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

REPLY BRIEF FOR PETITIONER

JASON S. MIYARES
Attorney General of Virginia

MAYA M. ECKSTEIN
TREVOR S. COX
DAVID M. PARKER
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 E. Byrd Street
Richmond, Virginia 23219

ANDREW N. FERGUSON
Solicitor General
Counsel of Record
ERIKA L. MALEY
Principal Deputy Solicitor General
GRAHAM K. BRYANT
Deputy Solicitor General
M. JORDAN MINOT
Assistant Solicitor General
OFFICE OF THE VIRGINIA ATTORNEY GENRAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071
aferguson@oag.state.va.us

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS ii
TABLE OF AUTHORITIES..... iii
INTRODUCTION.....1
ARGUMENT 2
I. The Courts of Appeals are divided on the questions presented 2
A. The Courts of Appeals are divided on whether a prediction of "likely" success constitutes a ruling "on the merits" 3
B. The Courts of Appeals are divided on when a preliminary injunction provides sufficiently "enduring" relief 5
II. The questions presented are important and recurring.....7
III. The Fourth Circuit answered the questions presented incorrectly 9
A. The Fourth Circuit's ruling is inconsistent with this Court's precedents as to both questions presented 9
B. Respondents' policy arguments are not persuasive 11
IV. This case is an ideal vehicle 12
CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Advantage Media, L.L.C. v. *City of Hopkins, Minn.*,
511 F.3d 833 (8th Cir. 2008).....6

Buckhannon Bd. & Care Home, Inc. v. *West Virginia Dep't of Health & Hum. Res.*,
532 U.S. 598 (2001).....*passim*

Dearmore v. *City of Garland*,
519 F.3d 517 (5th Cir. 2008).....2, 7

Dupuy v. *Samuels*,
423 F.3d 714 (7th Cir. 2005).....6

Evans v. *Jeff D.*,
475 U.S. 717 (1986).....12

Higher Taste, Inc. v. *City of Tacoma*,
717 F.3d 712 (9th Cir. 2013).....2

Lindke v. *Freed*,
601 U.S. ____ (2024) (slip op.).....9

Massachusetts v. *United States*,
333 U.S. 611 (1948).....6

Northern Cheyenne Tribe v. *Jackson*,
433 F.3d 1083 (8th Cir. 2006) 6

People Against Police Violence v. *City of Pittsburgh*,
520 F.3d 226 (3d Cir. 2008) 3

Singer Mgmt. Consultants, Inc. v. *Milgram*,
650 F.3d 223 (3d Cir. 2011) (en banc) 3, 4, 13

Sole v. *Wyner*,
551 U.S. 74 (2007) 11

Stinnie v. *Holcomb*,
355 F. Supp. 3d 514 (2018) 12, 13

Whitman v. *Department of Transportation*,
547 U.S. 512 (2006) 13

Other Authorities

Cert. Pet., *Conway* v. *McQueary*,
No. 10-569 8

Cert. Pet., *Davis* v. *Abbott*,
No. 15-46 8

Cert. Pet., *Live Gold Operations, Inc.* v. *Dow*,
No. 11-211 8

Cert. Pet., *Yost* v. *Planned Parenthood Sw. Ohio Region*, No. 19-677 8

S.B. 1, Va. Gen. Assem. (Reg. Sess. 2020) 14

S.B. 1013, Va. Gen. Assem. (Reg. Sess. 2019) 13

S.B. 181, Va. Gen. Assem. (Reg. Sess. 2018 13

INTRODUCTION

This Court has not decided when, if ever, a preliminary injunction confers prevailing party status. This critical open question has yielded two circuit splits, and 19 other States join Petitioner in asking "this Court to provide a clear answer." States Amicus Br. 3.

Unable to reconcile the circuit splits, Respondents change the subject. Respondents contend that all circuits agree preliminary injunctions can *sometimes* confer prevailing party status. That argument misses the point. The circuits are split on the questions presented: *when* preliminary injunctions confer prevailing party status, particularly whether that status requires a conclusive merits ruling and an enduring change resulting from a judicial act. The Courts of Appeals have acknowledged the splits, as did the dissenting judges below.

When Respondents do address the first split, they miss the point. While all circuits "focus[] closely" on the district court's discussion of the merits, different circuits apply different tests. The Third Circuit requires a definitive ruling on the merits, while some other circuits allow a prediction to suffice. Respondents do not bridge that gap.

On the second split, Respondents distort several opinions to suggest the circuits are aligned. They are not. The Seventh and Eighth Circuits require "enduring" relief to come from the preliminary

injunction itself, while some other circuits allow it to come from a later extrajudicial act. These courts "agree" only that preliminary injunctions *sometimes* warrant fees—which, again, is not the question presented.

Respondents' other arguments also fail. They do not dispute the importance of the questions presented. The Fourth Circuit's ruling below is incorrect. Finally, the supposed vehicle problems are illusory—both splits are outcome-determinative here, and the final *amount* of the award is irrelevant to the questions presented. The petition should be granted.

ARGUMENT

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

The Courts of Appeals are not "using varying words to describe the same general rule." BIO 1. They are deeply divided on two important questions, and they acknowledge as much. *Higher Taste, Inc.* v. *City of Tacoma*, 717 F.3d 712, 715–16 (9th Cir. 2013) (recognizing that "[l]ower courts have struggled to decide" the "two recurrent questions" at issue); *Dearmore* v. *City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008) ("Without a Supreme Court decision on point, circuit courts . . . have announced fact-specific standards that are anything but uniform."). As the dissent below recognized: "There is no unanimity of the circuit courts on this issue." App. 69a

(Quattlebaum, J., dissenting). This Court's review is needed to resolve the conflicts.

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

The first conflict concerns whether a plaintiff can "prevail" based on a prediction of "likely" success. Pet. 14–16. The Third Circuit holds that "merely finding a likelihood of success" is not enough. *Singer Mgmt. Consultants, Inc.* v. *Milgram,* 650 F.3d 223, 228 (3d Cir. 2011) (en banc); see Pet. 14–15. Eight other circuits hold that it is. Pet. 16. Although all circuits "focus[] closely on what the preliminary injunction says about the merits," BIO 16–17, these are distinct legal standards.

Pulling several quotes out of context, Respondents argue that the Third Circuit is "not so different" in "actual practice." BIO 16–17 (discussing *People Against Police Violence* v. *City of Pittsburgh*, 520 F.3d 226, 233 (3d Cir. 2008) ("*PAPV*")). But *PAPV* agreed with other circuits only that "a preliminary injunction can, *under appropriate circumstances*, render a party 'prevailing.'" 520 F.3d at 233 (emphasis added). That, again, is not the split. And while *PAPV* once referred to the trial court's "likelihood" ruling, BIO 16, the trial court held that the law "*was* unconstitutional" and thus presented the "rare situation" when a genuine "merits-based determination is made at the injunction stage," as the en banc Third Circuit later clarified. *Singer*, 650 F.3d at 229–30 (emphasis added).

Following *PAPV*, *Singer* left no doubt that a "likelihood" of success is insufficient: "[A] court's finding of 'reasonable probability of success on the merits' is not a resolution of 'any merit-based issue.'" *Singer*, 650 F.3d at 229 (citations omitted). The Third Circuit emphasized that "parties will not often 'prevail' based solely" upon preliminary injunction rulings because the "only merits-related legal determination" in these preliminary proceedings is the initial likelihood-of-success ruling. *Ibid.*

Far from being functionally the same analysis as Respondents suggest, BIO 16–17, the Third Circuit's test produces very different outcomes. In the Third Circuit, preliminary injunctions are almost *never* "on the merits," because definitive rulings are "rare" in those expedited proceedings. *Singer*, 650 F.3d at 229. Respondents even claim that such rulings are "impossible." BIO 20; see *Singer*, 650 F.3d at 229 ("[T]he 'merits' requirement is difficult to meet in the context of . . . preliminary injunctions."). By contrast, the Fourth Circuit now "expect[s] *all* preliminary injunctions to be solidly merits-based." App. 28a (emphasis added). The circuits are almost diametrically opposed.

Because the circuits have "no unanimity" on this issue, App. 69a (Quattlebaum, J., dissenting), this Court's intervention is needed.

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

The circuits also disagree on whether "enduring" relief must come from the preliminary injunction itself, as opposed to a later extrajudicial act. Pet. 19–23. The Seventh and Eighth Circuits hold that *Buckhannon* requires the "enduring" relief to come from the preliminary injunction itself. Pet. 19–21. Five other circuits allow "enduring" relief to come from a later extrajudicial act, like repeal of the challenged law. Pet. 21–22. And the Fifth Circuit holds an extrajudicial act sufficient only if "caused" by the preliminary injunction. Pet. 23.

Respondents claim there is "no meaningful difference" between cases mooted "by the passage of time" versus "the affirmative act of a legislative body." BIO 18. But that difference is crucial. In the first scenario, enduring relief comes from the *court*, through operation of the injunction itself. In the second scenario, enduring relief comes from the *legislature*, which cannot provide the "judicial imprimatur" needed to trigger fee liability. *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 598–99 (2001). The circuit court decisions are not "just different cases with different facts." BIO 18. They adopt different rules.

Respondents' effort to portray the circuits as united fails. BIO 18–19. First, the Seventh Circuit "sees no

daylight" with other circuits only in that preliminary injunctions can *sometimes* confer prevailing party status. BIO 18; compare *Dupuy* v. *Samuels*, 423 F.3d 714, 723 (7th Cir. 2005) (eschewing a "hard and fast rule that a preliminary injunction can *never* be an adequate predicate" (emphasis added)), with *id.* at 723 n.4 ("[O]ur sister circuits have held that attorneys' fees *may* be awarded after a party has obtained a preliminary injunction . . . ." (emphasis added)). The conflict is not whether a party can ever prevail based on a preliminary injunction; the question presented is whether an extrajudicial act can render preliminary injunctive relief enduring.

Second, Respondents argue the Eighth Circuit relied on additional grounds to reject prevailing party status. BIO 18–19. But where cases rely on *multiple* grounds, all are binding. *Massachusetts* v. *United States*, 333 U.S. 611, 623 (1948). The Eighth Circuit independently held that "enduring" relief cannot come from outside the court. *Advantage Media, L.L.C.* v. *City of Hopkins, Minn.*, 511 F.3d 833, 838 (8th Cir. 2008) ("Although Advantage's lawsuit resulted in alteration of several potentially unconstitutional provisions . . . the Supreme Court has rejected the 'catalyst' theory of fee recovery . . . ."); *Northern Cheyenne Tribe* v. *Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006) (rejecting prevailing-party status because "the Tribes achieved their desired result because of regulatory action taken by HUD . . . and because of voluntary decisions by the other defendants").

Moreover, Respondents fail to reconcile the Fifth Circuit's causation test. BIO 19–20. The Fifth Circuit agrees with other circuits only that preliminary injunctions *sometimes* warrant fees. BIO 20. On the question of *when*, it acknowledges the circuits are "anything but uniform." *Dearmore*, 519 F.3d at 521. Indeed, Respondents do not dispute that the Fifth Circuit's causation requirement is unique, but claim "it stands to reason" that the requirement usually will be satisfied. BIO 19. That contention is inaccurate. Here, for example, the preliminary injunction did not cause the legislature's repeal. See Section IV, *infra*. And Respondents argued below that the Fifth Circuit's causation requirement "dramatically increase[s] the complexity and resource-intensiveness" of fee petitions. Suppl. Opening Br. (4th Cir. ECF 71) 39.

II. The questions presented are important and recurring

Respondents do not dispute that the questions presented are important. Nor could they. Indeed, 19 other States implore "this Court to provide a clear answer." States Amicus Br. 3.

States have a vital interest in avoiding substantial fee awards based on necessarily expedited and inconclusive preliminary injunction proceedings. Pet. 23–24; States Amicus Br. 4–10 (collecting fee awards). These awards also deter States from voluntarily repealing challenged laws. Pet. 24–25. And the effects are not limited to civil rights cases, because

"prevailing party" is a term of art used in numerous other statutes. Pet. 25.

Respondents do not dispute these points. Instead, they contend that the petition should be denied because other States previously sought review of similar questions. BIO 29–30. But the frequent recurrence of these important questions is a reason to *grant* the petition, not deny it. Further, many of the petitions that Respondents cite are not recent and suffered from vehicle problems. See, *e.g.*, Cert. Pet., *Yost* v. *Planned Parenthood Sw. Ohio Region,* No. 19-677 (threshold standing issue); Cert. Pet., *Davis* v. *Abbott*, No. 15-46 (preliminary injunction expressly *not* merits-based); Cert. Pet., *Live Gold Operations, Inc.* v. *Dow*, No. 11-211 (no preliminary injunction issued); Cert. Pet., *Conway* v. *McQueary*, No. 10-569 ("prevailing party" ruling not final). Thus, the denials do not reflect that the questions presented lack importance.

Respondents also contend that the circuit conflicts are "irrelevant" and do not warrant review because Petitioner's position would "overturn all the circuits." BIO 13–20. But the conflict between the circuits on these critical questions calls out for intervention. See Section I, *supra.* And if this Court ultimately determined that all the circuits have adopted an incorrect rule, that decision would resolve the current circuit conflicts, ensuring the uniform and correct interpretation of federal law. Indeed, this Court recently rejected both sides of a circuit split on an

important First Amendment question and adopted its own view of the law. See *Lindke* v. *Freed*, 601 U.S. ____ (2024) (No. 22-611) (slip op. at 5). A ruling that prevailing-party status requires a definitive determination of the merits and an enduring change from a judicial act would likewise resolve the splits and require reversal. See Section III, *infra*. The Court should grant the petition to decide these important questions.

III. The Fourth Circuit answered the questions presented incorrectly

A. The Fourth Circuit's ruling is inconsistent with this Court's precedents as to both questions presented

In addition, the ruling below is erroneous and inconsistent with this Court's precedents. As to the first question presented, the Fourth Circuit erred by holding that a prediction of future success is sufficiently "on the merits" to confer "prevailing party" status. The plain meaning of "prevailing party"—which Respondents do not dispute—requires an *actual* decision on the merits. Pet. 27–28. This Court has repeatedly indicated that a definitive ruling is required. Pet. 28–29. "Congress is free, of course, to revise" Section 1988 and allow fees based on a "substantial likelihood" of success. *Buckhannon*, 532 U.S. at 622 (Scalia, J., concurring). But Congress has not done so.

Congress's deliberate choice of words makes sense. District court judges' early predictions, based on limited and expedited procedures, should not later justify hefty fee awards. Pet. 29. Here, for instance, after the preliminary injunction issued, numerous other courts upheld laws similar to the one Respondents challenged. Pet. 29–30. This was not an "odious law" that was "readily disposed of once people focus[ed] on [it]." BIO 2. In fact, the opposite is true.

The decision below also invites "a second major litigation" over attorney's fees. *Buckhannon*, 532 U.S. at 609. Circuits disagree as to how much of a likelihood is required, how to discern when that finding actually occurred, and how rigorous the preliminary-injunction procedures must be. Pet. 30–31. This confusion is "clearly not a formula for 'ready administrability.'" *Buckhannon*, 532 U.S. at 610 (citation omitted).

The Fourth Circuit also erred as to the second question presented by "allow[ing] a non-judicial decision to anoint a prevailing party." App. 63a (Quattlebaum, J., dissenting). Here, the "enduring" relief for Respondents resulted from repeal of the statute, not the preliminary injunction. That legislative act lacks the "judicial imprimatur" needed to "prevail" under *Buckhannon*. Pet. 32–35.

Respondents answer that no preliminary injunction issued in *Buckhannon*. BIO 26–27. This is a non sequitur. *Buckhannon* holds that only a judicial

act can confer prevailing party status. 532 U.S. at 598. *Sole* holds that this judicial act must provide "enduring" relief. *Sole* v. *Wyner*, 551 U.S. 74, 86 (2007). By allowing a legislative act to provide the "enduring" relief, the decision below is "little more than a new spin on the catalyst theory" this Court has squarely rejected. App. 62a (Quattlebaum, J., dissenting).

B. Respondents' policy arguments are not persuasive

Respondents complain that a contrary rule would allow States to "game the system." BIO 27. But *Buckhannon* rejected similar concerns. See 532 U.S. at 622 (Ginsburg, J., dissenting) (warning that defendants can "escape" fee awards by "abandon[ing] the fray"). Regardless, these concerns ignore the separation of powers. Only legislatures have the power to repeal laws, and legislatures are not the defendants in civil rights cases. The different branches of government—often controlled by different parties—make their own assessments of both the litigation and the wisdom of the underlying public policy. Respondents' gamesmanship arguments erroneously conflate the separate branches. They also overlook the impracticality of a legislature and executive attempting to coordinate to time a repeal strategically, particularly given the pace of litigation and the many competing demands of the legislative schedule. Here, for example, repeal was years in the making. See Section IV, *infra*. And the district court, of course, must approve any requested stay of the

litigation while a repeal is under consideration, and can refuse a stay if it believes defendants are attempting to "game the system."

There are also countervailing policy problems with the Fourth Circuit's rule. Holding that repeals trigger fee awards discourages repeals, see *Buckhannon*, 532 U.S. at 608, and encourages States to "forc[e] more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants," *Evans* v. *Jeff D.,* 475 U.S. 717, 736–37 (1986); see Pet. 24–25; States Amicus Br. 17–19. Petitioner (and amici) are not attacking "the existence of § 1988," BIO 27—just seeking recognition of the sensible limits that Congress placed on prevailing-party status.

IV. This case is an ideal vehicle

This case is an ideal vehicle for resolving the questions presented. Both questions are squarely presented and outcome-determinative. Pet. 35–36. There are no procedural obstacles or alternative grounds for decision. *Ibid.*

Respondents claim the outcome does not hinge on the questions presented, because they "would prevail in any circuit." BIO 21–23. Not so. Respondents first claim to satisfy the Third Circuit's test, arguing that the district court *did* make a definitive ruling on the merits. BIO 23. But the district court expressly declined to do so. *Stinnie* v. *Holcomb*, 355 F. Supp. 3d 514, 529 (2018) ("[T]he Court need not reach a definitive conclusion . . . ."); *id.* at 527 ("The

plaintiff[s] need not establish a certainty of success . . . .") (citation omitted). Rather, it merely predicted "likely" success. *Id.* at 520, 529, 531, 532. This case was not a "rare situation" like *PAPV. Singer*, 650 F.3d at 229.

Respondents next claim that they satisfy the Fifth Circuit's causation requirement. BIO 23. They do not, but that issue could "be addressed on remand" if this Court were to adopt such a requirement, because the Fourth Circuit never reached that issue below. *Whitman* v. *Department of Transportation*, 547 U.S. 512, 515 (2006).

Respondents also ignore the Seventh and Eighth Circuits, which hold that "enduring" relief must come from the preliminary injunction itself—not an extrajudicial event. See BIO 21–23; Pet. 36. Respondents instead pretend these circuits agree with the others. BIO 17–20.

And, to be clear, the preliminary injunction did not provide Respondents enduring relief, nor did it cause the repeal. Rather, changes in the Virginia legislature did. Political pressure to abolish Virginia's license-suspension policy had been building for years before Respondents filed suit, with repeal legislation introduced long before the preliminary injunction questioned one discrete aspect of the statutory regime. S.B. 181, Va. Gen. Assem. (Reg. Sess. 2018); S.B. 1013, Va. Gen. Assem. (Reg. Sess. 2019). Repeal legislation consistently failed, including after the

preliminary injunction. Only after the legislature's composition changed did repeal occur. S.B. 1, Va. Gen. Assem. (Reg. Sess. 2020).

Respondents' reliance on the Commissioner's letter to one of the repeal bills' sponsors is unpersuasive. BIO 9. That letter is from January 2020, CA.JA968, years after introduction of the first repeal measure. Respondents presented no evidence below that this letter, the preliminary injunction, or anything other than the change in the legislature's political makeup resulted in the repeal.

Finally, Respondents argue this case is "not final" because the district court has yet to calculate the *amount* of a fee award. BIO 24–25. That is a red herring. The question presented here concerns whether the statute authorizes *any* award, regardless of the amount. The order entitling Respondents to fees implicates both circuit splits. The case is ripe.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

JASON S. MIYARES
Attorney General of Virginia

MAYA M. ECKSTEIN
TREVOR S. COX
DAVID M. PARKER
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 E. Byrd Street
Richmond, Virginia 23219

ANDREW N. FERGUSON
Solicitor General
Counsel of Record
ERIKA L. MALEY
Principal Deputy Solicitor General
GRAHAM K. BRYANT
Deputy Solicitor General
M. JORDAN MINOT
Assistant Solicitor General
OFFICE OF THE VIRGINIA ATTORNEY GENRAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071
aferguson@oag.state.va.us
Counsel for Petitioner