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 FOR *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae New Jersey State Bar Association (NJSBA) is an avid advocate for members of the New Jersey bar. As a voluntary membership organization, the NJSBA serves, protects, fosters and promotes the personal and professional interests of over 16,000 members, and functions as the voice of New Jersey attorneys to other organizations, governmental entities and the public regarding the law, legal profession and legal system. The promotion of access to the justice system is a critical element of the NJSBA's Mission Statement.

The interest of the NJSBA in this matter is in furtherance of its strong commitment to ensuring the courthouse doors remain open to all as a means to resolve legal grievances. This same interest is at the heart of the public policy supporting fee shifting statutes. Such statutes are designed to ensure that litigants, who would otherwise not be able to bring their cause of action, can file their grievances with the court as a means of arriving at a resolution. The issue in this case will impact access to the courts in fee shifting cases by addressing whether and when statutorily-permitted attorney's fees may be considered when a case is rendered moot because of a lasting policy or other sustaining change made by a defendant before a final judicial determination.

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[1] *Amicus curiae* affirms that no counsel for any party authored this brief, in whole or in part. No person or entity other than *amicus curiae* contributed monetarily to its preparation or submission.

It is equally critical that there be clarity in the law so the NJSBA's member attorneys, whether prosecuting or defending claims, can adequately advise and provide effective representation to their clients. Here, the Circuits are consistent in their interpretation and parties have relied on the existing caselaw addressing when a prevailing party status exists in a preliminary injunction setting for an award of counsel fees. The case at issue does not warrant a departure from that well-established precedent.

SUMMARY OF ARGUMENT

For two reasons, this Court will have no difficulty in concluding that the Fourth Circuit's "prevailing party" determination should be affirmed.

First, that result is a matter of common sense and simple fairness. By virtue of a crudely drafted Virginia statute, Respondents' driver's licenses were suspended, without notice or hearing, automatically upon their failure to timely pay fines for motor vehicle violations, fines that they could not afford to pay. Respondents sued and sought injunctive relief. The District Court judge held an evidentiary hearing, and in a detailed and well-reasoned opinion concluded that Respondents had demonstrated a substantial likelihood of succeeding on the merits of their claim that the statute failed to provide procedural due process because it made no provision for either notice or hearing prior to the license suspension. In fact, the court found that the Virginia Department of Motor Vehicles automatically suspends the licenses of drivers who fail to timely pay court fines and costs upon receipt of a computer notification from the court system that a payment is delinquent. The court granted a preliminary injunction, enjoining

enforcement of the statute, reinstating Respondents' driver's licenses and prohibiting collection of the $145 reinstatement fee that the statute authorized. *See Stinnie v. Holcomb*, 355 F. Supp. 3d 514, 527-33 (W.D. Va. 2018).

The Commissioner of the Department of Motor Vehicles (the "Commissioner" or "Petitioner") did not appeal the preliminary injunction. After discovery, and five weeks before trial, the Commissioner sought a stay of the trial, noting that the Legislature had enacted Budget Amendment No. 33, which eliminated the suspension of driver's licenses for failure to pay court fees and costs through July 1, 2020, but did not repeal the underlying statute. The Commissioner represented that the Legislature was likely to repeal the statute during the next legislative session. *See Stinnie v. Holcomb*, 396 F. Supp. 3d 653, 656 (W.D. Va. 2019).

Over Respondents' "strenuous objections," *Stinnie v. Holcomb*, 77 F.4th 200, 204 (4th Cir. 2023), the court stayed the trial pending the next session of the Legislature. At that session, the Legislature repealed the offending statute from the Virginia Code, effective as of July 1, 2020. Based on the legislative repeal of the license suspension statute, in May 2020 the parties stipulated that the litigation should be dismissed as moot. Accordingly, the preliminary injunction had provided continuing relief to Respondents from December 2018 until May 2020.

Undeniably, Respondents prevailed on their claim. The preliminary injunction reinstated their licenses without a penalty and enjoined enforcement of the statute, based on their demonstrated likelihood of success, until the case was mooted eighteen months

after the preliminary injunction was entered. But for the stay of trial sought and obtained by the Commissioner, and the subsequent repeal of the statute, Respondents undoubtedly would have succeeded at trial and secured a Final Judgment. In that context, the lack of a Final Judgment cannot reasonably or justifiably preclude Respondents from designation as a prevailing party.

Second, this Court's decisions on the criteria for prevailing party designation have been clear, consistent and relatively uncontroversial. As a result, the Circuit Courts of Appeal decisions, contrary to Petitioner's claim of confusion and uncertainty, have been remarkably uniform and harmonious. In fact, prior to *Stinnie*, all of the Circuit Courts of Appeal, except for the Fourth Circuit, had agreed—even without a ruling from this Court—that under appropriate circumstances a preliminary injunction based on a finding of likelihood of success on the merits could support a prevailing party finding. In *Stinnie*, by virtue of the *en banc* decision reversing the three-judge panel, the Fourth Circuit has joined all of the other Circuits in adopting that holding. The uniformity among the Circuits on this question is not coincidental. It results directly from this Court's consistent precedents that require a judicial decision that alters the parties' relationship in a manner directly benefiting the plaintiff to serve as the *sine qua non* of a prevailing party finding, *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992), but that have pragmatically declined to require a final judgment on the merits as a predicate for that finding.

This Court should credit its own jurisprudence as the source of the Courts of Appeals' unanimity on the issue posed by this matter, and affirm the sound

and eminently sensible disposition by the Fourth Circuit.

ARGUMENT

I. CONSISTENT AND CLEAR SUPREME COURT PRECEDENT HAS LED TO UNANIMOUS AGREEMENT AMONG THE CIRCUITS THAT A MERITS-BASED PRELIMINARY INJUNCTION—NOT AN INJUNCTION SIMPLY INTENDED TO PRESERVE THE STATUS QUO, BUT AN INJUNCTION THAT MATERIALLY ALTERS THE RELATIONSHIP BETWEEN THE PARTIES—CAN CONSTITUTE THE BASIS FOR A "PREVAILING PARTY" RECOGNITION PURSUANT TO THE FEDERAL FEE-SHIFTING STATUTES.

Senate Report (Judiciary Committee) No. 94-1011, issued in support of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, the statute at issue in *Stinnie*, explains clearly the congressional purpose in enacting fee-shifting statutes in the civil rights field. The Statement included in the Senate Report succinctly and clearly explained the statutory purpose:

> The purpose and effect of S. 2278 are simple—it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866.
>
> . . .

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental 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.
>
> . . .
>
> When a plaintiff brings an action under (Title II) he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If 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. Congress therefore enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief under Title II.
>
> . . .
>
> Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. Without counsel fees the grant

> of Federal jurisdiction is but an empty gesture.

S.Rep. No. 94-1011, pp. 2-3 (1976) (citations omitted).

The Senate Judiciary Committee recognized that fee shifting would be an important incentive for attorneys to represent individuals unable to otherwise afford to bring civil rights cases. Had they anticipated the legal issue presented in this case, they may have more specifically addressed the criteria needed to achieve "prevailing party" status to account for situations such as the one presented here.

A. The Fourth Circuit Held that a Preliminary Injunction Based on a Likelihood of Success on the Merits that Fundamentally Alters the Parties' Relationship is a Sufficient Basis for a Prevailing Party Determination when the Case is Mooted by the Defendant's Capitulation before Final Judgment. That Holding is Thoroughly Consistent with this Court's Prior Decisions, and the Unanimous Agreement of the Circuits with that Holding Reflects the Clarity and Soundness of this Court's Prevailing Party Jurisprudence.

Before reviewing this Court's decisions on the essence of its "prevailing party" holdings, the District Court's ruling on Respondents' preliminary injunction application provides the necessary context for that review.

Respondents, indigent Virginia residents whose driver's licenses were automatically suspended for failure to pay motor vehicle violation fines they could not afford, sued to enjoin enforcement of Va.

Code § 46.2-395, the statute authorizing those suspensions. Respondents moved for a preliminary injunction seeking to (1) enjoin the Commissioner from enforcing § 46.2-395 against Respondents; (2) remove the current suspensions of their driver's licenses; and (3) enjoin the Commissioner from charging a fee to reinstate their licenses. *Stinnie*, 355 F. Supp. 3d at 519-20.

Following briefing and an evidentiary hearing that included expert testimony, the District Court concluded that Va. Code § 46.2-395 did not honor the notice and hearing demands of procedural due process:

> The evidence before the Court suggests that Plaintiffs may succeed on showing notice is deficient in this case. However, the Court need not reach a definitive conclusion on this issue because Plaintiffs have made a clear showing that they are likely to establish that they are not provided an opportunity to be heard.
>
> . . .
>
> Even if the notice provided here was more than a mere gesture, Plaintiffs are likely to show § 46.2-395 does not provide *any* hearing, much less one that satisfies due process.

Id. at 529.

The District Court also determined that the other factors enumerated in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008)—"irreparable harm, the balance of equities, and the public interest"—all

were weighted in Respondents' favor. *Stinnie*, 355 F. Supp. 3d at 532. The District Court granted the preliminary injunction and ordered that: (1) the Commissioner was "preliminarily enjoined from enforcing . . . § 46.2-395 against Plaintiffs unless or until the Commissioner or another entity provide[d] a hearing regarding license suspension and provide[d] adequate notice thereof"; (2) the Commissioner had to "remove any current suspensions of the Plaintiffs' driver's licenses imposed under . . . § 46.2-395"; and (3) the Commissioner was "enjoined from charging a fee to reinstate Plaintiffs' driver's licenses. . . ." J.A.381.

The Commissioner did not appeal the preliminary injunction. Five weeks before trial, at the Commissioner's request, and over Respondents' objections, the trial was adjourned pending the 2020 session of Virginia's General Assembly, in the course of which Va. Code § 46.2-395 was repealed, mooting the litigation. *See Stinnie*, 396 F. Supp. 3d at 661.

This Court's jurisprudence on the requirements for a "prevailing party" determination that supports a counsel fee award under a fee shifting statute has been clear, consistent and relatively easy to apply. One formulation, focused on the need for success in the litigation, stated that "plaintiffs may be considered 'prevailing parties' for attorney's fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

A consistent but more precise version of that principle is found in *Buckhannon Bd. and Care Home,*

Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001). Plaintiff Buckhannon Board and Care Home, Inc. (Buckhannon) operated assisted living facilities for its residents, some of whom were not capable of "self-preservation" under a West Virginia statute that required such residents to be capable of moving themselves "from situations involving imminent danger, such as fire." *Id.* at 600 (quoting W. Va. Code §§ 16-5H-1, 16-5H-2 1407 (1998)). After it received cease-and-desist orders requiring closure of its residential facilities within thirty days, Buckhannon sued the State, two of its agencies and various individuals, alleging that the "self-preservation" requirement violated the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 *et seq*., and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq*. *Id.* at 600-01.

The respondents stayed enforcement of the cease-and-desist orders pending discovery and trial. *Id.* at 601. While the case was pending, the West Virginia Legislature passed laws that repealed the "self-preservation" requirement, and the respondents moved to dismiss the case as moot. *Id.* The District Court granted the motion. *Id.*

Buckhannon requested counsel fees as the "prevailing party." *Id.* The District Court denied fees, and the Fourth Circuit affirmed, rejecting the "catalyst theory," which holds that if the lawsuit induced a voluntary change in the defendant's conduct that causes the plaintiff to achieve its desired result without judicial intervention, the plaintiff nevertheless is entitled to claim "prevailing party" status. *Id.* at 601-02. This Court affirmed in a 5-to-4 decision.

At the heart of this Court's rationale for rejecting the catalyst theory was the recognition that that theory allows a counsel fee award "where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. Citing the Court's prior precedents, the Court held that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id.* at 604 (quoting *Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)). Emphasizing that judicial intervention is an indispensable condition of prevailing party status, the Court concluded that "[a] defendant'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. Our precedents counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties." *Id.* at 605.

This Court's other precedents concerning prevailing party status are thoroughly consistent with *Buckhannon*'s mandate that any material alteration in the legal relationship of the parties must be judicially sanctioned, and that the required judicial intervention is indispensable to a prevailing party determination.

Hewitt v. Helms, 482 U.S. 755 (1987), is a procedurally complex case involving an inmate, Aaron Helms, who after a prison riot was placed in restrictive custody pending investigation of his role in the riot. A hearing committee that relied solely on an officer's report based on hearsay testimony of an

undisclosed informant convicted Helms of misconduct during the riot and sentenced him to six months restrictive confinement. *Id.* at 757. Helms sued, alleging that both the lack of a prompt hearing on his misconduct charges prior to his being placed in restrictive custody, and his conviction based on uncorroborated hearsay testimony, violated his due process rights. *Id.* The prison officials asserted an immunity defense and contested the constitutional claims. *Id.* Helms was paroled prior to the District Court's decision. *Id.*

The District Court rejected Helms' constitutional claims without resolving the immunity issue. *Id.* at 757-58. The Third Circuit reversed, concluding that his placement in restrictive custody without a hearing, and his conviction of misconduct based only on the hearsay testimony of an unidentified informant, violated his due process rights. *Id.* at 758. The Court of Appeals directed the District Court to enter summary judgment for Helms on the misconduct conviction unless the defendants established their immunity defense. *Id.*

Prior to the remand proceedings, this Court granted certiorari only on whether Helms' placement in restrictive custody violated due process, and reversed the Third Circuit on that issue, holding that the process afforded Helms by the prison officials was sufficient. *Id.* On remand to the Third Circuit, that court reiterated its mandate that the District Court enter summary judgment for Helms on the misconduct claim unless the prison officials prevailed on their sovereign immunity defense. *Id.*

On remand, the District Court found in favor of the prison officials on their immunity defense, and the

Third Circuit affirmed. *Id.* at 758-59. While that appeal was pending, the Pennsylvania Bureau of Corrections revised its regulations and adopted previously non-existent procedures for use of confidential source information in inmate disciplinary proceedings. *Id.* at 759.

Helms sought counsel fees, which were denied by the District Court. *Id.* The Third Circuit reversed, noting that its prior holding that Helms' constitutional rights were violated by the defendants' reliance on the hearsay testimony of an unidentified informant was a sufficient judicial intervention to justify treating Helms as a prevailing party. *Id.*

This Court reversed in a split decision, holding that because Helms obtained no relief on the merits of his claim due to judicial intervention, he could not be regarded as a prevailing party. *Id.* at 759-60. The Court determined that because the Third Circuit's due process ruling was overridden by the District Court's immunity determination, the Third Circuit's decision had provided no judicial relief to Helms. The Court observed that "[t]he most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made." *Id.* at 760.

In *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782 (1989), teachers unions sued the defendant school district challenging the constitutionality of its policy limiting communications with teachers and union representatives during school hours. The so-called "central issue" in the case was the constitutionality of the school board's policy to limit the unions' access to

teachers and school facilities during school hours. *Id.* at 785. Although the District Court denied relief on the "central issue" and most of the unions' other claims, the Fifth Circuit reversed in part, granting the unions summary judgment on their claims that the school district's prohibition of teacher-to-teacher discussions of unions during the school day, and of teachers' use of internal mail and billboards to discuss unions, was unconstitutional. *Id.* at 786-87. After this Court summarily affirmed, the unions sought counsel fees. *Id.* at 787. The District Court denied fees, noting that although the unions had been successful on some of their claims, they had not prevailed on the "central issue" and therefore were not prevailing parties. *Id.* A divided panel of the Fifth Circuit affirmed. *Id.*

This Court reversed, rejecting the "central issue" test and holding that plaintiffs may qualify as "prevailing parties" provided that they "succeed on any significant issue in litigation which achieves some of the benefit [they] sought in bringing the suit." *Id.* at 789 (quoting *Hensley*, 461 U.S. at 433).

In *Farrar v. Hobby*, 506 U.S. 103 (1992), Plaintiffs Joseph and Dale Farrar, who operated a Texas school for delinquent and disabled teenagers, sued various public officials who were instrumental in efforts leading to the school's closure after a student's death allegedly caused by inadequate medical care. *Id.* at 105-06. The suit alleged that the school's closure constituted a deprivation of property without due process and sought damages of $17 million. *Id.* at 106. The jury found that one of the officials charged, acting under the color of State law, had deprived Joseph Farrar of his civil rights, but that that action was not a proximate cause of any damages. *Id.* at 106. Accordingly, the jury awarded no damages to the

plaintiffs. *Id.* at 106-07. The Fifth Circuit reversed in part, concluding that because the jury found that Joseph Farrar had been deprived of a civil right by one of the defendants, the court should enter judgment in the plaintiffs' favor for nominal damages. *Id.* at 107.

The plaintiffs sought counsel fees, and the District Court awarded $280,000 in fees against the defendant who had violated plaintiff Joseph Farrar's civil rights. *Id.* A divided panel of the Fifth Circuit reversed, holding that the plaintiffs were not prevailing parties. *Id.* at 107-08.

This Court reversed in part, holding that even an award of "nominal damages" was sufficient to constitute the plaintiffs "prevailing parties" for purposes of a fee award, since the award altered the legal relationship between the parties by forcing one of the defendants "to pay an amount of money he otherwise would not pay." *Id.* at 112-13. However, the Court explained that "'the degree of the plaintiff's overall success goes to the reasonableness' of a fee award under *Hensley v. Eckerhart*," *id.* at 114 (quoting *Tex. State Tchrs. Ass'n*, 489 U.S. at 793), which is "'the most critical factor' in determining the reasonableness of a fee award," *id.* (quoting *Hensley*, 461 U.S. at 436). Accordingly, the Court concluded that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, . . . the only reasonable fee is usually no fee at all." *Id.* at 115 (internal citation omitted). The Court therefore affirmed the Fifth Circuit's judgment reversing the District Court's counsel fee award. *Id.* at 116.

In *Lefemine v. Wideman*, 568 U.S. 1 (2012), a most significant and more recent opinion, this Court

unanimously reversed a Fourth Circuit decision denying "prevailing party" recognition and counsel fees to a plaintiff who had secured a permanent injunction in his favor from the District Court. In 2005, Plaintiff Steven Lefemine and members of Columbia Christians for Life held a demonstration at a busy intersection in Greenwood County, South Carolina, in which they displayed pictures of aborted fetuses to protest the availability of abortions. *Id.* at 2. A Greenwood County Police Officer threatened Lefemine with prosecution for breach of the peace, causing the demonstrators to disband. *Id.* at 3.

About a year later, an attorney for Lefemine wrote a letter to the Greenwood County Sheriff, threatening litigation if future demonstrations were disrupted. *Id.* The Sheriff's Chief Deputy responded that any similar demonstrations also would face criminal sanctions. *Id.*

In 2008, Lefemine sued several Greenwood County Police Officers alleging violation of his First Amendment rights, and seeking nominal damages, a declaratory judgment, a permanent injunction and counsel fees. *Id.* The District Court found that the defendants had violated Lefemine's rights and permanently enjoined the defendants from imposing content-based restrictions on similar demonstrations led by Lefemine but denied Lefemine's claim for nominal damages based on a finding that the officers had immunity. *Id.* The District Court also denied counsel fees. *Id.* at 3-4.

The Fourth Circuit affirmed, holding that the relief granted did not "alte[r] the relative positions of the parties" or otherwise make Lefemine a prevailing party. *Id.* at 4 (citation and quotation marks omitted).

This Court unanimously reversed, holding that "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," that is sufficient to constitute the plaintiff a "prevailing party." *Id.* (quoting *Farar*, 506 U.S. at 111-12). The Court also noted that "an injunction or declaratory judgment, like a damages award, will usually satisfy that test." *Id.*

In *Hanrahan v. Hampton*, 446 U. S. 754 (1980), civil rights litigation was instituted after execution of a judicial warrant to search for and seize illegal weapons allegedly located in an apartment occupied by members of the Black Panther Party. The District Court granted a directed verdict in favor of the defendants. *Id.* at 755. The Seventh Circuit reversed, remanded for a new trial, and awarded attorney's fees to the plaintiffs as prevailing parties. *Id.* The basis for that court's prevailing party determination was several of its rulings on appeal, including (1) reversal of the District Court's ruling directing verdicts against the defendants; (2) reversal of the District Court's denial of the defendants' motion to discover the identity of an informant; and (3) that court's order to the District Court to allow further discovery, and to conduct a hearing on whether sanctions should be imposed on certain defendants for violation of discovery orders. *Id.* at 756.

In reversing the fee award, this Court's *per curiam* opinion first acknowledged that

> [t]he legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 indicates that a person may in some

> circumstances be a prevailing party without having obtained a favorable final judgment following a full trial on the merits[.]
>
> . . .
>
> It is evident also that Congress contemplated the award of fees *pendente lite* in some cases. But it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal.

Id. at 756-57 (internal citations and quotations omitted).

Notwithstanding that highly significant acknowledgement of Congress' intent to authorize prevailing party determinations based on certain trial court rulings in advance of final judgment, this Court reversed the Circuit Court's counsel fee award because

> [t]he respondents have of course not prevailed on the merits of any of their claims. The Court of Appeals held only that the respondents were entitled to a trial of their cause. As a practical matter, they are in a position no different from that they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court.

Id. at 758-59.

B. Whether or Not a Preliminary Injunction Qualifies as a "Judicially Sanctioned Change in the Relationship Between the Parties" Depends on Whether the Grounds for Relief, the Time and Resources Expended, and the Overall Quality of the Preliminary Injunction Proceeding Measure Up to the Demands of a Cognizable "Prevailing Party" Designation.

Petitioner argues that preliminary injunction proceedings invariably lack the substance, depth and effect required for a "prevailing party" determination. That generalization simply cannot bear the weight imposed on it by Petitioner. It is well settled that a preliminary injunction is an "extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." 11A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 2948 (3d ed. 2023). *See, e.g.*, *Winter*, 555 U.S. at 24 ("A preliminary injunction is an extraordinary remedy never awarded as of right."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (urging courts to "pay particular regard for the public consequences in employing the extraordinary remedy of injunction").

However, as this Court has acknowledged, in some preliminary injunction cases, "little time and resources are spent on the threshold contest." *Sole v. Wyner*, 551 U.S. 74, 84 (2007). In others, the result is fleeting, "especially when the relief is principally designed to preserve the status quo relationship of the parties and has little to do with the merits." *Roberts v. Neace*, 65 F. 4th 280, 284 (6th Cir. 2023). "An ill-considered, hastily entered, or tentative injunction

points against enduring relief," and "[t]he same holds true for an injunction that is later overturned, repudiated or vacated." *Id.*

In *Roberts v. Neace*, Executive Orders issued by Kentucky Governor Andy Beshear and designed to limit COVID-19 transmissions prohibited mass gatherings, including religious services. *Id.* at 283. Violations constituted a criminal misdemeanor. *Id.* The plaintiffs-congregants violated the Governor's Order by attending Easter services at Maryville Baptist Church and were warned that future violations could lead to criminal charges. *Id.* The congregants sued, seeking declaratory and injunctive relief, and moved to enjoin any prosecution based on their attendance at the Easter service. *Id.* They also challenged the Governor's Order prohibiting travel in or out of Kentucky, subject to certain exceptions. *Id.*

The District Court granted preliminary injunctive relief against the travel restriction but denied relief from the restriction on religious gatherings. *Id.* However, the Sixth Circuit reversed and granted the preliminary injunction regarding the religious gatherings restriction, reasoning that the Governor's Order violated the Free Exercise clause by treating "religious gatherings less favorably than comparable secular gatherings." *Id.*

Subsequently, the Governor issued new Orders allowing interstate travel and faith-based gatherings, and the Kentucky Legislature limited the Governor's authority to issue similar COVID-19 Orders. *Id.* Accordingly, the District Court dismissed the congregants' suit as moot. *Id.* The congregants then sought counsel fees, which were granted by the

District Court. *Id.* The Governor appealed, and the Sixth Circuit affirmed.

The court acknowledged that not all preliminary injunctions are sufficient to confer prevailing party status:

> Ordinarily, a preliminary injunction by itself does not suffice, especially when the relief is principally designed to maintain the status quo relationship of the parties and has little to do with the merits. But a preliminary injunction may well suffice if it mainly turns on the likelihood-of-success inquiry and changes the parties' relationship in a material and enduring way.

Id. at 284. Concluding that the congregants were "prevailing parties," the Sixth Circuit observed that "[b]oth injunctions changed the legal relationship between the congregants and Governor Beshear because they stopped the Governor from enforcing his orders and allowed the congregants to act in ways that he had 'previously resisted.'" *Id.* (quoting *McQueary v. Conway*, 614 F.3d 591, 600 (6th Cir. 2010)). The court added as follows:

> They were not fleeting or hasty opinions that merely preserved the status quo until time allowed for a closer look. Instead, the injunctions, entered after briefing and argument, focused on the legal reality that the congregants would likely succeed on the merits. We have labeled similar preliminary injunctions as *final in all but name*.

Id. (internal citations and quotation marks omitted) (emphasis added).

The Sixth Circuit also commented extensively on the enduring nature of the injunctions, noting that "*at least seventy cases cite the Sixth Circuit's preliminary injunction. The rationale in that case remains the law of the circuit, now indeed the law of the nation*." *Id.* at 285 (emphasis added). The court added:

> Time also looked favorably on the preliminary injunctions. No later decision reversed or vacated the injunctions. Instead, the view expressed in the Sixth Circuit injunction informed the analysis of other COVID-19 restrictions, both in this circuit and beyond. And it guided other cases addressing Governor Beshear's orders.
>
> . . .
>
> The statutory inquiry, we appreciate, refers to prevailing parties, not prevailing opinions. But the continued invocation of this published opinion within and outside the circuit confirms that there is little prospect—none, really—that the court would reverse course, and enter judgment in favor of the defendants.
>
> The longevity of the relief points the same way. The Sixth Circuit's injunction held for six months, and the district court's injunction lasted for over a year. During those periods, the congregants could attend faith-based gatherings and

> travel out of state, all without the threat of enforcement. Those benefits qualify as enduring.
>
> The relief endured in another tangible way. The injunctions prevented Governor Beshear and other officials from prosecuting [the congregants] for violating the mass-gatherings order when they attended church on April 12, 2020. By precluding prosecution, the injunctions materially altered the congregants' relationship with Kentucky. And that alteration endured because the statute of limitations expired while the injunctions tied Kentucky's hands.

Id. at 284-85 (internal citations and quotation marks omitted).

Other Court of Appeals decisions finding that a preliminary injunction is a sufficiently merits-based judicial intervention to warrant a prevailing party determination are squarely based on this Court's clear and consistent prevailing party jurisprudence. For example, in *Dearmore v. City of Garland*, 519 F.3d 517 (5th Cir. 2008), the plaintiff's amended complaint challenged, on Fourth and Fourteenth Amendment grounds, the constitutionality of a portion of a Garland City Ordinance, Section 32.09(F), that required any property owner who rents or leases a single-family dwelling to allow that property to be inspected by City officials as a condition of the owner's receipt of a permit allowing rental of the property. *Id.* at 519. After denying the plaintiff's request for a temporary restraining order, the District Court granted his

motion for a preliminary injunction, enjoining the City from enforcing Section 32.09(F). *Id.* at 519. On the same date, the court issued a scheduling order establishing discovery deadlines and setting a trial date. *Id.* at 520. The District Court summarized its conclusion that the City Ordinance violated the Fourth Amendment rights of property owners:

> Inspections and searches of unoccupied property would clearly infringe on the property owner's right under the Fourth Amendment to the United States Constitution to be free from unreasonable search and seizure. In these limited situations, where the property is unoccupied, the protections guaranteed by the Fourth Amendment to the United States Constitution to the property owner outweigh any interest that the government has in protecting the health, safety or welfare of the public. . . . The court fully understands that the City has a valid and important governmental interest in protecting the public, however, the court sees no reason why this should be done at the expense of infringing on rights guaranteed by the Fourth Amendment to the United States Constitution.

Id. at 525 (quoting *Dearmore v. City of Garland*, 400 F. Supp. 2d 894, 903 (N.D. Tex. 2005)).

Following issuance of the preliminary injunction, the City's counsel informed the plaintiff that he would not have to post the bond required to enforce the preliminary injunction because the City

planned to amend the ordinance to conform with the District Court's ruling. *Id.* at 520. Shortly thereafter, the City amended the Ordinance to remove the unconstitutional provisions, and also clarified the conditions in which the City could seek a warrant to inspect the subject properties when consent had not been obtained or refused. *Id.* The City notified the District Court of the amendments and also moved to dismiss the plaintiff's action as moot. *Id.* Without opposition from the plaintiff, the District Court granted the City's motion. *Id.* Subsequently, the District Court found that the plaintiff was a prevailing party and granted his motion for counsel fees. *Id.* The City appealed. *Id.*

The Fifth Circuit carefully reviewed this Court's precedents, noting at the outset that this Court had "never expressed a view 'on whether . . . success in gaining a preliminary injunction may. . . warrant an award of counsel fees.'" *Id.* at 521 (quoting *Sole*, 551 U.S. at 86). The court quoted this Court's guidance that "[t]he touchstone of the prevailing party inquiry . . . is the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Id.* (quoting *Sole*, 551 U.S. at 82) (quotation marks omitted). It also cited this Court's recognition in *Buckhannon* 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,'" and that such a "material alteration [of the legal relationship of the parties] must have the 'necessary judicial *imprimatur*.'" *Id.* (quoting *Buckhannon*, 532 U.S. at 603, 05).

The Fifth Circuit observed that "[t]he *Buckhannon* Court did not expressly define 'judicial

imprimatur' but stated that enforceable judgments on the merits and consent decrees are sufficient for prevailing party status." *Id.* (citing *Buckhannon*, 532 U.S. at 604). The court added that *Buckhannon* "rejected the 'catalyst theory,' explaining that a defendant's voluntary change in conduct in response to the plaintiff's lawsuit and not a court order, although perhaps accomplishing what the plaintiff sought to achieve, lacks the necessary judicial *imprimatur* to establish prevailing party status." *Id.* (citing *Buckhannon*, 532 U.S. at 601, 605.) Accordingly, and based on this Court's clear mandate for a judicial intervention that "materially alters the legal relationship of the parties," the Fifth Circuit ruled that the District Court's preliminary injunction enjoining the City from enforcing its ordinance was a sufficient judicial intervention to support the plaintiff's designation as a prevailing party. *See id.* at 524-26.

Similarly, in *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226 (3d Cir. 2008), the Third Circuit Court of Appeals affirmed the District Court's prevailing party determination and counsel fee award in the context of litigation initiated by a rally organizer against the City of Pittsburgh. The lawsuit challenged the constitutionality of Chapter 603 of the Pittsburgh City Code, pursuant to which the plaintiff's application to hold a rally and a parade to the Allegheny County Courthouse would be denied unless it prepaid the City its estimated costs for police protection required by the rally and parade. *Id.* at 229. The plaintiff sought a determination that Chapter 603 was unconstitutional, as well as a permanent injunction preventing the City from charging event sponsors for security related costs. *Id.*

The plaintiff also moved for a temporary restraining order and a preliminary injunction. *Id.*

On October 31, 2003, at the first hearing before the District Court, the City's counsel represented that the City no longer was enforcing Chapter 603, and was in the process of preparing a revised Ordinance to replace it. *Id.* The District Court granted the plaintiff's motion for a temporary injunction on the ground that Chapter 603 was facially unconstitutional, and that a permit regime without any standards also would be unconstitutional. *Id.* The court ordered the parties to meet and confer concerning the City's proposed revision to its ordinance and ordered the City to submit its proposed revisions to the court. *Id.* at 230. At a subsequent hearing, the court indicated that several aspects of the City's proposed revision to the Ordinance were "constitutionally problematic." *Id.* The court converted its temporary restraining order to a preliminary injunction, from which the City took no appeal. *Id.*

In February 2004, the City repealed Chapter 603 and moved to lift the preliminary injunction and dismiss the suit as moot. *Id.* The court denied the motion, finding that because the repeal was unaccompanied by a new ordinance, the suit was not moot, and the Court continued the preliminary injunction. *Id.* Over the ensuing two years, the parties continued their meet-and-confer process concerning the content of the proposed revised Ordinance, which the City ultimately passed in early 2006, and which met all of the plaintiff's concerns. *Id.* The court lifted the preliminary injunction and dismissed the plaintiff's suit. *Id.*

The plaintiff moved for counsel fees, which the district court granted. *Id.* The City appealed. *Id.* The Third Circuit, relying on this Court's precedents, unanimously affirmed. The court noted that a prerequisite for a prevailing party determination is that the party "succeed on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit." *Id.* at 232 (citation omitted). The Third Circuit noted that "[t]o 'succeed' under this standard, a party must achieve a 'court ordered change in the legal relationship between the plaintiff and the defendant.'" *Id.* (quoting *Buckhannon*, 532 U.S. at 604).

The Third Circuit observed that "a plaintiff does not become a 'prevailing party' solely because his lawsuit causes a voluntary change in a defendant's conduct. In that situation, the change in legal relationship lacks the requisite 'judicial imprimatur.'" *Id.* (quoting *Buckhannon*, 532 U.S. at 601). The court also cited *Sole* for the principle that "[s]uccess achieved in a preliminary injunction . . . does not render a party 'prevailing' if that success is ultimately 'reversed, dissolved or otherwise undone by the final decision in the same case.'" *Id.* (quoting *Sole*, 551 U.S. at 83).

The Third Circuit noted that this Court in *Buckhannon* affirmed that "litigation need not progress to a final judgment on the merits for a § 1988 fee award to be proper," and stated by way of example that "a settlement agreement enforced through a consent decree can serve as the basis for an award of attorney's fees in an appropriate situation." *Id.* (citing *Buckhannon*, 532 U.S. at 604). The court also recognized, however, the important principle that "[r]espect for ordinary language requires that a

plaintiff receive at least some relief on the merits of his claims before he can be said to prevail." *Id.* (quoting *Buckhannon*, 532 U.S. at 603-04).

Based on its careful review of this Court's "prevailing party" precedents, the Third Circuit affirmed the District Court's counsel fee award:

> This is a case in which (1) the trial court, based upon a finding of a likelihood of plaintiffs' success on the merits, entered a judicially enforceable order granting plaintiffs virtually all the relief they sought, thereby materially altering the legal relationship between the parties; (2) the defendant, after opposing interim relief, chose not to appeal from that order and remained subject to its restrictions for a period of over two years; and (3) the defendant ultimately avoided final resolution of the merits of plaintiffs' case by enacting new legislation giving plaintiffs virtually all of the relief sought in the complaint.
>
> . . .
>
> A preliminary injunction issued by a judge carries all of the judicial imprimatur necessary to satisfy *Buckhannon*, and this preliminary injunction placed a judicial imprimatur on plaintiffs' entitlement to substantially all the relief they sought in the complaint. This was not a case where the filing of the lawsuit resulted in voluntary change on the part of the City. It was precisely because the Court believed

> voluntary change was not to be expected that it ordered the City not to engage in the practices of which plaintiffs complained. There was nothing voluntary about the City's giving up those practices. And the preliminary injunction was not dissolved for lack of entitlement. Rather, it was terminated only when the new statute was enacted after the preliminary injunction had done its job.

Id. at 233-34 (internal citations and quotation marks omitted).

Significantly, in the case at bar, the Fourth Circuit, previously the only Circuit Court that declined to award "prevailing party" status to a party that obtained durable preliminary injunctive relief based on a likelihood of success on the merits, held *en banc*, by a 7-to-4 vote, that: (i) Respondents were entitled to prevailing party status based on the significant and durable success they achieved as a result of the preliminary injunction granted by the District Court; and (ii) the District Court's Order enjoined Virginia from enforcing its license suspension statute on due process grounds, restored Respondents' driver's licenses, and barred Virginia from collecting the statutory license restoration fee from them, an Order that materially altered the parties' relationship and afforded Respondents virtually all of the relief they sought in the litigation. *See Stinnie*, 77 F. 4th at 211, 13. But the dissenting opinion in the Fourth Circuit vehemently criticized the majority's holding, contending that only a final judgment on the merits was sufficient to confer prevailing party status, a position that this Court has

never adopted. Citing to the definition of "prevailing party" in Black's Law Dictionary at the time Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, the dissenting opinion stated:

> These definitions reveal that to prevail, a party must achieve final, not temporary, success. Absent that, it is not clear whether a party has "successfully prosecute[d]" an action. Without final success, no "decision or verdict is rendered and judgment entered" and the matter is not "set at rest." In sum, *Black's* tells us to look to the "end of the suit" to see if a party has "successfully maintained" a claim, not to interim events.

Id. at 221 (Quattlebaum, J., dissenting) (quoting Black's Law Dictionary, *Prevailing Party* (rev. 4th ed. 1968)).

The dissenters, however, did not address the strong policy concerns advanced by the majority that argued that the "final judgment" standard adopted by the dissenters would undermine the Congressional policies underlying the fee-shifting status "by allowing government defendants to game the system." *Id.* at 210. The majority observed:

> Congress enacted § 1988(b), we have noted, in furtherance of the policy of facilitating access to judicial process for the redress of civil rights grievances. Our circuit rule, however, may undermine that policy by allowing government defendants to game the system. Faced with a suit challenging a

> potentially or even very probably unlawful practice, a defendant may freely litigate the case through the preliminary injunction phase, hoping for the best or, perhaps, to outlast an indigent plaintiff. And when the court confirms the likely merit of the plaintiff's claim, the government will have ample time to cease the challenged conduct, moot the case, and avoid paying fees. That leaves the plaintiff, who likely devoted considerable resources to obtaining the preliminary injunction, holding the bag. The predictable outcome of this gamesmanship is fewer attorneys willing to represent civil rights plaintiffs in even clearly meritorious actions – particularly those whose urgent situations call for interim relief. And that result, instead of furthering the goals of § 1988(b), contravenes the statute's entire purpose.

Id. at 210 (internal citations and quotation marks omitted).

The majority's warning must be heeded here. Specifically, the majority opinion cautions against an interpretation of "prevailing party" that inappropriately restricts recognition to receipt of a final judgment on the merits. Such an interpretation will have a chilling effect on aggrieved parties who cannot afford costly legal fees and discourage attorneys from taking these cases given the significant time, expense, and resources needed to litigate a civil rights case seeking systemic change, no matter how meritorious the plaintiffs' claims may be.

The rule of law advocated by the dissent in *Stinnie*, and never suggested by this Court, runs the serious risk of undermining Congress' goal of supporting civil rights and related litigation by providing a sound statutory mechanism for payment of Respondents' reasonable legal fees in appropriate cases. That untoward result should not be condoned by this Court. It should affirm the Fourth Circuit.

CONCLUSION

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

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Respectfully submitted,

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