No. 23 -_____

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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. § 1988.

2. Whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a non-judicial event that moots the case, to prevail under 42 U.S.C. § 1988.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner (defendant-appellee below) is Gerald F. Lackey, in his official capacity as the Commissioner of the Virginia Department of Motor Vehicles. Mr. Lackey was automatically substituted as the defendant after the former Commissioner, Richard D. Holcomb, left office. See Fed. R. Civ. P. 25(d).

Respondents (plaintiffs-appellants below) are Damian Stinnie, Melissa Adams, Adrainne Johnson, Williest Bandy, and Brianna Morgan.

RELATED PROCEEDINGS

Stinnie v. *Holcomb*, No. 21-1756 (4th Cir.) (judgment from panel entered June 27, 2022, judgment from en banc court entered August 7, 2023).

Stinnie v. *Holcomb*, No. 3:16-cv-00044 (W.D. Va.) (order dismissing action as moot entered on May 7, 2020, order denying attorney's fees entered June 4, 2021).

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OPINIONS BELOW

The Fourth Circuit's en banc opinion (App. 1a–70a) is reported at 77 F.4th 200. The Fourth Circuit's prior panel opinion (App. 73a–92a) is reported at 37 F.4th 977. The district court's opinion denying attorney's fees (App. 95a–106a) is not reported but is available at 2021 WL 2292807 (W.D. Va. June 4, 2021).

JURISDICTIONAL STATEMENT

The Fourth Circuit entered judgment on August 7, 2023. On October 27, 2023, the Chief Justice granted an application to extend the time to file a petition for a writ of certiorari to November 20, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Civil Rights Attorney's Fees Awards Act of 1976, as amended, provides in pertinent part:

> In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

42 U.S.C. § 1988(b).

INTRODUCTION

This case presents multiple circuit splits on an important issue: whether a plaintiff who obtains only a preliminary injunction may be a "prevailing party" entitled to attorney's fees. "Prevailing party" is a term of art used in numerous fee-shifting statutes. A party "prevails" if it secures court-ordered relief that is both "on the merits" and "enduring." *Sole* v. *Wyner*, 551 U.S. 74, 82, 86 (2007). That happens when the party obtains a final, favorable ruling from a court, such as a "judgment on the merits or a court-ordered consent decree." *Buckhannon Bd. & Care Home, Inc.* v. *W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598 (2001). But if a court never issues such a ruling, whether and when a party can nonetheless "prevail" are questions that have confounded the lower courts, producing multiple circuit splits.

In *Buckhannon*, this Court held that a plaintiff does not "prevail" when the filing of the plaintiff's lawsuit causes the defendant to cease the complained-of conduct, mooting the case before final judgment. 532 U.S. 598. Then, in *Sole*, it held that a plaintiff also does not prevail when it obtains preliminary relief but fails to obtain a favorable final judgment—winning a battle but losing the war. 551 U.S. 74. But *Sole* left open a question that has caused considerable confusion among the lower courts: "whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an

award of counsel fees." *Id.* at 86. This case presents the ideal opportunity to answer this question.

In the 15 years since *Sole*, most courts of appeals have agreed that a preliminary injunction can sometimes warrant a fee award—but they disagree on when. Entrenched splits have emerged on two questions squarely presented in this case. First, does a party prevail "on the merits" when a court grants a preliminary injunction based only on a prediction of "likely" success? And second, does a party prevail when the relief from this preliminary injunction becomes "enduring" only because some later, non-judicial act moots the case?

These questions are important. Fee awards are often as significant, or even more significant, than an underlying liability determination—particularly in civil rights litigation. And they regularly cost state governments hundreds of thousands or millions of dollars. Further, the effect of the answers to the questions presented extends far beyond Section 1988, as numerous other fee-shifting statutes contain the same key phrase. This Court should again intervene, as it did in *Buckhannon* and *Sole*, to prevent lower courts from interpreting "prevailing party" too broadly.

This case is an ideal vehicle for resolving these questions. It turns exclusively on the purely legal question whether Respondents ("Plaintiffs") are entitled to fees, which is the only remaining issue in the case. Both circuit splits are dispositive here, and

the decision below falls on the wrong side of each. The splits are now fully mature, and this Court's review is badly needed to resolve them. The petition should be granted.

STATEMENT OF THE CASE

A. Legal background

"In the United States, parties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser." *Buckhannon*, 532 U.S. at 602. Under this "American Rule," each litigant "pays his own attorney's fees, win or lose." *Peter* v. *Nantkwest, Inc.,* 140 S. Ct. 365, 370 (2019) (citation omitted).

Congress can displace this rule by statute, so long as it is sufficiently "specific and explicit." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc.*, 421 U.S. 240, 260 (1975). Congress displaced the American rule in various statutes awarding fees to the "prevailing party." This key phrase—"prevailing party"—is a "legal term of art" that has been interpreted "consistently" in "numerous statutes." *Buckhannon*, 532 U.S. at 603 & n.4.[1] At issue here is 42 U.S.C.

[1] *See, e.g.*, 42 U.S.C. § 1988 (civil rights); 15 U.S.C. § 1117(a) (trademark infringement); 52 U.S.C. § 10310(e) (Voting Rights Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act); 29 U.S.C. § 794a(b) (disability discrimination); 35 U.S.C. § 285 (patent infringement); 42 U.S.C. § 2000a-3(b) (Civil Rights Act of 1964); 42 U.S.C. § 3613(c)(2) (Fair Housing Act); 42 U.S.C. § 12205 (Americans with Disabilities Act).

§ 1988(b), which provides that, in certain civil rights cases, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."

The "touchstone" requirement for a "prevailing party" is a "material alteration of the legal relationship of the parties." *Texas State Tchrs. Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989). And this "material alteration" must result from "relief on the merits." *Sole*, 551 U.S. at 82 (citation omitted). "Relief on the merits" typically is obtained in a "judgment on the merits or a court-ordered consent decree." *Buckhannon*, 532 U.S. at 600. A party can "prevail" while litigation remains pending, but only when the party "has established his entitlement to some relief on the merits of his claims." *Hanrahan* v. *Hampton,* 446 U.S. 754, 757 (1980).

In *Buckhannon*, this Court rejected the "catalyst theory," under which a plaintiff "prevail[ed]" if its lawsuit caused "a voluntary change in the defendant's conduct." 532 U.S. at 601–02. "[M]ost Courts of Appeals"—all but one—had adopted this theory. *Id.* at 602. But the Court explained that "a 'prevailing party' is one who has been awarded some relief *by the court*." *Id.* at 603 (emphasis added). The catalyst theory impermissibly allowed fee awards that were not based on any "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. "A defendant's voluntary change" therefore did not suffice, as it "lacks the necessary judicial *imprimatur*." *Id.* at 598–99.

In *Sole*, 551 U.S. 74, the Court reversed an award of fees to a plaintiff who obtained a preliminary injunction, but ultimately lost the case. *Id.* at 86. The Court explained that preliminary injunctions are based only on a "probability" of success. *Id.* at 84. And that "probability" is "more or less secure depending on the thoroughness of the exploration undertaken by the parties and the court." *Ibid.* In *Sole*, the proceedings were "necessarily hasty and abbreviated," *id.* at 84, and, ultimately, the relief they granted was "fleeting" and "ephemeral," *id.* at 83, 86. The plaintiff had "won a battle but lost the war." *Id.* at 86. *Sole*, however, left open the question "whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." *Ibid.*

B. Factual and procedural background

In this case, Plaintiffs sued the Commissioner of the Virginia Department of Motor Vehicles to challenge the constitutionality of former Section 46.2-395 of the Virginia Code. Am. Compl., *Stinnie v. Holcomb*, No. 3:16-cv-00044 (W.D. Va. Sept. 11, 2018), ECF 84 ("Am. Compl.") [CA.JA226–70].[2] Before its repeal, Section 46.2-395 required courts to suspend a

[2] References to CA.JA___ are to pages in the Joint Appendix, *Stinnie* v. *Holcomb*, No. 21-1756 (4th Cir. Nov. 15, 2021), ECF 20.

convicted criminal's driver's license for failure to pay court-ordered debts like fines, forfeitures, restitution, or other penalties. Va. Code § 46.2-395. The five named Plaintiffs, seeking to represent a putative class, alleged that this law violated their constitutional rights. Am. Compl. ¶¶ 322–65 [CA.JA264–68]. They asserted five counts, each based on a different constitutional theory.[3] *Ibid.*

Plaintiffs sought expansive relief: certification of two broad classes, *id.* ¶ 298 [CA.JA258–59], a declaratory judgment, *id.* p. 44 [CA.JA269], and preliminary and permanent injunctive relief, *ibid.* They sought to enjoin the Commissioner from enforcing Section 46.2-395 against any member of the putative class, and to require the Commissioner to reinstate suspended licenses (without any reinstatement fee). *Id.* p. 44 [CA.JA269]. Their "greatest wish"—what they were "really asking for in the lawsuit"—was "for this practice to end and for the one million people" affected by this law "to get their licenses back." Katherine Knott, *Northam Proposes End to Driver's License Suspensions over Court Fees*,

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[3] *See id.* ¶¶ 322–31 ("Count I: Violation of Procedural Due Process (Lack of Ability-to-Pay Hearing)"); *id.* ¶¶ 332–38 ("Count II: Violation of Due Process (Fundamental Fairness)"); *id.* ¶¶ 339–46 ("Count III: Violation of Equal Protection Clause (Equal Justice and Punishing Poverty)"); *id.* ¶¶ 347–57 ("Count IV: Violation of Due Process Clause (No Rational Basis)"); *id.* ¶¶ 358–65 ("Count V: Violation of the Equal Protection Clause (Extraordinary Collection Efforts)").

Daily Progress (Mar. 26, 2019), https://tinyurl.com/y3wamh5n.

The district court dismissed Plaintiffs' original complaint for lack of jurisdiction, without prejudice. The Fourth Circuit dismissed Plaintiffs' appeal of that decision for lack of appellate jurisdiction. *Stinnie* v. *Holcomb*, 734 F. App'x 858 (4th Cir. 2018). Months later, Plaintiffs filed an amended complaint and a motion for a preliminary injunction. The district court granted the motion in part, issuing a preliminary injunction pending trial on one of their five claims. *Stinnie* v. *Holcomb*, 355 F. Supp. 3d 514, 520 (W.D. Va. 2018) (due process claim alleged in Count I). Under *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008), the court concluded that the equitable factors weighed in Plaintiffs' favor, *Stinnie*, 355 F. Supp. 3d. at 532, and that they were "likely to succeed" on that single claim, *id.* at 520. The court noted, though, that Plaintiffs had not shown a "certainty of success." *Id.* at 527. It did "not reach a definitive conclusion" on the constitutionality of the law. *Id.* at 529. Rather, the district court awarded preliminary relief based on what it predicted Plaintiffs were "likely to show" at "trial." *Id*. at 531.

The court did not declare the law unconstitutional or issue the permanent injunction Plaintiffs also sought. Am. Compl. p. 44 [CA.JA269]. The injunction also was limited to the five named Plaintiffs. Order, *Stinnie*, No. 3:16-cv-00044 (Dec. 21, 2018), ECF 127 at 1 [CA.JA843–44]. It prevented the enforcement of Section 46.2-395 only as to them and required the

temporary reinstatement of only their licenses. *Ibid.* The court did not grant class certification, nor did it provide any relief to the other "hundreds of thousands" of drivers in the putative class allegedly affected by the law. Am. Compl. ¶ 4 [CA.JA227].

While this preliminary injunction was in effect, the Virginia General Assembly, lobbied by Plaintiffs' counsel and others, passed a law suspending the enforcement of Section 46.2-395 for one year. *Stinnie* v. *Holcomb*, 396 F. Supp. 3d 653, 656 (W.D. Va. 2019). With enforcement of the law suspended, and the legislature poised to repeal it permanently in the next legislative session, the district court stayed the case. *Ibid.* The district court reasoned that "if the General Assembly fails to repeal § 46.2-395, the [c]ourt will have ample time to address the merits of the case . . . ." *Id.* at 661. Early in 2020, however, the General Assembly repealed not just the aspects of Section 46.2-395 that Plaintiffs had challenged, but the entire statute. Stip. of Dismissal (ECF 231) at 1–2 [CA.JA1010–11]. The General Assembly also lifted suspensions imposed under Section 46.2-395. *Ibid.* Because the General Assembly's acts obviated Plaintiffs' requests for relief, Plaintiffs stipulated that their claims were moot and the district court dismissed the case. *Id.*; Dismissal Order (ECF 232) at 1–2 [CA.JA1017–18].

Plaintiffs then sought attorney's fees, claiming to be a "prevailing party" under Section 1988.[4] Pet. for Attorneys' Fees (ECF 234) at 1–2 [CA.JA1020–21]. The district court denied this motion. App. 93a–94a. It concluded that it was bound by Fourth Circuit precedent establishing "a bright line rule that preliminary injunction awardees are not prevailing parties." App. 105a (citing *Smyth ex rel. Smyth* v. *Rivero*, 282 F.3d 268, 276 (4th Cir. 2002), *overruled by Stinnie* v. *Holcomb*, 77 F.4th 200 (4th Cir. 2023) (en banc)). The preliminary injunction did not decide the merits of a matter, but merely offered "a prediction of a probable, but necessarily uncertain, outcome." App. 106a (quoting *Smyth*, 282 F.3d at 276). Plaintiffs appealed, and a panel of the Fourth Circuit unanimously affirmed, likewise holding that *Smyth* barred Plaintiffs' request for attorney's fees. App. 86a.

The Fourth Circuit then granted rehearing en banc and, in a 7–4 ruling, overruled *Smyth* and reversed and remanded this case. App. 1a–70a. In place of *Smyth*, the majority imposed a new rule:

> When a preliminary injunction provides the plaintiff concrete, irreversible relief on the merits of her claim and becomes moot before final judgment because no further court-ordered assistance proves

[4] Because Plaintiffs did not establish their entitlement to fees, the district court did not reach the question of what amount of fees, if any, would be appropriate. Dismissal Order (ECF 232) at 1–2 [CA.JA1017–18].

> necessary, the subsequent mootness of the case does not preclude an award of attorney's fees.

App. 22a. In establishing this new rule, the majority addressed several "recurrent questions." App. 23a. *First*, the court considered when relief from a preliminary injunction is "sufficiently *on the merits* to justify prevailing party status." App. 27a. The majority held that a prediction of "likely" success suffices. App. 28a. And because *all* preliminary injunctions require a "likelihood" of success under *Winter*, the court reasoned that "*all* preliminary injunctions" should qualify as "solidly merits-based." App. 28a (emphasis added).

Second, the Fourth Circuit considered when the "court-ordered change" from a preliminary injunction is sufficiently "enduring," as opposed to "ephemeral." App. 31a. The majority discussed "two sets of cases" where a preliminary injunction might suffice. App. 33a. In the first, the plaintiff receives a preliminary injunction, and "what moots the case is only court-ordered success and the passage of time." App. 32a (citation omitted). "The canonical example is a plaintiff who wins a preliminary injunction permitting a protest at a specific event." App. 32a. In that scenario, the preliminary injunction provides "all the court-ordered assistance required," and "[a]fter the event ends, the litigation will be dismissed as moot." App. 32a. In the second set of cases (which includes this one), a preliminary injunction provides relief that becomes "enduring" only later due to a non-

judicial act, as when "the policy is permanently repealed or abandoned before final judgment." App. 33a. The majority held that both sets of cases conferred "prevailing party" status. App. 35a–36a. It therefore reversed and remanded for calculation of a fee award. App. 41a.

Judge Quattlebaum, joined by three judges, dissented. The four dissenters disagreed with the majority on both "recurring" questions discussed above. As to the first, the dissent reasoned that a "likelihood of success" "only predicts the outcome of a future decision" and "does not definitively decide the merits of anything." App. 61a. And as to the second, the dissent explained that a preliminary injunction is not sufficiently "enduring" if it does not, itself, provide any "permanent relief." App. 62a–64a. Here, the required "lasting change" came not from the preliminary injunction, but from the Virginia legislature's subsequent repeal of the law. App. 64a. Under this Court's precedent, this subsequent, non-judicial act cannot confer prevailing party status, as it "lacks the necessary judicial *imprimatur* on the change." App. 64a (quoting *Buckhannon*, 532 U.S. at 605).

Prior to the remand, Plaintiffs moved for attorney's fees in the Fourth Circuit. Mot. for Atty. Fees, No. 21-1756 (4th Cir. Aug. 21, 2023), ECF 89-1. They requested over $767,000 in appellate fees alone. *Id.* at 23, ECF 89-2 at 14–37, ECF 89-3 at 22–33. The Fourth Circuit transferred all fee proceedings to the district court. Order, *Stinnie*, No. 21-1756 (Aug. 23,

2023), ECF 91. The district court stayed proceedings pending resolution of this petition. Order, *Stinnie*, No. 3:16-cv-00044 (Oct. 5, 2023), ECF 277.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals are divided on the questions presented

In the wake of *Sole*, the Courts of Appeals have sharply divided on how to answer the questions presented. They currently agree that a preliminary injunction "may *sometimes*" confer prevailing-party status—the overarching question left open in *Sole*. 551 U.S. at 86. But they disagree strongly as to *when*. Specifically, the Courts of Appeals are split over "two recurrent questions." *Higher Taste, Inc.* v. *City of Tacoma*, 717 F.3d 712, 716 (9th Cir. 2013). These questions are: (1) whether a prediction of "likely" future success is a ruling "on the merits," or whether a definitive ruling on the merits is required; and (2) whether the "enduring" change in the parties' relationship must come from the preliminary injunction itself, or whether it can come from a subsequent, non-judicial action that moots the case.

The lower courts "have struggled to decide" these questions. *Higher Taste, Inc.*, 717 F.3d at 715. "Without a Supreme Court decision on point," they have "announced fact-specific standards that are anything but uniform." *Dearmore* v. *City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008). The dissent below agreed that these standards are "quite diverse," and

put it plainly: "So, let's be clear. There is no unanimity of the circuit courts on this issue." App. 69a (Quattlebaum, J., dissenting).

There are now well-established, entrenched splits on both questions, warranting this Court's review. See *Buckhannon*, 532 U.S. at 603 (granting certiorari "[t]o resolve the disagreement amongst the Courts of Appeals"). And, as explained below, the courts in the majority on each split have once again adopted overly expansive interpretations of the key phrase "prevailing party." This Court's intervention is again necessary to establish the appropriate scope of this term and the numerous fee-shifting statutes that employ it.

A. The Courts of Appeals are divided on whether a prediction of "likely" success constitutes a ruling "on the merits"

The Courts of Appeals disagree on whether a prediction of "likely" success constitutes a ruling "on the merits" sufficient for a party to "prevail." *Buckhannon*, 532 U.S. at 603. The minority position holds that it never does, and that only an actual, conclusive ruling on the merits can suffice. By contrast, the majority of courts holds that a prediction of "likely" future success does constitute a ruling "on the merits"—at least in certain circumstances.

The minority position, currently occupied by the Third Circuit, is that "merely finding a likelihood of

success" does not amount to a "merits-based" ruling. *Singer Mgmt. Consultants, Inc.* v. *Milgram,* 650 F.3d 223, 230 n.4 (3d Cir. 2011); see also *id.* at 229 ("[A] court's finding of 'reasonable probability of success on the merits' is not a resolution of 'any merit-based issue.'") (citation omitted). Instead, a preliminary injunction confers prevailing-party status only in the "rare situation" where the court *actually* decides the merits. *Id.* at 229. For example, the Third Circuit has allowed fees where a district court, in granting a preliminary injunction, definitively held that the challenged ordinance "was facially unconstitutional," enjoined its enforcement, and ordered the defendant to propose a replacement. *Id.* at 229–30 (discussing *People Against Police Violence* v. *City of Pittsburgh*, 520 F.3d 226 (3d Cir. 2008) ("*PAPV*")). But because preliminary injunctions are usually based on "a *likelihood* of success on the merits," "it follows that parties will not often 'prevail' based solely on those events." *Id.* at 229 (emphasis in original); see also *Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939, 956 (D.C. Cir. 2005) (Henderson, J., dissenting) ("But 'likelihood of success on the merits' does not equal 'success on the merits.'") (citation omitted).[5]

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[5] As noted above, the Fourth Circuit previously shared this view. In *Smyth*, now overruled, the court held that a preliminary injunction cannot confer prevailing party status where it provides only "a prediction of a probable, but necessarily uncertain, outcome." 282 F.3d at 276. And the requisite "likelihood" varies according to the strength of other equitable factors, making it "an unhelpful guide to the legal determination of whether a party has prevailed." *Id.* at 277. In addition, the

By contrast, the Second, Fourth, Fifth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have held that a prediction of future success *is* sufficient, at least in certain circumstances. *Haley* v. *Pataki*, 106 F.3d 478, 483 (2d Cir. 1997) (affirming fee award where order granting preliminary relief was based on a likelihood of success); App. 28a (same); *Dearmore*, 519 F.3d 517 at 524–25 (same); *Planned Parenthood Sw. Ohio Region* v. *Dewine*, 931 F.3d 530, 535 (6th Cir. 2019) (same); *Rogers Grp., Inc.* v. *City of Fayetteville, Ark.*, 683 F.3d 903. 906 (8th Cir. 2012) (same); *Higher Taste*, 717 F.3d at 716 (same); *Kansas Jud. Watch* v. *Stout*, 653 F.3d 1230, 1238 (10th Cir. 2011) (same); *Common Cause Georgia* v. *Georgia*, 17 F.4th 102, 107 (11th Cir. 2021) (same); *Select Milk*, 400 F.3d at 948 (same). But they do not explain why—rather, they simply assume that a "likelihood" is sufficient. See*, e.g.*, *Haley*, 106 F.3d at 484 (asserting that relief based on a "likelihood" of success was "clearly based on the merits"); App. 28a (asserting that a prediction of likely success is "solidly merits-based").

These courts also have not adopted clear or consistent standards on when a "likelihood" of success is sufficient to find that a party has prevailed. Several decisions recognize that the rigor of preliminary-

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First Circuit has thus far refused to award fees for a preliminary injunction based on only a "likelihood" of future success. *Sinapi* v. *Rhode Island Bd. of Bar Examiners*, 910 F.3d 544 (1st Cir. 2018). The First Circuit has held that a prediction based on preliminary proceedings that are "hasty and abbreviated" is not enough, while leaving open whether a "likelihood" of success can ever be sufficient. *Id.* at 551 (quoting *Sole*, 551 U.S. at 84).

injunction proceedings can vary widely and deny fees if they find the proceedings were too hasty or informal. See, *e.g.*, *DiMartile v. Hochul*, 80 F.4th 443, 453 (2d Cir. 2023) (reversing fee award based on preliminary injunction that was "hastily entered and decided only after an extremely abbreviated briefing schedule"); *Kansas Jud. Watch,* 653 F.3d at 1238 ("[A] preliminary injunction does not provide relief on the merits if the district court does not undertake a serious examination of the plaintiff's likelihood of success . . . ."). Other courts have not articulated such a requirement. See, *e.g.*, App. 28a; *Dearmore*, 519 F.3d 517 at 524–25 (looking only to whether grant of preliminary injunction was based on the merits or balancing of equities).

Courts also differ on the degree of "likelihood" of success needed. In *Winter*, this Court held that a "likelihood" of success is required for all preliminary injunctions. 555 U.S. at 22. But several courts have held that a higher "likelihood" of success than *Winter* requires is needed to justify a fee award. See, *e.g.*, *Tennessee State Conference of N.A.A.C.P* v. *Hargett*, 53 F.4th 406, 410 (6th Cir. 2022) (requiring an "unambiguous indication of probable success"); *Kansas Jud. Watch*, 653 F.3d at 1238 (denying fees based on preliminary injunction granted "largely because the balance of equities favored [the plaintiff]"); *McQueary* v. *Conway*, 614 F.3d 591, 598 (6th Cir. 2010) ("[T]here is only prevailing party status if the [preliminary] injunction represents an unambiguous indication of probable success on the

merits, and not merely a maintenance of the status quo ordered because the balance of equities greatly favors the plaintiff.") (citation omitted). Confirming that this threshold is met "requires close analysis" of the "reasoning underlying the grant of preliminary relief." *Mastrio* v. *Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) (citation omitted). Other courts, including now the Fourth Circuit, apparently deem *Winter*'s floor to be sufficient, and therefore hold that "*all* preliminary injunctions" in which the district court did anything beyond preserve the status quo without discussion of the merits are "solidly merits-based." App. 28a (emphasis added); see also *Higher Taste, Inc.* v. *City of Tacoma*, 717 F.3d 712, 716 (9th Cir. 2013) ("[A] preliminary injunction satisfies the judicial imprimatur requirement if it is based on a finding that the plaintiff has shown a likelihood of success on the merits"); *Common Cause/Georgia* v. *Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009) ("[A] preliminary injunction on the merits . . . entitles one to prevailing party status and an award of attorney's fees." (quoting *Taylor* v. *City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987)); *Dearmore*, 519 F.3d at 524–25 (affirming prevailing-party status where preliminary injunction was "clearly merit-based" rather than grounded in balancing of equities).

Thus, the Courts of Appeals are deeply divided in more ways than one. Not only are they split on whether a plaintiff who satisfies the *Winter* standard may ever qualify as a prevailing party—a split on which the Fourth Circuit changed sides in this very

case—but even those that agree satisfying *Winter* may be enough for prevailing-party status are deeply divided on when that may be the case.

B. The Courts of Appeals are divided on when a preliminary injunction provides sufficiently "enduring" relief

The Courts of Appeals are also divided on when a preliminary injunction provides relief that is sufficiently enduring. *Sole* requires that a "prevailing party" obtain an "enduring change in the legal relationship" between the parties. 551 U.S. at 86. Two circuits allow fees only when this "enduring change" results from the preliminary injunction *itself*. Other circuits allow fees even if the "enduring change" results from a subsequent, non-judicial act that moots the case.

The Seventh and Eighth Circuits hold that the relief granted by the preliminary injunction must *itself* provide "enduring" change, because the relief is "not defeasible by further proceedings." *Dupuy* v. *Samuels*, 423 F.3d 714 (7th Cir. 2005). This relief must instead be "sufficiently akin to final relief on the merits," in that "the party's claim [for a] permanent injunction is rendered moot by the impact of the preliminary injunction." *N. Cheyenne Tribe* v. *Jackson*, 433 F.3d 1083 (8th Cir. 2006).

The "canonical example" of such a preliminary injunction is one "permitting a protest at a specific

event." App. 32a. The Seventh Circuit, for example, allowed fees for a preliminary injunction that permitted plaintiffs to protest at the 1996 Democratic National Convention. *Dupuy*, 423 F.3d at 719–20 (discussing *Young* v. *City of Chicago*, 202 F.3d 1000 (7th Cir. 2000)). In that case, the relief from the preliminary injunction "was not defeasible" because "[t]he sole event covered by the injunction, the 1996 Democratic National Convention, had ended." *Id.* at 723. In other words, the preliminary injunction itself provided the plaintiffs with "everything [they] asked for in the lawsuit," and all that mooted the case was this "court-ordered success and the passage of time." App. 19a.

By contrast, these circuits do not allow fees where the "enduring" relief comes from some later, non-judicial act, such as a legislature repealing or amending the challenged law. For example, the Eighth Circuit denied fees when the defendant amended an ordinance after the court preliminarily enjoined its enforcement. *Advantage Media, L.L.C.* v. *City of Hopkins, Minn.,* 511 F.3d 833, 835 (8th Cir. 2008). The court explained that while the lawsuit "resulted in alteration of several potentially unconstitutional provisions of the . . . ordinance, the Supreme Court has rejected the 'catalyst' theory of fee recovery as a means of attaining prevailing party status." *Id.* at 838; *Northern Cheyenne Tribe*, 433 F.3d at 1086 ("In the end, the Tribes achieved their desired result because of regulatory action taken by HUD . . . and because of voluntary decisions by the other

defendants . . . ."); see also *Hargett*, 53 F.4th at 413 (Nalbandian, J., dissenting) ("Here, Tennessee's voluntary repeal of the challenged provisions bars recovery of § 1988(b) attorney's fees. What mooted the case was the State-Defendants' own actions."); *Select Milk*, 400 F.3d at 956–57 (Henderson, J., dissenting) ("Nor does the subsequent mooting of the Milk Producers' lawsuit—not by adjudication but by voluntary regulatory change—bridge the gap between the preliminary relief granted and the award of 'irreversible' relief.").[6]

On the other side of the split, the Third, Fourth, Fifth, Sixth, and Ninth Circuits hold that "enduring" relief may come from some later, non-judicial event that moots the case. *PAPV*, 520 F.3d at 234; App. 31a–35a; *Dearmore*, 519 F.3d at 524; *Hargett*, 53 F.4th at 409; *Higher Taste,* 717 F.3d at 717–18. This generally occurs when the challenged law is repealed or amended while the preliminary injunction is in place.

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[6] To be sure, the Eighth Circuit has issued conflicting rulings on this issue. Contradicting *North Cheyenne Tribe* and *Advantage Media*, it subsequently *allowed* fees based on a preliminary injunction that was later mooted by repeal of the challenged law. *Rogers*, 683 F.3d at 904. *Rogers* did not acknowledge its departure from these prior rulings, or explain its basis for doing so, other than noting that the plaintiff specifically requested a preliminary injunction in its complaint, and, thus, received "'the precise relief that it had requested.'" *Id.* at 911 (citation omitted). Regardless, *Rogers* did not purport to overrule *North Cheyenne* or *Advantage Media*, and the resulting internal conflict merely highlights the confusion plaguing the Courts of Appeals on this issue.

See, *e.g.*, *PAPV*, 520 F.3d at 234 (defendant passed new ordinance); App. 31a–35a (legislature repealed the challenged law); *Hargett*, 53 F.4th at 409 (legislature amended the challenged law). In such cases, the courts have considered the preliminary injunction to become "enduring" when the case is mooted. See *PAPV*, 520 F.3d at 234 ("When the City ultimately passed a new ordinance . . . the Court closed the case . . . ; *at that point*, plaintiffs' victories were no longer subject to reconsideration on the merits in this case.") (emphasis added); App. 36a (allowing fees where the preliminary injunction "*becomes moot* before final judgment such that the injunction cannot be 'reversed, dissolved, or otherwise undone' by a later decision") (emphasis added).

These courts have not required the later mooting event to have the "judicial imprimatur" required by *Buckhannon*, 532 U.S. at 605. For instance, legislative repeal lacks such a "judicial imprimatur," *id.* at 601; so too does a settlement agreement that is not "judicially enforceable," *Higher Taste*, 717 F.3d at 718. On these courts' reasoning, the preliminary-injunction order provides the "judicial imprimatur" required by *Buckhannon*, while the later non-judicial mooting event provides the "enduring" relief required by *Sole*. See, *e.g.*, *Higher Taste*, 717 F.3d at 718 (holding that "the preliminary injunction 'carries all the "judicial imprimatur" necessary to satisfy *Buckhannon*,'"" while the later out-of-court settlement agreement "establish[ed] that the relief . . . is sufficiently enduring.").

The Fifth Circuit adds another requirement that the other circuits do not impose. It agrees that "enduring" relief can come from a later mooting event, but only when the defendant is responsible for that event and was actually motivated by the preliminary injunction. See *Dearmore*, 519 F.3d at 524 ("[W]e hold that the plaintiff . . . must win a preliminary injunction . . . that causes the defendant to moot the action . . . ."). It holds that this additional requirement "satisfies *Buckhannon*" because it mandates that "the defendant moots the plaintiff's action in response to a court order, not just in response to the filing of a lawsuit." *Ibid.*

II. The questions presented are important and recurring

These conflicts between the Courts of Appeals concern "important matter[s]." Sup. Ct. R. 10(a). Indeed, "confusion among lower courts" over the application of Section 1988 is an inherently "important" matter. *Webb* v. *Bd. of Educ. of Dyer Cnty., Tenn.*, 471 U.S. 234, 245 (1985) (Brennan, J., concurring in part). This is true for at least three reasons.

First, attorney's fees in civil rights cases often impose substantial financial burdens on state governments. As *Buckhannon* recognized, "fees in this kind of litigation can be as significant as, and sometimes even more significant than, . . . potential liability on the merits." 532 U.S. at 608 (quoting *Evans* v. *Jeff D.*, 475 U.S. 717, 734 (1986)). These

burdens are exacerbated by the "unpredictability" of fee awards, which can be "just as important as their magnitude." *Evans*, 475 U.S. at 735.

Examples of substantial fee awards against government actors are not hard to find. In this case, Plaintiffs have already requested an award of more than $767,000 in *appellate fees alone*. Fee Petition at 23, ECF 89-2 at 14–37, ECF 89-3 at 22–33. Their total fee request likely will run into the millions of dollars, considering the years of litigation in the district court. Other recent examples of fee demands against States include: *Veasey* v. *Abbott,* No. 2:13-CV-193, 2020 WL 9888360 (S.D. Tex. May 27, 2020), *aff'd*, 13 F.4th 362 (5th Cir. 2021) ($6,790,333.31); *Tennessee State Conference of the N.A.A.C.P.* v. *Hargett*, Nos. 3:19-cv-00365, 3:19-cv-00385, 2021 WL 4441262 (M.D. Tenn. Sept. 28, 2021), *aff'd*, 53 F.4th 406 (6th Cir. 2022) ($851,279.44); *New York State Rifle & Pistol Association, Inc.* v. *Nigrelli*, No. 1:18-cv-134, 2023 WL 6200195 (N.D.N.Y. Sept. 22, 2023) ($447,700.82); *Chrysafis* v. *Marks*, No. 21-CV-2516, 2023 WL 6158537 (E.D.N.Y. Sept. 21, 2023) ($384,728.86); see also Br. of Am. Curiae State of Georgia, et al., *Hargett* v. *Tennessee State Conference of the NAACP*, No. 22-773 (Feb. 21, 2023) at 6–9 (collecting additional cases). Due to sovereign immunity, these judgments are not against the States themselves—but they will invariably be *paid* by the States and, ultimately, their taxpayers.

Second, the risk of large, unpredictable fee awards will deter States from voluntarily altering allegedly

unlawful behavior. See *Buckhannon,* 532 U.S. at 608 ("[T]he possibility of being assessed attorney's fees may well deter a defendant from altering its conduct."). Whenever a plaintiff secures a preliminary injunction, State defendants must fight to a final judgment (and potentially beyond) to avoid a fee award. *Evans*, 475 U.S. at 736 ("It is . . . not implausible to anticipate that parties to a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open, thereby forcing more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants."). This is true even if the State *wanted* to change the law for reasons unrelated to the lawsuit. Indeed, it is true even if the State had already *planned* to do so before the preliminary injunction issued.

Third, this issue affects more than just civil rights litigation. As explained above, "prevailing party" is a "legal term of art" that is interpreted "consistently" in "numerous statutes" authorizing awards of attorney's fees." *Buckhannon*, 532 U.S. at 602–03 & n.4. These fee-shifting statutes cover a host of substantive areas, from trademark infringement to disability discrimination to voting rights. See pp. 4–5, n.1, *supra*. Accordingly, the effect of the term's interpretation is sweeping.

Because the questions presented continue to be "recurring and important," Br. of Am. Curiae State of Georgia, et al., *Hargett* v. *Tennessee State Conference*

of the NAACP, No. 22-773 (Feb. 21, 2023), at 3, the Court should resolve them.

III. The Fourth Circuit answered the questions presented incorrectly

The Court should also grant certiorari because the ruling below was incorrect. In erroneously overruling *Smyth*, the Fourth Circuit joined the wrong side of both circuit splits. *See* Section I, *supra*. Accordingly, this case presents an ideal opportunity for the Court to resolve these splits, while also reversing an erroneous ruling that could cost Virginia taxpayers millions of dollars.

A. "On the merits" requires an actual decision on the merits rather than a prediction of "likely" future success

The decision below erred by holding that a preliminary injunction provides "relief on the merits" when it is based on a prediction of "likely" success in the future. The "merits" requirement "means a court actually makes a final decision." App. 66a (Quattlebaum, J., dissenting). A "likelihood" finding "does not definitively decide the merits of anything." App. 61a. Instead, it merely "predicts the outcome of a future decision." App. 61a; see also *Singer*, 650 F.3d at 230 n.4 ("[T]he determination must be merits-based . . . not be merely a finding of a likelihood of success on the merits, as in this case."); *Select Milk*, 400 F.3d at 956 (Henderson, J., dissenting) ("But 'likelihood of

success on the merits' does not equal 'success on the merits.'").

Indeed, because preliminary-injunction rulings are generally based on an initial prediction of "likely" success, they usually have no preclusive effect. They are generally "not binding at trial," for example. *Univ. of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981). Nor are they generally binding in a future case. See, *e.g.*, *Medtronic, Inc.* v. *Gibbons*, 684 F.2d 565, 569 (8th Cir. 1982). Instead, they are deemed preclusive only in "rare circumstances" where they were "'clearly intended to firmly and finally resolve [an] issue', rather than 'estimate the likelihood of success' of proving that issue." *Abbott Labs.* v. *Andrx Pharms., Inc.*, 473 F.3d 1196, 1205–06 (Fed. Cir. 2007) (citation omitted).

The plain meaning of "prevailing party" confirms that an actual, conclusive ruling on the merits is required to warrant fees. The Court commonly looks to dictionary definitions to determine plain meaning. See, *e.g.*, *Astrue* v. *Ratliff*, 560 U.S. 586, 592 (2010); *Mississippi* v. *Louisiana*, 506 U.S. 73, 78 (1992). And at the time Congress passed Section 1988, the term "prevailing party" was defined as "[t]he party ultimately prevailing when the matter is finally set to rest." *Black's Law Dictionary* 1352 (rev. 4th ed. 1968). Whether a party is prevailing does not depend on "the degree of success at different stages of the suit." *Ibid.*; see App. 46a–47a (Quattlebaum, J., dissenting) ("At the time Congress enacted [Section 1988], the term 'prevailing party' was understood in the law.")

(discussing *Black's Law Dictionary*). This definition "tells us to look to the 'end of the suit' to see if a party has 'successfully maintained' a claim, not to interim events." App. 47a (Quattlebaum, J., dissenting) (quoting *Black's Law Dictionary*). A preliminary prediction of "likely" future success is not sufficient.

In line with the term's plain meaning, this Court has repeatedly suggested that a "prevailing party" must obtain a definitive ruling on the merits. See, *e.g.*, *Texas State Tchrs. Ass'n*, 489 U.S. at 792 ("[T]o be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a *resolution of the dispute* which changes the legal relationship between itself and the defendant.") (emphasis added). Indeed, *Buckhannon* held that "prevailing" requires more than "filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined)." 532 U.S. at 606; see also*, e.g.*, *Hanrahan*, 446 U.S. at 757 ("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") (emphasis added); *Flight Attendants* v. *Zipes*, 491 U.S. 754, 762 (1989) ("Our cases have emphasized the crucial connection between *liability* for violation of federal law and liability for attorney's fees under federal fee-shifting statutes") (emphasis added). Thus, as the dissenting judges below correctly concluded, a "prevailing party" must "obtain a judicial decision that is like a judgment or a consent decree" and "resolve[s] at least one issue on the merits." App.

57a (Quattlebaum, J., dissenting). "And resolving an issue on the merits means deciding who ultimately wins." App. 58a (Quattlebaum, J., dissenting).

It is for good reason that Congress requires a *definitive* ruling on the merits. A prediction of "likely" success occurs at a preliminary phase of litigation, based on relaxed procedures and an incomplete record. That prediction can be wrong, and it often is. But under the ruling below, if the case is mooted before that error is corrected, the defendant will pay attorney's fees anyway. Thus, the ruling below will inevitably punish some defendants with hefty fee awards for entirely lawful conduct based only on a single district judge's preliminary conclusion that the conduct may have been unlawful.

This case is a clear example of the problem. At the time the district court predicted Plaintiffs were "likely" to succeed, the most analogous decision available supported Plaintiffs. *Fowler* v. *Johnson*, No. CV-17-11441, 2017 WL 6379676 (E.D. Mich. Dec. 14, 2017). But six months later, the Sixth Circuit *reversed* that decision, agreeing with many of the arguments the Commissioner had made in the present case. *Fowler* v. *Benson*, 924 F.3d 247, 264 (6th Cir. 2019). Since then, many decisions in similar license-suspension cases have supported the Commissioner. See, *e.g., Mendoza* v. *Strickler*, 51 F.4th 346, 349 (9th Cir. 2022); *Robinson* v. *Long*, 814 F. App'x 991 (6th Cir. 2020); *Motley* v. *Taylor*, 451 F. Supp. 3d 1251 (M.D. Ala. 2020), *aff'd*, No. 20-11688, 2022 WL 1506971 (11th Cir. May 12, 2022); *White* v. *Shwedo*,

No. 2:19-CV-3083-RMG, 2020 WL 2315800 (D.S.C. May 11, 2020); *Johnson* v. *Jessup*, 381 F. Supp. 3d 619 (M.D.N.C. 2019). Had this case not been mooted, the *Commissioner* would have prevailed, not Plaintiffs.

In addition, the decision below results in precisely "what *Buckhannon* sought to avoid"—"a second major litigation" over attorney's fees. App. 67a (Quattlebaum, J., dissenting) (quoting *Buckhannon*, 532 U.S. at 609). For good reason, this Court has previously preferred "ready administrability" when it comes to the standard for attorney's fees. *Buckhannon*, 532 U.S. at 610. Allowing fees based on a "likelihood" of success is "clearly not a formula for 'ready administrability.'" *Ibid.* Rather, such a rule thrusts courts into thorny questions, including how *much* of a "likelihood" is sufficient to provide "relief on the merits," and how to determine when that threshold has been crossed. The "likelihood" of success needed to grant a preliminary injunction can be quite low: many circuits hold that a "serious question" on the merits or a "plausible claim" can suffice. See *All. for the Wild Rockies* v. *Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) ("serious question"); *Citigroup Glob. Markets, Inc.* v. *VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010) (same); *Hoosier Energy Rural Elec. Co-op., Inc.* v. *John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) ("plausible claim").

Accordingly, many courts have held that a stronger "likelihood" is needed for fees than for a preliminary injunction, see Section I.A, *supra*. But courts

assessing fee requests then face difficult and fact-intensive distinctions between preliminary injunctions decided sufficiently "on the merits" and injunctions based too heavily on equitable factors. *Ibid.* Because the merits and equitable factors are often weighed on a "sliding scale," courts face the daunting task of parsing district court opinions and hearing transcripts to decide whether that threshold had been crossed. *Ibid.*; see also *Select Milk*, 400 F.3d at 957 (Henderson, J., dissenting) ("How much of a 'likelihood of success' is enough? Will a 75 per cent likelihood do? How about 50 per cent with a strong public interest showing to boot?"). At best, this is a "contextual and case-specific inquiry," *McQueary*, 614 F.3d at 601, that will drain party and judicial resources.

Courts also face difficult questions of how rigorous the procedures must be that led to the "likelihood" prediction. Preliminary injunctions are "customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Camenisch,* 451 U.S. at 395; see *id.* at 394. (describing "the significant procedural differences between preliminary and permanent injunctions"). Acknowledging this problem, some Courts of Appeals have held that a prediction of future success cannot confer prevailing party status where the proceedings were "hasty and abbreviated," *Sinapi*, 910 F.3d at 551, or where there was no "serious examination" of the merits, *Kansas Jud. Watch*, 653 F.3d at 1238. See also Section I.A, *supra.* But where,

exactly, is the line between "hasty and abbreviated" and "thorough" or "serious" examination? Cases offer no clear answer. See App. 67a (Quattlebaum, J., dissenting) ("How much discussion of the merits is necessary?"). "[C]reative lawyers haggling over fees will contest these and likely other issues undoubtedly bringing about what *Buckhannon* sought to avoid . . . ." *Ibid.*

B. A court order, rather than a non-judicial act, must make the plaintiff a "prevailing party"

The decision below also places the Fourth Circuit on the wrong side of the second split. This side erroneously holds that a preliminary injunction need not itself provide "enduring" relief, which can come instead from some subsequent non-judicial act that moots the case. See Section I.B, *supra*. As the dissent below correctly explained, that improperly "allows a non-judicial decision to anoint a prevailing party." App. 63a (Quattlebaum, J., dissenting); see also *Advantage Media,* 511 F.3d at 835; *Northern Cheyenne Tribe*, 433 F.3d at 1086; *Hargett*, 53 F.4th at 413 (Nalbandian, J., dissenting); *Select Milk*, 400 F.3d at 956–57 (Henderson, J., dissenting).

This holding is in fatal tension with *Sole* and *Buckhannon*. "[E]ither way the majority turns, its conclusion conflicts with Supreme Court precedent." App. 63a (Quattlebaum, J., dissenting). *Sole* requires that a prevailing party obtain an "enduring change in the legal relationship" between the litigants. 551 U.S.

at 86 (cleaned up). And *Buckhannon* requires that this "change in the legal relationship" be "judicially sanctioned." 532 U.S. at 605. A non-judicial act, such as a "defendant's voluntary change in conduct," cannot make the plaintiff a "prevailing party" because it "lacks the necessary judicial *imprimatur*." *Id.* at 598–99. But the "enduring" change here had no judicial imprimatur, and the only change with a judicial imprimatur was not enduring. The court's holding that Plaintiffs are prevailing parties thus cannot be reconciled with this Court's precedent.

Treating a *non-judicial act* as "enduring" relief violates *Buckhannon*. At the time the preliminary injunction here was issued, it provided no "enduring" relief. See pp. 8–9, *supra*. Instead, it provided only "ephemeral" relief that could have been reversed by further proceedings, meaning plaintiffs had "won a battle," but might still have "lost the war." *Sole*, 551 U.S. at 86. Plaintiffs received "enduring" relief only when the Virginia General Assembly repealed the law at issue. Thus, the court allowed "a non-judicial decision to anoint a prevailing party." App. 63a (Quattlebaum, J., dissenting). In other words, "the lasting change did not come from the court." App. 64a. As the dissent persuasively explained: "The plaintiffs ultimately got what they wanted. But they did not get what they wanted because a federal court decided the merits of their challenge." App. 61a–62a. Rather, "[t]hey got what they wanted because the General Assembly of Virginia decided to change the law." App.

62a. Thus, "*Buckhannon* is crystal clear" that "the plaintiffs cannot be prevailing parties." *Ibid.*

Indeed, Plaintiffs' "claim to prevailing party status" is "little more than a new spin on the catalyst theory" that this Court rejected in *Buckhannon*. *Id.* To avoid *Buckhannon*, the Fourth Circuit majority below asserted that its decision rests "entirely on [the plaintiffs'] victory at the preliminary injunction stage, and not on the General Assembly's subsequent repeal of § 46.2-395." App. 28a. But the majority relied on the repeal to satisfy the second part of its test—that the claim "becomes moot before final judgment such that the injunction cannot be reversed, dissolved, or otherwise undone . . . ." App. 36a; see App. 63a (Quattlebaum, J., dissenting) ("But the second part of the majority's test . . . necessitates a non-judicial act."). Indeed, the majority had no choice but to rely on the repeal, because Plaintiffs' preliminary injunction did not itself provide "enduring" relief—without the repeal, Plaintiffs could have lost at summary judgment, at trial, or on appeal, and therefore obtained nothing more than the "fleeting" relief that *Sole* held insufficient. *Sole*, 551 U.S. at 83. Because "[t]he majority needs something more," it allows a "legislative, not judicial, action" to provide the enduring change, which lacks the "judicial *imprimatur*" needed to satisfy *Buckhannon*. App. 63a–64a (Quattlebaum, J., dissenting).

This maneuver improperly resurrects the "catalyst" theory, allowing a defendant's voluntary cessation to confer prevailing party status. Under

Buckhannon, a party must prevail *in* court, not outside of it. The decision below is thus contrary to this Court's precedent.

IV. This case is an ideal vehicle for resolving the questions presented

This case presents the Court with an ideal vehicle for resolving the questions presented. It turns on the purely legal issue of whether Plaintiffs are entitled to attorney's fees, which was cleanly presented to, and decided by, the Fourth Circuit en banc. See App. 5a ("This fee dispute turns on a single question of law. . . ."). The questions presented are the only remaining issues in the case. And the Fourth Circuit's ruling was not interlocutory—it was based on a complete record.

In addition, the two circuit splits presented here are both outcome-determinative. As to the first split, the preliminary injunction was expressly based on a prediction of future success. See, *e.g.*, *Stinnie*, 355 F. Supp. 3d at 520 ("Plaintiffs are *likely* to succeed on the merits of their procedural due process claim."); *id.* at 527 (Plaintiffs made "a clear showing that they are likely to succeed" but did not "show a certainty of success"). The district court expressly declined to "reach a definitive conclusion." *Id.* at 529. Accordingly, the outcome would have been different under the minority rule. *Singer*, 650 F.3d at 230 n.4 (fee award may not be based on "merely a finding of a likelihood of success").

The second split is equally determinative here, because the preliminary injunction was decidedly "defeasible." Before the case was mooted, it could have been "reversed, dissolved, or otherwise undone" by a final decision—just as in *Sole*. 551 U.S. at 83. The preliminary injunction did not *itself* provide "enduring" relief, as in the "canonical example" of an injunction allowing a particular event to go forward. App. 32a.

Further, both splits are mature. Ten circuits have taken sides on the first split, and seven circuits on the second. *See* Section I, *supra*. And as discussed above, the Fourth Circuit has taken the wrong side of both. *See* Section III, *supra*.

Finally, this case is emblematic of how the questions presented generally arise. Here, the district court issued a preliminary injunction, and the case was subsequently mooted, prior to final judgment, by the legislature's repeal of the law. See pp. 6–13, *supra*. Similar fact patterns commonly arise in other cases. See, *e.g.*, *Dearmore,* 519 F.3d at 520 (city amended challenged ordinance); *Hargett*, 53 F.4th at 408 (legislature repealed challenged law); *Higher Taste,* 717 F.3d at 714–15 (city amended challenged ordinance); *Kansas Jud. Watch*, 653 F.3d at 1234 (Kansas Supreme Court amended challenged ethics code).

CONCLUSION

The Court should grant the petition for certiorari.

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