed for purposes of Section 1988.

In such cases, a "preliminary" injunction provides ultimate relief, regardless of nomenclature or label. While plaintiffs may ask a court to convert his motion for preliminary injunction to a motion for final judgment, *see* Fed. R. Civ. P. 65(a)(2), this step has never been mandatory, nor do courts have to grant Rule 65 requests. *See McQueary*, 614 F.3d at 599–600. "[N]othing about the nature of the prevailing-party inquiry suggests that it should turn on whether a district court happens to embrace this administrative streamlining device." *Id.* at 600. Nothing in the text of Section 1988 suggests that adding perfunctory administrative or procedural hurdles is required, nor would adding such new requirements serve the law's purpose.

C. A plaintiff also achieves prevailing-party status when he wins preliminary relief enjoining a statute or practice, but such policy is abandoned or repealed before final judgment.

Under *Sole*, this Court has made clear that "[p]revailing party status … does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone *by the final decision* in the same case." 551 U.S. at 83 (emphasis added). Petitioner now seeks to extend that holding to block attorney's fees if the governmental defendant moots the plaintiff's victory through actions outside court. Governmental defendants should not be able to violate a civil right and then deprive civil rights plaintiffs of the benefit of federal law or their prevailing-party status through extrajudicial conduct—conduct typically motivated by looming civil

rights litigation. They cannot fairly claim to have voluntarily amended their behavior *after* a court enjoined their offending policies or practices. Rather, this Court should clarify that a party's efforts to game the system out of court cannot allow them to skirt obligations to pay fees otherwise awardable under Section 1988. Once a plaintiff earns "some [enduring] relief" by court order, he steps outside *Buckhannon*'s domain, and later actions outside of court should not change the calculus. *See Roberts v. Neace*, 65 F.4th 280, 285 (6th Cir. 2023) (citing *Buckhannon*, 532 U.S. at 605); *see also Sole*, 551 U.S. at 86.

Strategically timed mooting is an unfortunate but common call from the government defendant playbook. Indeed, in courts across the country, state, local, and municipal governments have regularly repealed or abandoned unconstitutional or illegal statutes and practices in the face of an unfavorable preliminary injunction. *See, e.g.*, *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009) (the state repealed the enjoined statute and then opposed counsel fees on that basis); *Roberts*, 65 F.4th at 283, 285; *Dearmore v. City of Garland*, 519 F.3d 517, 523 (5th Cir. 2008) (same); *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 717–18 (9th Cir. 2013) (similar).

For example, during the COVID-19 pandemic, some Christians celebrated Easter at Maryville Baptist Church in Kentucky. But that placed them at odds with orders issued by the state governor to curtail the spread of COVID-19. *Roberts*, 65 F.4th at 283. The plaintiffs won preliminary injunctions, enjoining any prosecutions stemming from attending

that Easter service. While the preliminary injunction was still in place, the governor issued new orders allowing faith-based gatherings and shortly after, the State legislature curtailed his authority to issue future COVID-19 orders. Although the plaintiffs had received all the requested benefit of the lawsuit through the injunction, the defendants claimed the suit was now moot by virtual of their own conduct outside of court, and thus the plaintiffs could not be prevailing parties for purposes of fees. *Id.*

Consider a similar situation in *New York State Rifle & Pistol Association, Inc. v. City of New York*, 590 U.S. 336, 360–61 (2020) (Alito, J., dissenting, joined by Gorsuch, J. and Thomas, J.). The plaintiffs there brought a 1983 constitutional challenge against a city ordinance that the City of New York "went to great lengths to defend" through five years of litigation. *Id.* Late in the litigation, after a petition for certiorari was granted but before this Court could make a decision, the City "ultimately abandoned" its challenged ordinance in an effort to moot the case, "now admit[ting the ordinance] was not needed for public safety." *Id.* This effort "to impose a unilateral settlement" would have "deprived petitioners of attorney's fees." *Id.* at 361.

"*Buckhannon* does not stand for the proposition that a defendant should be allowed to moot an action to avoid the payment of the plaintiff's attorney's fees when a district court grants a preliminary injunction based upon an unambiguous indication of probable success on the merits." *Dearmore*, 519 F.3d at 523. To adopt Petitioner's proposed rules would incentivize gamesmanship to the disadvantage of civil rights

plaintiffs. A government defendant could fight tooth and nail for its doomed policy, only to change course at the last minute to moot the challenge. Even if—technically—the plaintiffs in such situations gain the benefit of the government's new law change, such artful dodging to avoid paying the fees that would otherwise be due undermines the purpose of Section 1988: to "enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights," *see Baker & Hostetler LLP*, 473 F.3d at 325 (Kavanaugh, J.), and to put "aggrieved parties … in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Piggie Park*, 390 U.S. at 402.

Petitioner argues that finding prevailing-party status in such a circumstance simply smuggles in a catalyst theory. Not so. In these cases, none of the inquiry has been about whether the plaintiff's lawsuit was a primary reason or otherwise contributing factor to the government changing its conduct. These cases have not asked the courts to determine to what degree a plaintiff helped create a change in law or policy. Rather, these cases stand for a different principle entirely: "Once a plaintiff earns 'some relief' … he steps outside *Buckhannon*'s domain," *Roberts*, 65 F.4th at 285, and thus, the only question is whether "[a]n immediately enforceable preliminary injunction compelled [the government] to" amend its behavior," *McQueary*, 614 F.3d at 599. The question is not about whether a plaintiff's action in bringing the lawsuit was an impetus in changing course, but rather, whether the nature of the underlying preliminary injunction materially altered the legal relationship of the parties in an enduring way. What the non-

prevailing party does in response outside or on top of the scope of the injunction—such as taking additional steps to rescind or abandon the statute or policy at issue—does not erase the preliminary injunction from the books. Nor should it mean that relief granted through the injunction itself could bar prevailing-party status. Instead, in these cases, the plaintiffs did not "leave[] the courthouse emptyhanded," *Sole*, 551 U.S. at 78, but rather enjoyed enduring relief from a merits-based preliminary injunction that remained in effect, unaltered.

III. Interpreting "prevailing party" to impose a new, higher threshold than stated in *Buckhannon* and *Sole* would harm plaintiffs seeking to vindicate their constitutional and statutory rights.

Although *Buckhannon* and *Sole* adequately lay out the contours of what concrete measures of success are necessary to become a prevailing party, Petitioner now seeks to have this court impose a new, higher threshold. In his view, no plaintiff who has otherwise satisfied *Buckhannon* and *Sole* but fails to check the right procedural boxes should receive the counsel fees anticipated in Section 1988. His proposed rule would make civil rights plaintiffs go through rigidly prescribed procedural steps in every litigation, and if those checkboxes are procedurally unavailable because of the plaintiff's own earlier success in the litigation, then the plaintiff is out of luck for fees. Petitioners' preferred rule would thus dramatically narrow the scope of Section 1988, limit the number of meritorious civil rights plaintiffs who could receive attorney's fees, and ultimately undermine the quick

resolution of such cases. Petitioner's proposed rule would undercut the availability of attorney's fees, which could significantly impair the ability of individuals whose constitutional rights have been harmed to vindicate those fundamental rights.

Petitioner argues that imposing a heightened standard for a plaintiff to become a "prevailing party" is necessary to protect the "public fisc," prevent taxpayer waste, and encourage quicker resolution of civil rights litigation. Pet. Br. 49; Pet. Cert. Br. 24. But experience does not bear this out. Rather, allowing for fees at a preliminary injunction stage (when appropriate, as laid out earlier) may stop an otherwise intransigent defendant from further entrenchment. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc.*, 590 U.S. at 360–61 (Alito, J. dissenting, joined by Gorsuch, J. and Thomas, J.) ("Relief would be particularly appropriate here because the City's litigation strategy caused petitioners to incur what are surely very substantial attorney's fees in challenging the constitutionality of a City ordinance that the City went to great lengths to defend."); *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 205 (2016) (Kagan, J.) (unanimous opinion of the Court) (explaining reasonableness test for fee awards "encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation."); *People Against Police Violence*, 520 F.3d at 236 ("We see no reason why plaintiffs should be denied fees merely because they participated in a more efficient, cooperative process; a contrary result would force future litigants in plaintiffs' position to prolong litigation unnecessarily to assure entitlement to fees.").

Indeed, the earlier in litigation that a party prevails for purposes of Section 1988 fees, the lower those fees will necessarily be, because fewer attorney hours will have been exerted. Conversely, prolonged, scorched-earth litigation will almost certainly result in many more hours worked and higher demanded fees. So, it stands to reason, fees awarded upon relief through a qualifying preliminary injunction will likely be less—and thus less costly to the taxpayer—compared to fees awarded upon the entry of final judgment after discovery, motions practice, and a possible trial. In either circumstance, a governmental defendant is only on the hook if it loses on the merits. But a rule that incentivizes earlier resolution would ultimately benefit both the prevailing plaintiff, the losing governmental entity, and its taxpayer base. The Petitioner's proposed rule would have the opposite effect by requiring civil rights plaintiffs to push litigation longer to final judgment, unnecessarily adding attorney hours, and inevitably precluding some plaintiffs from fee awards whose cases are mooted only by virtue of their early success.

Petitioner worries that without a *per se* rule against awarding fees in circumstances like those presented here, governmental defendants will face exorbitant fee awards. But the statutory text and this Court's precedent make clear that adequate restraints prevent windfall awards or unjust counsel fees.

Section 1988 allows only "reasonable fees," 42 U.S.C. § 1988(b), to be awarded at the court's discretion. Once a civil rights plaintiff crosses the statutory threshold to establish prevailing-party status, he must still demonstrate that his fees are

"reasonable." *Hensley*, 461 U.S. at 433. Courts may choose not to award all fees expended, particularly in circumstances where a plaintiff "achieved only partial or limited success." *Id.* at 436. When a prevailing party only achieves partial success, courts "should exercise their equitable discretion" to adjust the fee award "to account for the limited success of the plaintiff," rather than denying a fee award altogether. *Tex. State Tchrs. Ass'n*, 489 U.S. at 789–90.

Nothing at issue in this matter would upend the guidance that protects governmental defendants in civil rights litigation from excessive fee awards.

CONCLUSION

For these reasons, the Court should affirm the Fourth Circuit's decision.

Respectfully submitted,

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