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

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Whether the Fourth Circuit, in line with every other circuit, correctly held that Respondents can be "prevailing parties" under 42 U.S.C. § 1988 based on winning a preliminary injunction that awarded them meaningful relief from an unconstitutional law that the legislature later repealed.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

## INTRODUCTION

A Virginia statute penalized Respondents by automatically suspending their driver's licenses without affording them notice and an opportunity to be heard. Respondents challenged the law. The district court readily identified the procedural due process problem. *Stinnie v. Holcomb*, 355 F. Supp. 3d 514, 529 (W.D. Va. 2018) ("Plaintiffs are likely to show § 46.2-395 does not provide *any* hearing, much less one that satisfies due process."). The district court then entered a preliminary injunction against the law. That act opened the door to Respondents receiving their driver's licenses (and livelihoods) back.

In the wake of the injunction, the Commissioner of the Department of Motor Vehicles advised the General Assembly to repeal the law. With the Governor's support, across two legislative sessions, it did so. Today the offending law no longer exists.

The question is whether Respondents "prevailed" under 42 U.S.C. § 1988. The answer, as a matter of common sense and under the law of every federal circuit, is yes.

The Commissioner contends that at least two circuit splits exist on this point. But the supposed splits are simply different courts using varying words to describe the same general rule—that a preliminary injunction winner who secures meaningful relief in an order weighing the merits of the constitutional issue "prevails" when the government chooses to moot the case before further proceedings. The various formulations are no meaningful clash of visions. In

fact, this case would come out the same way in every circuit.

Even more importantly, the Commissioner's position does not agree with any circuit. In his view, no mooted case can ever have a prevailing party, even if, as here, the preliminary injunction changed the parties' positions and the mootness then arose from what amounts to a government surrender.

The Commissioner's view garbles the everyday meaning of "prevail" and "prevailing party." It also punishes litigants who take on the most odious laws—the ones that are readily disposed of once people focus on them. Such is the case here, where after the Plaintiffs won a preliminary injunction against the offending law, the Virginia General Assembly repealed it by a combined vote of 113 to 26.

This case was about procedural due process. Other similar cases have vindicated freedoms of speech, association, and religion. *E.g.*, *People Against Police Violence v. Pittsburgh*, 520 F.3d 226, 230 (3d Cir. 2008) ("*PAPV*") (affirming attorney's fees for challengers who won a preliminary injunction against a series of ordinances disfavoring public marches and protests, and then the city revised its ordinance to correct the constitutional problems); *Roberts v. Neace*, 65 F.4th 280, 283 (6th Cir. 2023) (Sutton, C.J.) (affirming fees for churchgoers threatened with prosecution for attending Easter Sunday church in 2020, who had won a preliminary injunction, after which the government eliminated the offending ban).

The Commissioner's proposed bite out of § 1988 would erase the fees in all of these cases. No circuit

accepts this view. This Court has denied certiorari repeatedly and recently on this same question. *E.g.*, *Hargett v. Tennessee State Conf. of the NAACP*, No. 22-773 (cert. denied June 12, 2023). This Court should deny the Petition.

## STATEMENT OF THE CASE

### I. Legal Background

"Section 1988 was enacted to [e]nsure that private citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Acts." *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559 (1986). "Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process." *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986).

"Title 42 U.S.C. § 1988 provides that in federal civil rights actions 'the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.'" *Hensley v. Eckerhart*, 461 U.S. 424, 426 (1983). A "prevailing party" need only "receive at least some relief on the merits." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). In determining whether the relief granted confers prevailing party status, "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989), *quoted in CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 422 (2016).

"A plaintiff 'prevails,' . . . 'when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Lefemine v. Wideman*, 568 U.S. 1, 4 (2012). "[A]n injunction or declaratory judgment, like a damages award, will usually satisfy that test." *Id.* And "the prevailing party inquiry does not turn on the magnitude of the relief obtained." *Farrar v. Hobby*, 506 U.S. 103, 114 (1992); *Texas State Teachers Ass'n*, 489 U.S. at 791–92 ("If the plaintiff has succeeded on '*any significant issue* in litigation which achieve[d] *some of the benefit* the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind." (emphases added)).

## II. Factual and Procedural Background

### A. Va. Code § 46.2-395 punished those unable to pay court debt without procedural due process.

For years, the Commonwealth of Virginia automatically suspended driver's licenses for failure to pay court debt. *See* Va. Code § 46.2-395. Suspension occurred without a hearing or any inquiry into the reasons for nonpayment or financial circumstances. Va. Code § 46.2-395.

Respondents are indigent Virginia residents whose driver's licenses were automatically suspended by the Commissioner for failure to pay court debt that they could not afford. Those suspensions deprived drivers of transportation necessary to get to and from work, keep medical appointments, care for ill or disabled family members, and, paradoxically, to meet

their financial obligations to the courts. *See, e.g.*, 4th Cir. No. 21-1756, ECF No. 20, JA226–70 (hereinafter JA) (First Am. Compl. ¶¶ 2, 31, 33, 39, 109, 151, 152, 168).

Respondents were unable, not unwilling, to pay their court debt. *Stinnie*, 355 F. Supp. 3d at 520–23. The district court noted the many struggles Respondents have endured that have adversely affected their ability to pay their court debt, such as serious illness, unemployment, and incarceration. *See id.* Despite Respondents' inability to pay, none of them were asked about their financial circumstances before license suspension or were otherwise provided due process. *See id.*

### B. Respondents sued to defend their constitutional rights and won an injunction.

Respondents filed suit against the Commissioner of the DMV. JA27–172. They alleged that § 46.2-395 violated due process by denying them a property interest without notice or an opportunity to be heard. Respondents sought declaratory and injunctive relief, as well as attorney's fees and costs under 42 U.S.C. § 1988. JA79–80.

Eventually Respondents filed a Motion for Preliminary Injunction, asking the district court to: (1) enjoin the Commissioner from enforcing § 46.2-395 against Respondents; (2) remove any current suspensions of Respondents' driver's licenses imposed under § 46.2-395; and (3) enjoin the Commissioner from charging a fee to reinstate Respondents' licenses

if no other restrictions on their licenses existed. JA297.

Following briefing by the parties and a hearing involving several hours of testimony, including expert evidence, the district court granted a preliminary injunction. The court relieved Respondents of the burdens of § 46.2-395. *Stinnie*, 355 F. Supp. 3d at 527–32.

The district court noted that "[t]o obtain a preliminary injunction, the moving party must establish 'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Id.* (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

The district court then concluded that Respondents were likely to succeed on their procedural due process claim. *See id.* at 527–28. In so ruling, the district court scrutinized the notice and hearing components of procedural due process. *See id.* at 528–31. The district court recognized that § 46.2-395 failed the hearing requirement of procedural due process. *Stinnie*, 355 F. Supp. 3d at 529 ("Plaintiffs are likely to show § 46.2-395 does not provide *any* hearing, much less one that satisfies due process."); *id.* at 529–30 ("The Court determines that Plaintiffs are likely to succeed because the procedures in place are not sufficient to protect against the erroneous deprivation of the property interest involved. Indeed, § 46.2-395, on its face, provides no procedural hearing at all."). The district court also determined that the rest of the *Winter* factors ("irreparable harm, the

balance of equities, and the public interest") all counseled in Respondents' favor. *Id.* at 532.

Granting the injunction, the district court 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 shall "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 if there [were] no other restrictions on their licenses." JA843.

The Commissioner did not appeal the preliminary injunction. Then litigation proceeded as to class certification briefing, fact and expert discovery, and motions for summary judgment. JA17–23. Five weeks before the case was scheduled to go to trial in August 2019, the district court stayed the case at the request of the Commissioner and over Respondents' objection, pending the 2020 session of Virginia's General Assembly. JA15–23; JA955.

### C. The General Assembly repealed § 46.2-395.

The entry of the preliminary injunction led the General Assembly to focus on this problem. Less than a month after the injunction, Senator William M. Stanley, who sponsored legislation to repeal § 46.2-395, remarked: "[W]ith the preliminary injunction being granted . . . I hope the House of Delegates will join the Senate in fixing this problem."[1]

Governor Northam also proposed a Budget Amendment to provide temporary relief to individuals whose driver's licenses had been automatically suspended for failure to pay court debt.[2] The General Assembly passed the Budget Amendment, which suspended the operation of § 46.2-395 from July 1, 2019, to June 30, 2020 (one budget cycle). It also waived associated reinstatement fees for driver's licenses otherwise eligible for reinstatement.

Shortly after the Budget Amendment suspended § 46.2-395, the district court stayed this case and

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[1] Matthew Chaney, *Virginia License Suspension Law Faces New Challenges*, Va. Law. Wkly. (Jan. 9, 2019), https://valawyersweekly.com/2019/01/09/va-license-suspension-law-faces-new-challenges/ (last visited Feb. 27, 2024).

[2] Office of Virginia Governor, *Gov. Northam Announces Budget Amendment to Eliminate Driver's License Suspensions for Nonpayment of Court Fines and Costs* (Mar. 26, 2019), http://bit.ly/GovNorthamBudget (last visited Feb. 27, 2024); *see also* Virginia Legis. Info. Sys., Va. HB 1700, *Governor's Recommendation*, 2019 Sess., http://lis.virginia.gov/cgi-bin/legp604.exe?191+amd+HB1700AG (last visited Feb. 27, 2024).

canceled the scheduled trial. *Stinnie v. Holcomb*, 396 F. Supp. 3d 653, 661 (W.D. Va. 2019).

Then, during its 2020 regular session, the General Assembly considered legislation to permanently eliminate the statute's unconstitutional mandate.[3] In January 2020, the Commissioner sent a letter to Senator Stanley advising how to repeal § 46.2-395 effectively. JA968–1000. The Commissioner also recognized the direct impact this case was having on the legislative process:

> As you are aware DMV is currently a party to the *Stinnie v. Holcomb* case, in which the issue under consideration is driver's license suspensions for failure to pay court fines and costs pursuant to § 46.2-395. On June 28, 2019, *the Court stayed the litigation until after the close of the 2020 General Assembly Session to allow the legislature to repeal § 46.2-395*. An emergency enactment clause is needed to demonstrate to the Court that matters at issue in the *Stinnie v. Holcomb* litigation have been addressed by the General Assembly. *This should result in the pending litigation being dismissed*, relieving the Department from continuing to incur costly legal fees.

JA968–69 (emphases added). The Commissioner even went so far as to "offer a substitute" bill that had all of his recommended changes. JA969–1000. The

[3] *See* Virginia Legis. Info. Sys., Va. SB 1, 2020 Sess., https://lis.virginia.gov/cgi-bin/legp604.exe?ses=201&typ=bil&val=sb1 (last visited Feb. 27, 2024).

Commissioner was calling for a repeal to stem his losses here from continuing to defend a law the district court had already concluded likely violated procedural due process.

The General Assembly repealed § 46.2-395 on February 26, 2020, with an overwhelming majority. Governor Northam signed the repeal, and it took effect on July 1, 2020. The new law also required the Commissioner to reinstate driving privileges suspended due to § 46.2-395.

### D. The Fourth Circuit determined that Respondents were prevailing parties under § 1988.

In light of the action taken by the General Assembly, on May 7, 2020, the parties stipulated that this action was moot. JA1010–13. The preliminary injunction that relieved Respondents from § 46.2-395 remained in effect as a source of continuing relief to Respondents from December 2018 through the mooting of this case in 2020.

After the case became moot, the district court retained jurisdiction to determine Respondents' entitlement to attorney's fees and entered an order bifurcating the briefing on Respondents' Fee Petition. JA1017–18. Under the briefing schedule entered by the district court, the parties first briefed the "prevailing party" issue. *Id.* The amount and reasonableness of any fees to be awarded were reserved for a later round of briefing. *Id.*

The district court denied the fee petition based on then-existing Fourth Circuit precedent in *Smyth ex*

*rel. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002). *Stinnie v. Holcomb*, No. 3:16-CV-00044, 2021 WL 2292807 (W.D. Va. June 4, 2021). Under *Smyth*, a preliminary injunction victory in a case that is later mooted could *never* make a party a "prevailing party." *Smyth*, 282 F.3d at 277.

Respondents appealed. A three-judge panel of the Fourth Circuit affirmed on the grounds that *Smyth* remained binding authority. *Stinnie v. Holcomb*, 37 F.4th 977, 982–83 (4th Cir. 2022). But Judge Harris noted that the court "may wish" to reconsider *Smyth*. *Id.* at 983 (Harris, J., concurring). She noted that the rule in *Smyth* was "a complete outlier" among the other circuits. *Id.* at 984. Without *Smyth*'s categorical bar, she wrote, "plaintiffs would almost certainly qualify as prevailing parties[.]" *Id.* at 985. But *Smyth*'s rule "allow[ed] defendants to game the system." *Id.*

The Fourth Circuit took the case *en banc* and rejected *Smyth*. *Stinnie v. Holcomb*, 77 F.4th 200, 203 (4th Cir. 2023). The court overruled *Smyth* as an "outlier" and observed that "[e]very other circuit to consider the issue has held that a preliminary injunction may confer prevailing party status in appropriate circumstances." *Id.* The Fourth Circuit held that "the plaintiffs here 'prevailed' in every sense needed to make them eligible for a fee award[.]" *Id.*

The Fourth Circuit stated:

> This case illustrates the point. The plaintiffs here secured a preliminary injunction based on a "clear showing" that Va. Code § 46.2-395 was likely

> unconstitutional. . . . And after years of "long, contentious, and no doubt costly" litigation, the plaintiffs were eager to proceed to summary judgment. . . . But over the plaintiffs' protests, the Commissioner secured a stay so that the General Assembly could repeal the statute and moot the case . . . . Moreover, the Commissioner provided significant input on how to structure the repeal – including a draft bill – so that it would "result in the pending litigation being dismissed, relieving" the government's obligation to "incur costly legal fees." J.A. 968–69. And because Virginia is in the Fourth Circuit and not anywhere else in the country, the Commonwealth could rest assured that this eleventh-hour capitulation would insulate it from a fee award. As this case so unfortunately demonstrates, instead of opening the courthouse doors to meritorious civil rights claimants, *Smyth*'s rule gives the government the key, allowing it to lock out civil rights plaintiffs whenever their success seems imminent. This cannot have been Congress's intent in passing § 1988.

*Id.* at 210.

The Fourth Circuit remanded the case to the district court for further proceedings on the reasonableness of the fee to which Respondents are entitled. Those proceedings remain pending today.

The district court, which will exercise broad discretion over the amount of fees Respondents should receive, has made no conclusion on that point, preferring to await the outcome of this certiorari petition.

## REASONS FOR DENYING THE WRIT

No part of the Petition satisfies the criteria warranting review by this Court. *First*, there is no circuit split requiring this Court's resolution, and the Commissioner disagrees with all circuits anyway. *Second*, this case is a poor vehicle to address the question presented, even if such split did exist. Respondents would qualify as the prevailing party under any circuit's particular articulation of the rule and the case is not final—no fee award has yet been made. *Third*, the *en banc* Fourth Circuit reached the right result. The Fourth Circuit faithfully implemented this Court's prevailing party precedent, and the Commissioner's policy-based arguments would undermine the statutory scheme set up in § 1988. *Fourth*, the question presented is often and recently denied.

### I. There is no circuit split warranting further review.

There are two problems with the Commissioner's arguments about circuit splits. Pet. 13–23. First, the claimed splits are not real. Second, the supposed splits are irrelevant to the Petition: the Commissioner contends that *every* circuit is wrong.

On the core question presented here, there is no split. Eleven circuits have held that a preliminary injunction on the merits can attain prevailing-party

status, even where the case is later rendered moot. *Haley v. Pataki*, 106 F.3d 478, 483 (2d Cir. 1997); *PAPV*, 520 F.3d at 233–34; *Stinnie*, 77 F.4th at 203; *Dearmore v. City of Garland*, 519 F.3d 517, 526 (5th Cir. 2008); *Planned Parenthood S.W. Ohio Region v. Dewine*, 931 F.3d 530, 542 (6th Cir. 2019); *Dupuy v. Samuels*, 423 F.3d 714, 720 (7th Cir. 2005); *Rogers Grp., Inc. v. City of Fayetteville*, 683 F.3d 903, 910–11 (8th Cir. 2012); *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 717–18 (9th Cir. 2013); *Kansas Jud. Watch v. Stout*, 653 F.3d 1230, 1238, 1240–41 (10th Cir. 2011); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1355–56 (11th Cir. 2009); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 942 (D.C. Cir. 2005).

Courts have recognized the uniformity of the different circuits, though they may use different words. *See PAPV*, 520 F.3d at 232–33 ("[N]early every Court of Appeals to have addressed the issue has held that relief obtained via a preliminary injunction can, under appropriate circumstances, render a party 'prevailing.'" (citing, at the time, six different circuits); *Dupuy*, 423 F.3d at 723 n.4 ("Our circuit's law on the mootness issue is hardly an outlier among the federal circuit courts. . . . [S]everal of our sister circuits have held that attorneys' fees may be awarded after a party has obtained a preliminary injunction and the case subsequently has become moot."); *Higher Taste, Inc.*, 717 F.3d at 717 ("Other circuits have applied the same reasoning when the plaintiff wins a preliminary injunction and the case is subsequently rendered moot by the defendant's own actions."); *Kansas Jud. Watch*,

653 F.3d at 1237, 1239 (citing positively the 3d, 7th, 9th and D.C. Circuits).

Indeed, the sole outlier *was* the Fourth Circuit—until this case, when the *en banc* court brought itself into line with all the others. "We believe this straightforward approach is not only faithful to Supreme Court guidance but also reflective of the broad consensus in our sister circuits." *Stinnie*, 77 F.4th at 216.

### A. The circuits are aligned over when a preliminary injunction may be "some relief on the merits."

A prevailing party need only "receive at least some relief on the merits." *Hewitt*, 482 U.S. at 760. The Commissioner claims a split regarding whether a likelihood-of-success ruling on a preliminary injunction can qualify. Pet. 15. There is no split.

To start, the Commissioner concedes that all but the Third Circuit are in alignment on this question. Pet. 14. For example, the Second Circuit had "little trouble finding that the district court based the preliminary injunction on the merits of plaintiffs' Contract Clause claim." *Haley*, 106 F.3d at 483. And in *Rogers Group*, the Eighth Circuit noted how the district court "engaged in a thorough analysis of the probability that Rogers Group would succeed on the merits of its claim[.]" *Rogers Grp.*, 683 F.3d at 910. The Ninth Circuit also requires merit-based preliminary injunctions, not ones that are "hasty and abbreviated." *Higher Taste, Inc.*, 717 F.3d at 716. The Tenth Circuit requires the district court to have

completed "a serious examination" of a plaintiff's case. *Kansas Jud. Watch*, 653 F.3d at 1238.

The Third Circuit does not differ in any meaningful way from these precedents. The Third Circuit holds, along with its sister circuits, "that relief obtained via a preliminary injunction can, under appropriate circumstances, render a party 'prevailing.'" *PAPV*, 520 F.3d at 232–33; *see also Singer Mgt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 230 & n.4 (3d Cir. 2011) (*en banc*) (accepting the "'well-supported legal proposition' that, in some cases, interim injunctive relief may be sufficient to warrant attorney's fees.").

Still, the Commissioner contends that the Third Circuit will only grant a preliminary injunction when the "court *actually* decides the merits." Pet. 15 (citing *Singer*, 650 F.3d at 230). But that strong-sounding language is just another way to express that the Third Circuit, like all the others, focuses closely on what the preliminary injunction says about the merits. *PAPV*, 520 F.3d at 232–33 (announcing that "we agree" with the other circuits on this point); *Singer*, 650 F.3d at 230 (assessing whether a TRO was "merits-based").

The Third Circuit's actual practice proves the point. In *PAPV*, the plaintiffs were prevailing parties entitled to attorney's fees under § 1988 when they won a preliminary injunction that remained until the government amended the offending law to correct the "alleged constitutional infirmities." 520 F.3d at 228. In granting the injunction, the district court evaluated the merits of the case. *See id.* at 233 ("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").

That attorney's fees were proper in *PAPV* shows that the Third Circuit's rule is not so different from the other circuits. All circuits distinguish between injunctions that merely maintain the status quo and those merits-based injunctions that alter the legal relationship between the parties. *Id.* at 233. Even the Third Circuit's firm assertion that a preliminary injunction must be a merits determination is hardly different from, say, the Fourth Circuit in this case. *Compare Singer*, 650 F.3d at 229–30 (requiring a "merits-based determination at the injunction stage"); *with Stinnie*, 77 F.4th at 216 (requiring a preliminary injunction to have provided "concrete, irreversible relief on the merits of her claim by materially altering the parties' legal relationship").

### B. No dispute among the circuits exists over what is an "enduring" change in the parties' legal relationship.

Just as there is no real dispute over what "some relief on the merits" may mean, so too the circuits generally agree on what is an "enduring" change in the parties' legal relationship. *Sole v. Wyner*, 551 U.S. 74, 86 (2007) (requiring a prevailing party to secure an "enduring change [in] the legal relationship between herself and the [defendant]").

To begin, this Court has already given the circuits guidance that "[p]revailing party status . . . does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the

final decision in the same case." *Sole*, 551 U.S. at 83; *id.* at 78 ("A plaintiff who achieves a transient victory at the threshold of an action can gain no award under that fee-shifting provision if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded."). It is clear that the mooting of a case "does not represent the kind of active, merits-based undoing the Supreme Court referred to in *Sole*." *Planned Parenthood*, 931 F.3d at 540.

The supposed split posited by the Commissioner is just different cases with different facts. The Commissioner seems to differentiate between cases that are mooted by the passage of time, *see Dupuy*, 423 F.3d 714, and cases that are mooted by the affirmative act of a legislative body, *Stinnie*, 77 F.4th 200.

There is no meaningful difference between the two. The Seventh Circuit sees no daylight between its approach and the other circuits. *Dupuy*, 423 F.3d at 723 n.4 ("[S]everal of our sister circuits have held that attorneys' fees may be awarded after a party has obtained a preliminary injunction and the case subsequently has become moot. . . . we follow the approach of the other circuits").

The Commissioner also relies on *Advantage Media* from the Eighth Circuit as support for this supposed distinction. Pet. 20. But in *Advantage Media*, the plaintiff first won a preliminary injunction and then later lost the trial on the merits. *Advantage Media, L.L.C. v. City of Hopkins, Minn.*, 511 F.3d 833, 835 (8th Cir. 2008); *id.* at 838 (referring to the "adverse jury verdict" plaintiff suffered). The Commissioner omits that key fact. No party here contends, and no

circuit would find, that a party who loses the trial is the prevailing party.

Nor does the Commissioner's citation to *Northern Cheyenne Tribe* support a different result. Pet. 20. In that case, "the [trial] court granted only interim relief that preserved the status quo until it could resolve the merits of the Tribes' claims." *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006). No circuit permits a mere status quo injunction to confer prevailing party status. *Northern Cheyenne Tribe* is far afield from the "material alteration" requirement imposed by this Court's precedent. *See Tex. State Teachers Ass'n*, 489 U.S. at 792–93.

Finally, the Commissioner contends the Fifth Circuit takes a different tack from the rest of the circuits in requiring the mooting event to be "actually motivated by the preliminary injunction." Pet. 23 (citing *Dearmore*, 519 F.3d at 526). But that argument fails.

As an initial matter, it stands to reason that often the court's granting of a preliminary injunction will be the impetus for the law change. For instance, in this case, Virginia Senator William Stanley stated that "with the preliminary injunction being granted . . . I hope the House of Delegates will join the Senate in fixing this problem.");[4] JA968–1000 (letter from the Commissioner advising how to repeal § 46.2-395 effectively). Thus, based on the case presented here it is near impossible to assess if the Fifth Circuit's possibly different requirement actually leads to

[4] *See supra*, n.1.

different outcomes in different circuits with any frequency.

Possibly for that reason, the Fifth Circuit itself sees no difference between itself and the other circuits. *Dearmore*, 519 F.3d at 526 ("As a result, this test does not signal any disagreement with the approaches adopted by the other circuits, with the exception of the Fourth Circuit." [now corrected]).

### C. The alleged circuit splits are irrelevant because the Commissioner asks this Court to overturn all the circuits.

The Commissioner's arguments on the purported circuit splits are a red herring. The Commissioner is actually asking this Court to overturn every circuit's precedent and adopt a rule at odds with the established practice across the nation. He wants a rule where a preliminary injunction is categorically insufficient to confer prevailing party status on a litigant. *See* Pet. 26–32; *id.* at 29 (arguing that a "definitive ruling on the merits" of the sort that would be impossible for a preliminary injunction stage is required).

The Commissioner does not and cannot point to any circuit that he contends has the right rule. In his view, they are all wrong.

Every circuit has created, through varying words, similar standards that aim to identify plaintiffs who truly "prevailed" in a meaningful way through a preliminary injunction. And all seek likewise to identify plaintiffs whose preliminary injunction does not qualify as "prevailing" in a meaningful sense, and

exclude them from fees. It is easy to point to variations in the language and analyses by the different circuits, but they are agreeing on the core point: a plaintiff who challenges a law as unconstitutional, wins a preliminary injunction stopping the law's effect on them in an opinion that evaluates the merits of the constitutional issue, and then cows the government into capitulating by changing the law before a true final judgment can be made, has "prevailed." This is true in the ordinary sense of the words "prevailing party," and it is true in every circuit. That includes people vindicating religious and assembly rights in the Sixth Circuit, freedom of speech in the Tenth Circuit, and in this case, procedural due process rights. The Commissioner's position would sweep away § 1988 fees in all of those cases.

## II. This case is a poor vehicle.

This case is also a poor vehicle for two different reasons. First, this case would be resolved the same way in every circuit. So even if the Third or Fifth Circuits had outlying rules, this case would present an odd and improper way to address them. Second, this case is not over. The amount of fees to be awarded remains entirely unknown—in fact, Respondents have not yet even been able to ask for, or brief, their full fee request.

### A. Respondents would prevail in any circuit.

Respondents meet the tests for prevailing party status as set forth by every circuit that has addressed the issue.

Respondents won a preliminary injunction. *See Stinnie*, 355 F. Supp. 3d at 532–33. That preliminary injunction was on the merits. *Stinnie*, 77 F.4th at 204 ("In a comprehensive opinion, the court made detailed findings of fact and conducted a robust assessment of the plaintiffs' procedural due process claim before concluding that it was likely to succeed on the merits."). Respondents' win materially altered the legal relationship between the parties. *Id.* at 211.

Before the preliminary injunction, Respondents were harmed by the unconstitutional application of § 46.2-395. After the preliminary injunction, they could not be. The relief Respondents obtained "material[ly] alter[ed] the legal relationship of the parties[.]" *Tex. State Teachers Ass'n*, 489 U.S. at 792–93; *see also Stinnie*, 77 F.4th at 211. The preliminary injunction restrained enforcement of the challenged law against Respondents until the case was mooted by legislative repeal. Indeed, the Commissioner managed to stave off trial long enough to persuade the General Assembly to repeal the law, and to advise them on how. Respondents' relief thus was never "reversed, dissolved, or otherwise undone by the final decision in the same case." *Sole*, 551 U.S. at 83. Respondents are prevailing parties and would be in every circuit.

First, even if the Third Circuit were using a distinct rule, Respondents would prevail there, too. In that circuit, even if some sort of "actual" decision on the merits at a preliminary injunction—whatever that may mean—were required, Respondents meet it. According to the Third Circuit, the preliminary injunction in *PAPV* was sufficient to confer prevailing party status on the plaintiffs because the district court

found that the ordinance at issue was "facially unconstitutional." *Singer*, 650 F.3d at 229–30.

The district court made a nearly identical finding here. In granting the preliminary injunction, the district court noted that "the private interest at stake *plainly* merits some pre-deprivation process" and "§ 46.2-395, *on its face*, does not provide a meaningful opportunity to be heard regarding license suspension." *Stinnie*, 355 F. Supp. 3d at 531 (emphases added). This is the same sort of merits-based finding that the Third Circuit deemed sufficient in *Singer* and *PAPV*.

Second, to the extent the Fifth Circuit differs, Respondents would prevail there, too. If Respondents needed to show a direct connection between the repeal of the law and this lawsuit, they could do so. Respondents' win on the preliminary injunction led to the General Assembly quickly passing a Budget Amendment to provide relief to everyone subject to § 46.2-395, the Governor calling for repeal of the statute, the Commissioner advising the General Assembly on how to do it, and a leading legislator expressing hope that the injunction would persuade his colleagues to go ahead and "fix[] this problem."[5] The General Assembly then *did* fix the problem, in part based on the Commissioner's letter stating that he would like to avoid paying to further defend the law. Thus, as in many other cases, here there *is* a clear connection between the injunction and the government act that mooted the case.

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[5] *See supra*, n.1.

### B. This case is not final.

Finally, this case is a poor vehicle because a key issue remains: how much the district court will award in fees. There is no indication how much the district court will award Respondents as the prevailing parties. *Stinnie*, 77 F.4th at 218 (remanding to the district court for further proceedings, i.e., the reasonableness inquiry). This case is not over.

As the Commissioner and his amici point out, the amount of fees awarded can vary widely. Amicus Br. 6–9 (noting $800,000 in fees in a voter registration case, $103,000 in fees in a First Amendment case, and $17,000 in fees in an education rights case). The Commissioner expresses concern that the amount of fees in this case could be higher than those, Pet. 24, but he certainly plans to argue that they should be far lower. And while he vaguely complains about the amount of fees being requested for appellate work specifically, after all, this case has involved *three separate rounds* of briefing and argument in the Fourth Circuit. *Stinnie v. Holcomb*, 734 F. App'x 858 (4th Cir. 2018); 37 F.4th 977 (4th Cir. 2022); 77 F.4th 200 (4th Cir. 2023). Nor does the Commissioner say what he paid to defend the case using the second-largest law firm in the state, fighting this case now for over five years.

The point is, significant discretion by the district court—and just how financially aggrieved the Commissioner really is—remains open. During that phase of the case, settlement negotiations are common and often succeed. Otherwise, once the district court rules, that decision still will be subject to abuse of discretion review in the Court of Appeals. *Mercer v.*

*Duke Univ.*, 401 F.3d 199, 203 (4th Cir. 2005) ("A district court's decision to grant or deny attorney's fee under section 1988 is reviewed for abuse of discretion.").

## III. The Fourth Circuit was right.

### A. The Fourth Circuit implemented this Court's precedent.

The Fourth Circuit's decision is grounded in precedent from this Court. The "Supreme Court's 'generous formulation' for prevailing party status, *Hensley*, 461 U.S. at 433, 103 S. Ct. 1933, is satisfied when a plaintiff obtains a preliminary injunction that (a) provides her with concrete, irreversible relief on the merits of her claim by materially altering the parties' legal relationship, and (b) becomes moot before final judgment such that the injunction cannot be 'reversed, dissolved, or otherwise undone' by a later decision." *Stinnie*, 77 F.4th at 216.

This holding aligns with this Court's precedent. *See CRST*, 578 U.S. at 422 ("The Court has explained that, when a plaintiff secures an 'enforceable judgmen[t] on the merits' or a 'court-ordered consent decre[e],' that plaintiff is the prevailing party because he has received a 'judicially sanctioned change in the legal relationship of the parties.'"); *Lefemine*, 568 U.S. at 4–5; *Sole*, 551 U.S. at 74.

All the necessary elements are present here. *See Stinnie*, 77 F.4th at 216 ("Because the plaintiffs here satisfy these baseline criteria, they cross the 'statutory threshold,' *id.*, to qualify as prevailing

parties whom 'the court, in its discretion, may allow . . . a reasonable attorney's fee,' 42 U.S.C. § 1988(b).").

The preliminary injunction hearing was merits-based, as shown by the district court's own extensive decision—one reached after a full evidentiary hearing involving exhibits and live testimony from six witnesses (some of whom were experts). *See* District Court ECF No. 113 (188-page transcript from preliminary injunction hearing); JA820–42 (district court memorandum opinion). The preliminary injunction changed the legal relationship between the parties, as it immediately shielded Respondents from the unconstitutional application of Virginia Code § 46.2-395. The relief was concrete. And the relief was enduring. After the preliminary injunction, the Commissioner did everything in his power to stop Respondents from having a trial and lobbied the General Assembly for reform.

Because Respondents' claim fits within this Court's precedent, the Commissioner seeks to recast Respondents' position as relying on the *Buckhannon*-forbidden "catalyst theory." *See* Pet. 34. The "'catalyst theory' . . . posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a *voluntary change* in the defendant's conduct." *Buckhannon Bd. & Care, Inc. v. W.V. Dep't of Health & Home Res.*, 532 U.S. 598, 601 (2001) (emphasis added). In *Buckhannon*, a plaintiff sued and then the government promptly changed its behavior and amended the at-issue laws. *See id.* at 600–01. The plaintiff never won a preliminary injunction or any other judicial relief. Because this case *did* involve judicial action and a

court ruling changing the legal relationship between the parties, this is not a "catalyst theory" case.

### B. The Commissioner's proposed bright-line rule would prompt bad behavior by the government.

The Commissioner's proposed rule would create all the wrong incentives for government actors. A rule that no preliminary injunction ever can make a prevailing party "allows defendants to game the system." *Stinnie*, 37 F.4th at 985 (Harris, J., concurring).

Under the Commissioner's view, a government can always do this: (1) pass an unconstitutional law, depriving its citizens of their rights—whether that be procedural due process, religious rights, Second Amendment rights, whatever—; (2) vigorously defend the offending law in expensive litigation through losing a preliminary injunction that enjoins its operation; (3) delay the merits trial while considering changing the law; (4) change the law; and (5) then categorically escape any attorney's fees under § 1988.

The Commissioner's position is that a plaintiff does not "prevail" in a litigation war if the government loses the first major battle and then surrenders. That is just as silly as it sounds, and no circuit follows that view of § 1988.

The Commissioner portrays the current legal landscape as "unpredictable" and laments "substantial financial burdens" from civil rights cases. Pet. 23–25. But the Commissioner basically just disagrees with the existence of § 1988.

After all, how much a district judge is going to award in fees will always be unpredictable, yet subject to appellate oversight. Further, Congress decided that the financial burdens of § 1988 were worth it to encourage people to stand up for their rights.

Section 1988 has been used effectively against all types of unconstitutional government action. For instance, just last year the Sixth Circuit affirmed a $272,000 fee award for plaintiffs who had won a preliminary injunction allowing them to go to church. In 2020, Kentucky threatened to prosecute people who attended church on Easter Sunday. The district court entered a preliminary injunction, and shortly thereafter the legislature effectively revoked the ban on church gatherings. With their preliminary injunction, the plaintiffs had the right to attend church, and then the legislature solved the problem. The Sixth Circuit had little trouble affirming the attorney's fees. *Roberts*, 65 F.4th at 283 (Sutton, C.J.).

Section 1988 fees have also been won in the context of preliminary injunctions made under the Second Amendment against gun restrictions. *E.g.*, *Veasey v. Wilkins*, 158 F. Supp. 3d 466, 468 (E.D.N.C. 2016) (awarding attorney's fees under § 1988 based on a preliminary injunction against a citizenship requirement for a concealed carry permit, later mooted by the legislature changing the law).

The Commissioner's position that no preliminary injunction later mooted by a legislative change ever qualifies anyone as a "prevailing party" is an assault on every circuit's view of § 1988 and the normal meaning of the word "prevail."

If state governments are worried about large fee awards under scenarios like this one, they have many strategies to mitigate such awards. Most obviously, they could voluntarily change unconstitutional laws *before* a court rules against them. Under *Buckhannon*, there would be no attorney's fees in that situation. *Buckhannon*, 532 U.S. 598. They could also negotiate with plaintiffs over potential fees in a voluntary settlement (which of course could still happen here).

Alternatively, a cost-conscious government could cooperate with plaintiffs to efficiently litigate the merits of the case, instead of engaging in scorched-earth litigation practice. When the government is confident in its position, it can proceed to trial and simply win. (The Commissioner here asked the General Assembly to surrender but claims now that he would have won had he been allowed to carry on the fight that he petitioned to avoid).

Part of what makes the rule applied by every circuit practical is that it is flexible. Judges make decisions on a case-by-case basis about to what degree a preliminary injunction victory is on the merits, and also about what amount of fees are reasonable given all the circumstances.

## IV. The question presented is often and recently denied.

This Court has consistently and recently denied petitions involving the same precedents and questions presented. *See*, *e.g.*, *Hargett v. Tennessee Conf. of the NAACP*, 143 S. Ct. 2609 (2023) (No. 22-773); *Yost v. Planned Parenthood Sw. Ohio Region*, 141 S. Ct. 189

(2020) (No. 19-677); *Davis v. Abbott*, 136 S. Ct. 534 (2015) (No. 15-46); *King v. Kan. Jud. Watch*, 565 U.S. 1246 (2012) (No. 11-829); *Live Gold Operations, Inc. v. Dow*, 565 U.S. 977 (2011) (No. 11-211); *Conway v. McQueary*, 562 U.S. 1137 (2011) (No. 10-569).

Those appeals were denied when the Fourth Circuit *was* an outlier, and now it is not. There is even less reason for this Court to consider the question now.

## CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

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